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THE PRIVY COUNCIL.

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THE COURT OF APPEAL.

HIGH COURT OF JUSTICE.
CHANCERY DIVISION,
QUEEN'S BENCH DIVISION,

COMMONS DIVISION,
EXCHEQUER DIVISION,
DIVISIONAL COURT OF APPEAL.
PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

THE BANKRUPTCY COURT,
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VOLUME XXXV.

FROM SEPTEMBER 1877 : FEBRUARY 1878.

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- Counter-claim.—Application for leave to file.—Delay.—Foreclosure suit.—Where the defendant in a foreclosure suit obtained an order for leave to file a counter-claim by way of set-off, and through the negligence of his solicitor, no counter-claim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counter-claim was refused on the ground of delay ... page 622
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- Default of appearance.—Orders XIX., r. 6; LIII., r. 3; XVI., r. 6; LVI., r. 1.—In cases where the defendant does not appear, and judgment cannot go by default, owing to the complexity of the claim, the filing of notice of motion for judgment, which is a document under Order XVI. r. 6, amounts to a delivery of notice to the defendant under Order LIII., r. 3. That order is in such a case complied with by the observance of Order XIX., r. 6, which directs the filing of notice of motion ... 27
- Discontinuance of action.—Where a plaintiff has given notice to the defendant to discontinue the action, and the costs have been taxed, no further order of the court is required to enable the Chief Clerk to issue a writ to enforce payment, and the writ may be varied to suit the circumstances of the case. Order XXIII. has the force of an order of the judge or court ... 358
- Discovery.—Production of documents.—Interrogation of plaintiff by defendant.—The defendant to an action, after filing an affidavit to the effect that he was ignorant of the claim made by the plaintiff, and was unable to make a defence unless certain information was given and documents handed over to him by the plaintiff, applied for leave to deliver interrogatories to the plaintiff for putting in his defence.—Held, that leave must be refused, and the defendant must make the best defence he could and then interrogate ... 311
- Dismissing an appeal for want of prosecution.—Security for costs of appeal.—Where the Court of Appeal had ordered that an appellant should give security to a certain amount for the costs of the appeal, and that the appeal should not be set down for hearing till fourteen days after security had been given, and nine months afterwards the respondent applied that the appeal might be dismissed on the ground that the appellant had not yet complied with the order to give security for costs, and the appellant gave no explanation of the delay: The court refused to give the appellant further time, and dismissed the appeal with costs, including the costs of the motion for security for costs, and of the motion to dismiss ... 873
- Foreign government plaintiff.—Further security for costs.—Rules of Feb. 1876, rule 7.—In a suit commenced under the old practice of the court, the foreign plaintiffs were required to give security for costs in the usual way, and did pay 120*l.* into court for that purpose. Upon an application by the defendants for an order directing the plaintiffs to give further security for costs under rule 7 of the rules of the Supreme Court of Feb. 1876. Held (reversing the decision of Malins, V.C.), that the rules of the Supreme Court of 1876, applied in cases under the old practice as well as in actions under the new practice, and that further security for costs might be ordered to be given ... 19
- Fund in court.—Proceeds of sale of settled estate.—Payment out to tenant in tail.—Disentailing deed.—Certain real estate of which a lunatic was tenant in tail was sold under a private Act of Parliament, and the proceeds were paid into court in the matter of the lunacy and invested in Consols which the Act directed to be treated as real estate. The lunatic died, and the tenant in tail remainder converted his estate tail into a life fee, and subsequently died. Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a properly executed deed disentailing the base fee ... 293
- Interrogatories.—Delivery of before statement of defence.—Order XXXI., rules 1 and 5.—A judge at chambers having ordered interrogatories to be struck out, on the ground that the delivery of interrogatories before a statement of defence was delivered, was premature and useless, the Queen's Bench Division discharged a rule to rescind the order for the purpose of enabling the plaintiff to appeal. Held, that the judge in chambers was quite right in striking out the interrogatories. Where a plaintiff wanted information, interrogatories before the statement of defence would be allowed. But in the large majority of cases at common law the statement of defence would make most of the answers to interrogatories useless. This was an action for libel, and if the defendant admitted the publication, nearly all the interrogatories would be useless ... 79
- Order XXXI., rule 5.—Specific performance, action for.—Alleged breach of trust.—In an action to enforce specific performance of an agreement to sell an underlease, the statement of claim disclosed that the plaintiffs were trustees for a married woman. The defendant

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- dant denied a binding agreement, did not admit that the plaintiffs were trustees, and alleged that she did not know the particulars of the trust, and submitted that if the proposed purchase was not authorised by the terms of the trust the action must be dismissed with costs. Interrogatories delivered by the defendant to ascertain the particulars of the trust deed, and whether the proposed purchase was authorised by the terms of the trust, were, on the application of the plaintiffs, ordered to be struck out as irrelevant to the question at issue ... page 580
- Order XXXI., rr. 4, 5.—Discovery by a railway company of the contents of books, in the possession of themselves and their agents, extending over a series of years, to show the receipt of goods specifically described, delivered to them for carriage, ordered. (Grove, J. dissentiente) ... 846
- Joinder of parties.—Adding a defendant.—The defendant, on behalf of himself and the members of a projected company, purchased a ship from the plaintiffs. The ship was delivered by the plaintiffs to the company who paid \$3000., out of \$8000., the amount of the purchase money, to the plaintiffs. The defendant had accepted a bill for the remaining \$500. In an action against him on this bill, he applied to join the company as defendants. Held, that the company were not within Order XVI., r. 13 ... 846
- Judge's order for statement of names of defendant's co-partners and for a verified account.—Attachment.—A judge's order for a statement of the names of a defendant's co-partners, under Order XVI., rule 10, of the Rules of Court 1875, or for a verified account under Order XV., rules 1 and 2, are neither of them an order for "discovery or inspection" within Order XXXI., rule 20, and consequently the provisions in the said last named order for attachment in case of disobedience do not apply to disobedience of such judge's orders ... 841
- Judicature Act 1875, Order XIV., r. 1.—Affidavit verifying the cause of action.—The affidavit verifying the cause of action required by Order XIV., rule 1, before plaintiff is at liberty to sign final judgment against the defendant, must, in all cases, be made by the plaintiff himself ... 889
- Judicial committee.—Costs.—Appealable value.—Appeals to the judicial committee merely for the sake of costs will not be allowed, even if the costs amount to the appealable value ... 869
- Leave to amend defence.—Costs.—H., one of several defendants, who had put in a joint statement of defence, subsequently changed his solicitor, who advised him that he had additional grounds of defence. The defendant, therefore, moved for leave to amend the statement of defence so far as it related to him, or to deliver a fresh or supplemental statement of defence on his own behalf. The only affidavit filed by H. in support of his application was one by his solicitor stating that H. had additional grounds of defence but not showing the nature of the proposed amendments. Held, that no further affidavit was under Order XXVII. necessary. Leave given accordingly. The plaintiff had instructed two Queen's Counsel and a junior to oppose the application, and the other defendants were represented by a junior counsel and supported the plaintiff. The court in ordering H. to pay the costs of the application allowed the costs of only one counsel on behalf of the plaintiff, and 40s. costs to the other defendants ... 621
- Mode of trial.—In a suit to ascertain boundaries the plaintiff gave notice of trial before a judge and obtained an order that the evidence should be taken *viâ* jury at the trial. Five weeks afterwards he applied that the suit might be referred to an official referee, on the ground of saving expense, and that a local investigation was necessary. Held, that the application was out of time. Held, also, that the plaintiff having already selected the mode in which his action should be tried, could not afterwards resort to another mode of trial ... 122
- New trial.—Evidence prematurely admitted.—Witness called but not examined.—A new trial will not be granted for evidence prematurely admitted, but which becomes admissible in the course of a trial ... 861
- Verdict against evidence.—Costs of first trial.—Stat. 17 & 18 Vict. c. 125, s. 44.—The plaintiff brought an action for three parcels carried by three ships belonging to the defendants, and which were lost during transit. As regards two of these parcels, a verdict was found for the plaintiff; as to the other, the defendants succeeded. The defendants subsequently applied for and obtained a new trial, the result of which was that they got an entire verdict. Held, that as there had been no default on the part of the defendants, and the plaintiffs had not exercised the power which they possessed of entering a *volte facie*, or of intimating that they did not intend to pursue further the particular issue found against them on the first trial, the defendants were entitled, under the circumstances, to recover the costs of the first trial, relating to the issue found in their favour. On taxation of costs, the master declined to allow the costs incurred by the defendants at the second trial for shorthand writer's notes. Held, that it was entirely within the discretion of the master to allow or disallow these items, and that it was not the practice of the court to interfere with that discretion, except in cases of gross abuse ... 353
- Pauper lunatic.—Order for maintenance.—Action.—Striking out defence.—An action was brought on an order made by justices under 16 & 17 Vict. c. 87, s. 86, directing the guardians of a lunatic pauper in an asylum. The guardians defended the action. An application was then made to have the statement of defence struck out under Order XXVII., rule 1. Held, that, though the order itself could not be appealed against, yet where such order formed the subject-matter of an action a defendant was entitled to plead to such action, and if such plea afforded no answer to the statement of claim the proper mode of objection is by demurrer ... page 390.
- Pleading.—Prolivity.—Rules of court 1875.—Order XXVII., r. 1.—Order XIX., r. 4, 24, 25, 26, and 27.—In an action by a lady against her solicitor, charging him with misconduct and seeking to have accounts taken of moneys received by him on her behalf, the statement of claim comprised fifty-three paragraphs, and contained lengthy allegations of the facts and circumstances relied upon by the plaintiff. The defendant moved under Order XXVII., rule 1, to strike out or amend the statement of claim, so as to raise the real question in controversy between the parties, on the ground that it was not a proper pleading, and that it was prolix and tended to prejudice and embarrass the fair trial of the action; or that eighteen specified paragraphs, and parts of certain others, should be struck out as being irrelevant, improperly pleaded, or scandalous respectively, and as tending to prejudice and embarrass the fair trial of the action. Malins, V.C., had refused to make any order, except to strike out one paragraph, the striking out of which was not opposed by the plaintiff. Held, that although the statement of claim was unnecessarily long, the Court of appeal would not interfere with the decision of the judge of first instance on a matter which was left to his discretion, by Order XXVII., rule 1, of the Judicature Act 1875 ... 86.
- Order XIV., r. 4.—Landlord and tenant.—Signing judgment.—Assignee of lease.—Under the present system of pleading, the facts must be stated, and then it is the duty of the court to decide upon what is the legal result of the facts stated; whereas the former system required the parties to set forth the legal result of the facts and not the facts themselves. If, on the facts, it is clear that a certain sum must, in any view, be recovered by a plaintiff, he may sign judgment at once for such sum ... 129
- Rejoinder.—Application for leave to rejoin specially, when the court in the exercise of its discretion considered a rejoinder unnecessary, refused ... 845
- Reply.—There is nothing in the rules of court to limit the plaintiff's right to state what facts he pleases in his reply to meet a defence by confession and avoidance, so that they were not irrelevant or scandalous ... 926.
- Scandalous and irrelevant matters.—Striking out statement of claim.—Rules of Court 1875, Order XXVII., rule 1.—A statement of claim had been drawn by the plaintiff himself, containing sixty-four paragraphs, which occupied eighteen printed pages. The former claim was divided into twelve heads. The subject-matter of the suit was the sale of certain collieries to the London and Brighton Cheap Coal Supply Company; and the statement contained serious charges of fraud against several of the defendants, and was made in such a confused way that it was impossible to ascertain what the real ground of complaint was. On an application to strike out the whole of the claim on the ground that it was scandalous and tended to prejudice and delay the fair trial of the action, Held, that the statement was unintelligible, and that the charges were brought in a form it was impossible to meet. It would be oppressive to the defendants to allow such pleadings to remain on the record, and therefore the statement must be struck out, but without prejudice to the plaintiff's right to file a new statement of claim ... 452.
- Specific performance.—Demurrer.—Multifariousness.—Declaratory decree ... 685.
- Question of law raised without pleadings.—Judge's discretion.—Special case.—Affidavit.—It is within the discretion of a judge at chambers, under Order XXXIV., rule 2, to order a special case to be settled by the parties to raise a point of law, where the plaintiffs, without putting in a statement of claim, have made an affidavit, not contradicted by the defendants, that there are no facts in dispute, and that the question between the parties is one of law only. The plaintiffs sued the defendants to recover damages for the defendants' refusal to supply the plaintiffs with water by meter under sect. 41 of the New River Act 1852. The plaintiffs having filed no statement of claim, made an affidavit, which was not contradicted by the defendants, that no facts were in dispute between the parties, and that the only question to be decided was one of law. Upon the application of the plaintiffs, a judge in chambers made an order that a special case should be stated between the parties in order to raise the point of law. The Court of Appeal, affirming the decision of the Queen's Bench Division, refused to rescind this order ... 589.
- Renewal of writ.—Where an action of debt has been commenced in a common law court within six years

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- from the debt accruing, and the writ has been duly renewed, pursuant to sect. 11 of the Common Law Procedure Act 1853, the renewal of the writ keeps alive the debt, but only for the purposes of the particular action, and not for the purpose of taking proceedings in another court.—In March 1869, A. died, indebted to the plaintiff. In Jan. 1875 (within six years from the death of A.), the plaintiff commenced an action for debt against the defendant, the administrator of A., by issuing a writ out of the Court of Common Pleas. This writ was never served upon the defendant nor renewed. In July 1876, while the writ remained in force (but more than six years from the death of A.), the plaintiff took out a summons against the defendant to administer the estate of A.: Held, that as at the date of the summons the debt was kept alive, by virtue of the writ, only for the purposes of the action in the Court of Common Pleas, and not for the purpose of taking proceedings in another court, the Statute of Limitations was a complete bar to the plaintiff's claim.page 307
- Report of official referee.—When an official referee has made a report on a cause or matter before him, the court will not entertain an application under Order XXXVI., rule 34, to remit the same back to him for re-trial or further consideration, unless the application be supported by affidavits. 906
- Service of writ of summons.—Service out of jurisdiction.—Where the cause of action is a slander published in Ireland of a personal chattel situate in England, leave will not be given under Order XI., rules 1 and 3, to serve a writ of summons in Ireland. Such a slander is not an "act or thing" "affecting" property situate within the jurisdiction, within the meaning of those words in Order XI., rule 1. 424
- Out of the jurisdiction.—Evidence of cause of action.—The affidavits required by Order XI., r. 3, in support of an application for an order for leave to serve a writ of summons on a defendant out of the jurisdiction must state that the deponent is advised and believes that there is a good cause of action arising within the jurisdiction, and must state in distinct terms what the cause of action is. 703, 874
- Out of jurisdiction.—Statement of defence raising question of propriety of service.—Whether the subject matter of the action is such that service of the writ out of the jurisdiction ought to be allowed under Order XI., rule 1, of the Rules of Court 1875, is a question which a defendant cannot raise upon his statement of defence; such question being one exclusively for the discretion and decision of the court or a judge, subject to appeal; and when once the question has been so decided the service cannot be set aside, but must stand, and the defendant must defend the action on its merits. 341
- Substituted service.—Action against Colonial Government.—Rules of Court, 1875, Order IX., r. 2.—An action was brought against the Governor and Government of the Colony of New Zealand, to recover damages for the alleged breach of an emigration contract expressed to be made between the Queen of the first part, the Agent-general in England for the government of the said colony of the second part, and the plaintiffs, who shipowners of Hamburg, of the third part. Held, that as no action could be maintained against the Governor and Government of the Colony of New Zealand, and that, therefore, no order could be made for substituted service of the writ. 464
- Stay of proceedings in action.—Agreement to refer.—Common Law Procedure Act 1874 (17 & 18 Vict. c. 125, s. 11).—Where there is no agreement except to refer a particular dispute about a particular matter, and the agreement has not been made a rule of court, and is consequently revocable, then, if such an agreement be revoked, it is at an end. 193
- Cause of action decided to be groundless.—Judge's privilege.—Abuse of process.—Plaintiff had brought an action of defamation against a witness at a Military Court of Inquiry, and the House of Lords, upon appeal, had held that the witness enjoyed the same privilege as if he had given his evidence in a court of justice. Plaintiff now brought an action for conspiracy to make a false representation to the Commander-in-Chief against a member of the same Court of Inquiry in respect of the judicial report made by that court. Upon application by the defendant, further proceedings were stayed on the ground that this action was groundless, and under the circumstances an abuse of the process of the court. 323
- Striking out scandalous and irrelevant paragraphs.—Evidence.—Fraudulent course of dealing.—Order XIX., r. 4. 269
- Substitution of notice for service.—Absconding defendant out of jurisdiction.—Substitution of "notice for service" of the bill in a suit dealing with the interest in a certain newspaper of an absconding defendant out of the jurisdiction, ordered to be effected by advertising the prayer of the bill, and the writ indorsed thereon in the *London Gazette* and the *Times*, and the particular newspaper. 706
- Third party.—Service of notice out of the jurisdiction.—The court, on the application of defendant in an action, will order service of a notice citing a third party to appear in the action under rr. 17 and 18 of Order XVI., where it is satisfied that there is a material question to be tried in the action, common both to the plaintiff and the defendant, and the defendant and the third party, although the whole question to be tried is not precisely identical in both cases, and that the plaintiff will not be prejudiced by so calling in the third party. Such notice may properly be served on the third parties in Scotland, as rr. 1 and 4 of Order XI. apply to service of notices under rr. 17 and 18 of Order XVI.page 879
- Time for appeal from chambers.—It is not a sufficient compliance with Order LIV., rule 6, to give notice of motion within eight days, if the motion is made after the expiration of the eight days. 690
- Time for appealing.—Orders on petitions under Trustee Relief Act.—Appeals from orders made upon petitions under the Trustee Relief Act must be brought within twenty-one days, such orders coming within the words "in any other matter not being an action," in rule 9 of Order LVIII. 917
- Winding-up order.—Order LVIII., rule 8, provides that "the time for appealing from any order or decision made or given in the matter of the winding-up of a company, under the provisions of the Companies Act 1863, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15." Rule 15 fixes the limit of twenty-one days for bringing an appeal from an interlocutory order. Held, that under rule 9 an appeal from an order to wind up a company ought to be brought within twenty-one days. 689
- Transfer of actions.—If in an action in a Common Law Division, where a cross action has also been brought in the Chancery Division, it appears that the whole dispute between the parties can be more conveniently disposed of in the Chancery Division, an order transferring the cause to that division will be made, even though there be a question in the cause which might be properly tried by a jury in the Common Law Division. Therefore, where an action was brought in this division for breach of a certain agreement, and for a fraudulent and false representation concerning the subject matter of that agreement, and a cross action was brought in the Chancery Division for the specific performance of the same agreement, upon an application to transfer the action to the Chancery Division the court made the order. 600
- Trial by jury.—Action in Chancery Division.—Under the new practice a judge of the Chancery Division cannot try a case with a jury, but when an action in the Chancery Division has been ordered to be tried before a judge with a jury, it must be set down in the general list to be tried before a judge of one of the common law divisions, at the London or Middlesex sittings for trials by jury, or at the assizes. 748
- Trial by referee.—Order XXXVI. rule 30, of the Rules of Court under the Judicature Acts, relating to trial by referee, is directory only. Therefore, where a special referee did not sit *de die in diem*, as prescribed by that rule, the court refused to set aside the award. 337
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- PRINCIPAL AND AGENT.
- Factor.—Set-off against principal of debt due from agent.—The fact that an agent for the sale of goods was directed by his principal not to sell the goods in his own name, but to disclose his agency, will not deprive a buyer of the right of setting off against the principal's claim for the goods a debt due to him from the agent, if the limitation of the agent's authority was not disclosed to the buyer. 644
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- Stockbroker and principal.—Bankruptcy of stockbroker.—Following trust money.—A trustee instructed his stockbroker to sell for him a sum of Consols, which he informed the broker he held as a trust fund, and to invest the proceeds of sale in the purchase of certain railway stock. As the broker had notice of the trust, the proceeds of sale retained the character of trust money in his hands, and could be followed by the principal if they could be traced. Per Bramwell, J.A., *semble* that this would have been so, even if the broker had had no notice of the trust. 649
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- Discharge of surety by alteration in original contract.—Divisibility of the security.—Knowledge of the surety.—If the principal creditor deprives the surety of any right he would have had against the original debtor, even though the surety is discharged, although the surety is aware that an alteration is being made in the original contract, he is not bound to express his dissent to the transaction. 350

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Appointment of administrator—Chancery suit—Practice.—On an application in the Probate Division by the defendant in a Chancery suit for a grant of letters of administration to the estate of the plaintiff in that suit with a view to wind-up the Chancery suit: *Held*, that an affidavit by the parties interested in the estate and assenting to such a course is necessary. *Held* further, that even with an affidavit before the court no order can be made without first a certificate under the hand of the judge in the Chancery Division before whom the suit is pending, which shall state that the course proposed is a proper one under the circumstances ... page 767

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Practice—Place of trial.—By Order XXXVI., rule 1, the statement of claim must contain a paragraph stating the place where the plaintiff proposes the trial of his cause shall take place. Except under special circumstances the court will not allow causes to be tried out of Middlesex unless the application is made in the statement of claim in pursuance of this order ... 438

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THE SUPREME COURT OF JUDICATURE, IN BANKRUPTCY, AT
NISI PRIUS, THE CRIMINAL COURTS, IN IRELAND, &c.

FROM SEPTEMBER 1876 TO FEBRUARY 1877.

H. OF L.]

MINORS v. BATTISON AND OTHERS.

[H. OF L.]

House of Lords.

May 23 and 26, and June 1.

(Before Lords CHELMSFORD, HATHERLEY, PENZANCE,
and O'HAGAN.)

MINORS v. BATTISON AND OTHERS.(a)

ON APPEAL FROM THE COURT OF CHANCERY IN ENGLAND.

*Construction of will—Trust for sale—Discretion of
trustees—Divesting clause.*

A testator left his property to trustees, and directed them "from and after the decease of my said wife, or during her life, if she and the majority of my children and my trustees shall think it proper and expedient to do so, at the sole discretion of my trustees or trustees, to sell and absolutely dispose of all my real and personal estates, and my trade or profession and the goodwill thereof, and to divide the proceeds thereof," &c. The will also contained a provision that "in case any of my said children shall survive my said wife and die before he or she shall have received his or her share of my said trust estate and without leaving lawful issue," then that such share should go over.

Held (reversing the judgment of the court below) that these words imposed on the trustees an absolute trust for sale, not merely a power of sale, and that the discretion given to them referred only to the time and manner of selling to the best advantage. Further, that the word "received" in the divesting clause must be taken to mean "became de jure receivable," and that the shares vested indefeasibly immediately on the death of the widow.

THIS was an appeal from an order of the Lords Justices, reversing an order of Hall, V.C., of 17th Feb. 1874. The whole question turned on the meaning to be given to certain expressions in the will of the late Frederick Hobson of Leeds, the proprietor of the *Leeds Times* newspaper. The will was filed by Emma Minors, as the legal personal representative of the late William Hobson, one of the children of the testator, claiming a share of the residuary estate.

The will was dated 27th Feb. 1857, and the tes-

tator died on 18th Feb. 1863, leaving his wife and five children surviving. The widow died on 9th April 1870, two of the children having died before her without issue. William Hobson died without issue on 11th Jan. 1872, and the appellant was his executrix.

The matter had been before the court on several occasions, and various orders had been made by Stuart, V.C., and Wickens, V.C., and affirmed by the Lords Justices, before the date of the order out of which the present appeal arose.

The testator had left all his property to trustees, with directions to carry on the business of the newspaper after his death, during the life of his widow, and after her death to sell it; and the question in dispute was whether the words imposed an absolute trust to sell, or only conferred a discretionary power of sale. The will also contained a clause that if any of the children survived the wife, and died without issue, before he or she shall have received his or her "share," such share should go over. The business had not been sold at the date of the death of William Hobson, and the respondents contended that the appellant had consequently no claims on the residuary estate.

The clauses of the will and the history of the case appear sufficiently in the judgments of their Lordships.

E. K. Karlake, Q.C. and Ford North, appeared for the appellant.

Dickinson, Q.C., De Gaz, Q.C., Brodrick, W. Joyce, J. W. Dunning, F. Clarke, and Pattison, for the various respondents.

The following cases were cited in the course of the arguments:

Elwin v. Elwin, 8 Ves. 547;
Re Arrowsmith's Trusts, 2 D. F. & J. 474; 29 L. J. 774, Ch.; 3 L. T. Rep. N. S. 635;
Walker v. Walker, 5 Madd. 424;
Re Phene's Trusts, L. Rep. 5 Eq. 346;
Newman v. Warner, 1 Sim. N. S. 457;
Hutchin v. Mannington, 1 Ves. Jun. 366;
Martin v. Martin, L. Rep. 2 Eq. 404.

June 1.—Their Lordships delivered judgment as follows:

Lord CHELMSFORD.—My Lords, the question to

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.
Vol. XXXV., N. S., 877.

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be determined in this appeal is whether, upon the true construction of the will of Frederick Hobson, the appellant, Emma Minors, as the representative of William Hobson, is entitled to one-third share of the part of the testator's residuary estate, which consists of the proprietorship of the *Leeds Times* newspaper, and of a fund called the Reserved Fund, connected with it. The manner in which the will is drawn presents some difficulty in construing it satisfactorily. The testator gives all his real and personal estate under various descriptions, including the proprietorship of the newspaper, to trustees upon trust during the life of his wife to carry on the newspaper, which he calls the trade or profession in which he is engaged, and to use and employ for that purpose such part of his real and personal estate as shall be then used and employed therein, with a power at their discretion to increase or diminish the estate so employed. He then directs his trustees to set apart annually one-fourth of the profits of the trade or profession as a reserve fund to aid in carrying it on, or to meet emergencies or losses, and to divide the remaining three-fourths of the profits, and also the rents, issues, profits and proceeds of all his other real and personal estate into six parts, and to pay one-sixth to each of them his wife and five children, or to the children of any of them who shall die in the lifetime of the wife, and if any shall so die without issue, to divide the income of the share amongst the wife and the surviving children. Then follows the clause upon which the question mainly depends, which is rather out of place, in these terms, "In case any of my children shall survive my wife, and die before he shall have received his share of my trust estate, without leaving issue, I give such share equally amongst my surviving children." This clause is followed by one which ought to have preceded it, "And from and after the decease of my wife (or during her life, if she and the majority of my children and my trustees shall think it proper and fit so to do) at the sole discretion of my trustees or trustee, to sell and dispose of all my real and personal estate, and my trade or profession, and the goodwill thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Upon these two last mentioned clauses the question arises whether the directions with regard to the sale of the testator's real and personal estate and his trade or profession, give to the trustees a mere power to be exercised or not at their discretion, or are an absolute trust for sale, their discretion not applying to the sale itself, but only to the manner of effecting it. The question of the construction of the will has come before the court at different times, but only, as it were, by piecemeal. In 1866 a bill was filed by two of the trustees, Battison and Buckton, against Mary Hobson, the widow, and William Hobson, the third trustee, and others interested under the will, for an administration of the trusts of the will, and praying for an enquiry whether it is fit and proper, and for the benefit of all parties, that the trade or business of a newspaper proprietor should be carried on and continued, and if it shall appear not to be fit and proper, that the stock in trade, goodwill, and proprietorship of the newspaper be

sold with the approbation of the judge. Vice-Chancellor Stuart made an order declaring it to be fit and proper, and for the benefit of all parties interested, who are not *sui juris*, that the newspaper should be carried on. I do not comprehend how this inquiry came to be directed, and the order of the Vice-Chancellor made; because, during the life of the testator's widow the newspaper is directed to be carried on and continued, unless she and the majority of the children and the trustees think it fit and expedient that it should be sold. After the death of the testator's widow, Buckton, one of the trustees, on the 8th July 1870, presented a petition, praying, amongst other things, that the unsold real and personal estate of the testator, including the proprietorship of the newspaper, and the goodwill of the trade or business, should be sold by and under the direction of the court. Vice-Chancellor Stuart, on the 24th Nov. 1870, made an order that, being of opinion that the directions contained in the will of the testator as to a sale and disposition of all his real and personal estate, and his trade or profession, and the goodwill thereof after the decease of his wife, at the sole discretion of his trustees, is a power enabling such trustees to sell and dispose of the same, and is not to be construed or held as an absolute trust for the sale and disposition thereof on the happening of such event; and being also of opinion that it is for the benefit of all persons interested that the business of the *Leeds Times* and the real estate of the testator should not at the present time be sold, but that the business should be continued and carried on until further order; a scheme should be settled for carrying it on. I will not here advert to the opinion of the Vice-Chancellor as to the trustees having a power and not a trust; but I must remark upon his opinion that it was for the benefit of all persons interested that the business of the *Leeds Times* should be continued and carried on, when it was stated in the petition that William Hobson claimed to be entitled under the will to purchase the stock in trade and proprietorship of the *Leeds Times* at the sum of 500*l.* less than the market price thereof. William Hobson appealed by petition from this order, but the Lords Justices, by an order of the 3rd May 1871, dismissed his petition. The newspaper continued to be carried on under these orders, and a further order of Wickens, V.C. of the 18th July 1871, down to the time of the death of William Hobson on the 11th Jan. 1872. After his death the cause came on for further consideration to determine the rights of all parties before Hall, V.C., who, by an order of the 17th Feb. 1874, declared that the appellant, Emma Minors, as personal representative of William Hobson, and Fanny Metcalfe, and Mary Buckley, were entitled in equal shares to the rents and income of the testator's real and personal estate, accrued since the death of William Hobson, including as part of such income three-fourths of the profits of the testator's business, until the sale and conversion thereof; and that for the purposes of distribution the testator's estate, including his business of the *Leeds Times* newspaper, ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. Upon appeal from this order the Lords Justices reversed the decision of Hall, V.C., James, L.J. being of opinion that the point was really decided for all purposes by the former decision of the court

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which affirmed the decision of Stuart, V.C. And they held that there was not an absolute trust to sell on the death of the widow, but simply a power to sell at the discretion of the trustees; "an absolute discretion" as James, L.J. said, "extending beyond the death of the wife, and extending apparently until there would be some person or persons entitled absolutely to say, we will have nothing more to do with the trust, and we claim the property ourselves." It is to be regretted that the Lords Justices should have thought the question settled by their former decision, as it probably prevented a more close and careful consideration of the case, which might possibly have led them to a different conclusion. For after a repeated examination of the will I am unable to acquiesce in their judgment. It appears to me that with regard to the business of the newspaper, the principal subject in the mind of the testator, he contemplated its being carried on and continued during the life of his wife, except in the event of the wife, the majority of the children, and the trustees agreeing to sell it, and that upon the decease of the wife it should absolutely be sold. It is observable that the discretion to use and employ the real and personal estate in the business applies only to its being carried on during the wife's life, and the creation of the reserve fund is confined to the same period. The trustees are directed, while the business is being thus carried on, to divide the profits of the trade or profession, and also the rents, issues, profits, and proceeds of all his other real and personal estate amongst the wife and children. This direction appears to me to give the wife and children, not a share of the profits merely, but an absolute share in the business itself, and in the real and personal estate. If that be so Hall, V.C., was incorrect in holding that for the purposes of distribution the testator's estate ought to be considered as sold and converted at the expiration of twelve months from the death of the widow, so as to entitle William Hobson to his share of the trust fund under the clause providing for the case of children surviving the wife and dying before they had received their share; because before the death of the wife William Hobson's share was vested in him, and was, to use the words of James, L.J. "*de jure* receivable." If as I have said William Hobson's share was vested at the time of the wife's decease, the clause as to children receiving their share can only be regarded as a divesting clause, and is either repugnant, as, after vesting, a share could not be divested, or it must mean not before actually receiving it, but before becoming entitled to receive it. Mellish, L.J., is of opinion that if according to the true construction of the will there was an absolute trust to sell on the death of the widow, this would be the meaning of the word "received." Now that there was such a trust created, and not an absolute discretion in the trustees, as held by the Lords Justices, appears to my mind—I will not say clear after their opinions—but to be the better construction of the clause for sale, and to be recommended by the consequences which would follow from the adoption of the view of it taken by the Lords Justices. An absolute discretion in the trustees to sell whenever they thought proper would, as Hall, V.C., said, "prolong indefinitely the ascertainment of the persons to be beneficially interested in the property, by an undefined and

indefinite continuance of the business," and would thus place in the absolute power of the trustees the interests of all the children and their issue given them by the will. Such a construction of the clause ought not to be adopted if it is capable of a more reasonable one. In my opinion the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage. The counsel for the respondents argued in favour of the absolute discretion of the trustees by referring to the clause, declaring "that in case it shall be agreed, or the trustees shall decide to sell" they are authorised to sell to the sons at 500*l.* less than the market price. This clause seems to be inserted in the will for the benefit of the sons, and the word "decide" was perhaps inadvertently used. But the moment it is ascertained that an absolute trust for sale is created all nice criticisms as to the meaning of the words "received" or "decide" fall to the ground. I cannot help observing, though perhaps it is unnecessary, that even assuming the Lords Justices' opinion that the trustees had an absolute discretion to be correct, yet this would not prevent the appellant from being entitled to her share of the testator's residuary estate, as the representative of William Hobson, because during the life of William Hobson the trustees had retired from the trust and placed themselves in the hands of the court by the bill filed by them for administration of the trusts, and the order founded thereon, after which they could not exercise any discretion with which they were invested without the sanction of the court. Therefore, as the business could no longer be carried on by the trustees, the period must at all events have arrived when the persons interested were entitled to their shares in the business, and in the real and personal estate of the testator. I submit to your Lordships that this appeal ought to be allowed, and that the case ought to be disposed of in the manner which I believe your Lordships have agreed upon.

LORD HATHERLEY.—My Lords, I concur in the interpretation which has been put upon this will by my noble and learned friend who has just addressed the House. I think if we make allowance for certain difficulties introduced by the testator throwing in parenthetical expressions in scarcely the fit place for their insertion, the interpretation of the will is really of the simplest character. [His Lordship went through the earlier clauses of the will, and continued]: So far the will is very plain and intelligible. There is a trust to carry on the business during the wife's life, and a trust to sell at her death. And your Lordships will observe that this is the only place where we find any trust at all to sell any part of the property, including this business; and further, after what I have already referred to in the will, there is no direction giving the trustees full powers for carrying on the business after the wife's death, as they could carry it on before; there is no direction for their setting aside a fourth part of the profits after that time, as they were to do before, and there is no direction about applying the income of the general estate towards the carrying on of the business. Possibly if the construction of the whole will had forced the court upon such a construction all that might

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have been held to be implied after the death of the wife, as it had been directed during the wife's lifetime. That would have been a strong conclusion, that the business was to be carried on in a certain event after her death. But, in the absence of any expressions leading to that strong conclusion, the observation seems to me to have great weight as leading us to what is the real interpretation of the will, and tending to show that the testator did not contemplate the business going on for any length of time after the wife's death, that what he does direct in the parenthesis is this: "From and after the decease of my wife, or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do." Now, observe what happens there. Having given his wife only a life interest in her share, because there is no portion of the corpus given to her, or to her representatives absolutely, she does not take in any sense absolutely, but after her death her representatives lose the income derived from the estate, and the whole bulk of the property goes to be sold and divided among the children—having done that, it occurs to the testator as possible that during his wife's lifetime a sale may be desirable, and he makes a provision for it, which I think is of some importance with reference to the subsequent discretion of the trustees. He says, if that is done in my wife's lifetime I notice that her position under the previous part of the will will necessarily be changed, because then she will come in for a portion of the corpus together with her children, instead of having solely a life interest. That being the case he thinks it desirable that it should not be the wife's sole voice, or the sole voice of the children, or the sole voice of the trustees which should determine that such a change of interest as that should take place. Therefore, he says, if it is sold in her lifetime it must be done by the voice of the majority of his children and his trustees, if they think proper and expedient to do so. Now there is no such direction about the majority of the children and the trustees after the death of the wife. Your Lordships will observe, if the respondents' contention be true, what a position the trustees are placed in with reference to the interest of the children. If they are to have an absolute discretion, unfettered by any majority of the voices of the children, and unfettered by any direction on the testator's part, it is left to them to say whether or not they will continue the business, the position of the family being this: two children having died without issue in the lifetime of the wife, their shares have passed over; William Hobson has no children, his brother and sister have children, so that their shares will pass over to their children, while according to the construction of the respondents his would be limited and confined to his own life, and afterwards pass over to them: and, moreover, William Hobson has an interest, if the business is sold to the extent of 500*l.* in value, because he was to be allowed to buy it at 500*l.* less than the market price. He being placed therefore in a position in which his interests were extremely antagonistic, as far as pecuniary interests went, to the interest of his brother and sister, would be left to be dealt with by the trustees to this very considerable extent at their discretion solely, without any regard to the claims that he might have to

have the property so managed that he should not lose the benefit of those interests, which were in the first instance obviously contemplated for him by the will. These considerations would lead me to think it was a very difficult conclusion to arrive at to hold that the trustees could postpone the sale to an unlimited period, to any period up to William Hobson's death, and then direct a sale without giving him an opportunity of making the purchase for the 500*l.* less than the market price, and in the absence of any issue on his part to whom the share which he would lose by death anterior to the sale should pass over for the benefit of his family. On the other hand, leaving out the parenthesis, it seems to me as plain and simple a trust as possible for a sale to be made, and it contains an expression which is not at all unusual, leaving a certain liberty to the trustees as to the mode of dealing with the estate, especially as it consists in part of a newspaper, requiring some considerable extent of management in the proper disposition and sale of it. That is left to the discretion of the trustees, but it is not left to their discretion whether they shall sell or not. It is a trust that they shall sell, but when they do sell fault is not to be found with them because they have sold at a later period than others might have thought beneficial, if they have acted with proper and reasonable discretion. The word "decide" occurring later in the will, I think means nothing more than that. Having said, if a sale takes place during my wife's life there must be a form gone through, and more than a form, a resolution come to by the majority of my children, and the trustees in this matter, to all of whom I give a voice; he then says if it takes place after her death it is to be at the discretion of the trustees; whether it be in the wife's lifetime, or whether it be after her death, they must decide what is the right moment in their reasonable discretion, for the sale, which they must effect in a reasonable time, especially having regard to the circumstances I have mentioned as to the interest of parties; the testator having said, When the time for the sale has come, whether it is at one period or the other, I mean William Hobson to have 500*l.* That seems to me a strong expression of intention on the testator's part that whenever the sale takes place his son is to have that benefit; but I cannot understand it to imply anything which gives to the trustees anything like that wide discretion which appears to have been thought by the court below to have been vested in them. Still less can I come to the conclusion to which Stuart, V.C., came, in which he was afterwards confirmed by the Lords Justices, that this was not a trust, but a power for sale. I hold, on the contrary, that it is a distinct trust for sale. Nothing is left to the trustees, but that discretion of dealing with it which must be reasonably expected in the conduct of trustees who are anxious to perform their duty. Supposing that this is not a power, but a discretion, in the sense in which I use the word, then it is possible that you might apply the doctrine of *Re Arrowmuth's Trusts* (*ubi sup.*) and consider that it was in this case a reasonable time for the sale; or you might, following other cases, say that in regard to the expression, "children dying before the period of division," you cannot hold that to be an unlimited period; and that the reasonable discretion of the trustees cannot be prolonged to an

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indefinite time, especially having regard to that 500*l.* clause, which I referred to. I should be disposed to hold that it came within one or other of those views. But what seems to me to make the whole matter clear as to the trustees is this. Almost immediately after the death of the wife, Buckton, one of the three trustees, presented a petition to the court setting forth a desire expressed by the *cestuis que trust* other than William Hobson, and one of the trustees, Battison, that he, Buckton, should retire from this trust; and he prays for a sale, and asks for a direction by the court as to what is his proper course to pursue. Now we must bear in mind that anterior to this petition, there had been, during the lifetime of the wife, an order made by Stuart, V.C., directing an inquiry whether it was for the benefit of all parties that the business should be continued or not, instead of taking the course of the majority of the children and the trustees deciding on that point; and there was a finding upon that; and then Buckton, the wife being dead, prays for a sale. William Hobson, as of course was shown by his subsequent petition, was also desirous that there should be a sale. There were, therefore, two out of the three trustees desirous that a sale should then and there take place. The court then again inquired whether it would be for the benefit of all parties. That does not mean that the court wished to alter the rights of all the parties who might have acquired vested interests by the death of the widow and the postponement of the sale, during which those rights would be seriously affected; but it means merely this, that taking the rights and interests of all parties under the will as remaining unaffected by the inquiry, what is best for their benefit; their rights will remain exactly as before, and will have to be determined by the true construction of the will. Assuming that the court was right in coming to the conclusion that it was for the benefit of all parties, including William Hobson, that there shall not be a sale, it seems to me quite clear that the inquiry would make no difference whatever in the construction we ought to put upon the rights which accrue to all parties under the will, whatever arrangement may have been made by the court, for the sake of the convenience of the estate. I think that is the view we ought to take of an inquiry of that kind directed by the court, and having come to the conclusion that William Hobson did certainly, notwithstanding the clause about children dying before the period of division, acquire an interest, if not before, according to the view adopted in the case of *Arrowmilk's Trusts* (*ubi sup.*), at least after the presentation of the petition, when he and Buckton desired that a sale should take place, I see nothing at all that can be held, upon the face of this will, to displace that interest, and therefore it seems to me that the decision which has been come to by Stuart, V.C., in the first instance, and by the Lords Justices affirming him, cannot be a right conclusion. It is a very singular circumstance in this case that a different view should have been taken with regard to the other part of the testator's property. He has put them all evidently into one fund, and it does seem to me a very singular construction which would sever one part of this property from the other. The result of the decision already come to is this, that a separate inquiry seems to have been necessary with regard to a variety of

the portions of the testator's property, and a very different result is applied to one class of the property from that which is applied to the other, although the whole appears in the will to be given over to one class, and to be intended to be divided as for one class. I cannot think that any such conclusion could have been arrived at, had it not been for the unfortunate course which this case has taken. It has been brought before the court in half a dozen different ways at half a dozen different times, under varying circumstances, and the court has never had a clear exposition of the whole will to fasten its judgment upon, but it has been asked to pronounce first on one point, and then on another, until in the end the whole general scope of the testator's will seems to me, with great respect to the Lord Justices, to have been lost sight of.

Lord O'HAGAN.—My Lords, although I do concur, I cannot say that I concur undoubtingly in the conclusion of my noble and learned friends. The first judgment of the Lords Justices seems to me from the observations of Hall, V.C., to have impressed that learned judge as conveying an opinion in the main matter before us different from that which their second judgment, founding itself on their first, indicates as having been expressed in the latter. But, however this may have been, the question is one of those in which we are forced to seek the true construction of a document, in the absence of the means of determining with absolute certainty, by the exercise of common sense, guided by the ordinary meaning of language, and the circumstances of each particular case, and with such light as may be gained from legal principles in ascertaining the probable intention of a testator. Endeavouring in this way to interpret a difficult will, I concur, with hesitation, in the proposed resolution. It is to be observed that the literal meaning of the words we have to construe is not insisted on. The provision that if any of the children shall die "before he or she shall have received his or her share" of the trust estate is not interpreted in the judgment under appeal as if it meant to point to an actual receipt of the share, as in the case of *Martin v. Martin* (L. Rep. 2 Eq. 404), which is very different from that before us; but the word "received" is held by the Lords Justices, and rightly held, to have the meaning of "*de facto* received or *de jure* receivable;" and if such an interpretation can be admissible, the only question really is, at what time were the shares *de jure* receivable? If at the death of the widow, or twelve months afterwards, *cadit quaestio*. The fact of the non-receipt becomes immaterial, and the judgment of the Vice-Chancellor is sustained. It seems to me, obscure as the phraseology is, that it sufficiently indicates, according to the view of the Vice-Chancellor, the creation of a trust, and not the creation of a power; of a trust to sell "all the real and personal estate and the trade or profession" of the testator, accompanied by a "discretion" in the trustees as to the time and manner of the selling; and I think that the word "decide" in a subsequent part of the will may fairly be taken to point, not to a capricious or unlimited capacity of action or postponement, but to the exercise of the discretion in fixing judiciously the period for the fulfilment of the trust to sell. And I do not conceive that the mere fact of the non-sale up to the

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present time prevents the vesting of shares. I quite agree that if the testator had unequivocally expressed a contrary intention it would have been our duty to carry it into effect. But as the matter stands I think we are driven to consider his whole will in relation to the circumstances with which he was dealing; and, so considering it, I do not feel obliged to attribute to him the contemplation of an indefinite postponement of the sale; of the keeping his legatees in a state of doubt and uncertainty, perhaps for all their lives; of giving to his trustees, or to a single one of them, the power to nullify his bequest at their or his absolute pleasure; or of the prevention of the ascertainment of the beneficiaries really to take, while trustee might succeed trustee in a lengthened series. It may be that an absolute intestacy might not be wrought, as was suggested by Mr. Karlake, but the view of the respondents would make possible and probable such a delay of vesting, to the prejudice and confusion of the legatees and their families as in my opinion the law should not and will not countenance without coercive reason. The cases of *Hutchin v. Mannington* (*ubi sup.*) and *Elwin v. Elwin* (*ubi sup.*) certainly sustain this view. In the former the gift over was defeated because the purpose was, in the words of the Lord Chancellor "unreasonable," because it was "all too uncertain;" and the uncertainty and difficulty of ascertaining the intent which operated there exists also in the case before us; while in the latter a different rule was reached, because the intention was declared with a "definite certainty," which does not here compel us to an injurious decision. To justify this reasonable view I do not think it necessary to strike any words out of the will, or to depart further from its verbal effect, or to give it any more flexibility than is involved in the alternative meaning attributed to the word "received" by the Lords Justices, and accepted at the Bar. Besides, it seems to me, that the will contains indications of the testator's intention with reference to the newspaper property which persuasively support, the construction of the Vice-Chancellor. The "discretion" given to the trustees is not to carry on the business, but "to sell and absolutely dispose of all my real and personal estates, and my trade and profession, and the goodwill thereof." And these words put the real and personal estate, and the trade of the journalist on precisely the same footing, and indicate that they should be dealt with in the same way. If the real and personal estate only had been mentioned, I apprehend that there could have been little controversy as to the existence of a trust to sell, and that the observations of Lord Thurlow, L.C., in *Hutchin v. Mannington* (*ubi sup.*), would have had clear application; "where there is a trust that is always considered to be done, which is ordered to be done." And, again, "If the testator had given a real estate in the same way, it would not depend upon the trustee to sell, nor upon his dilatoriness." Pressed by this consideration, the respondents vigorously contended that the testator had in view a distinction between his business and his real and personal estate, and desired that they should be dealt with in different ways; and it was suggested that even if the Lords Justices were wrong as to the freehold and personal property, they were right as to the newspaper. But I fail to discover this difference in the terms of

the will, or the reason of the thing. True it is, as was ably urged, that the business might, from its peculiar nature, require a different exercise of discretion from the freehold or the personalty; but those again might require a difference as between themselves; and I am not satisfied that there was any such distinction in the mind of the testator as would warrant a dealing with them for the purposes of this case on different principles. It was urged by Mr. Dickinson, that the prevailing idea of the will regarded the continuance of the newspaper; and his inference from that would seem to tend to the justification of the indefinite postponement of the sale, involving unlimited delay in the settlement of the rights of the parties, and the ascertainment of the beneficiaries entitled to take advantage of them. But that the testator had no such view of splitting up his property when the time of distribution should arrive, seems intimated not only by the identical treatment of the real and personal property and the business, to which I have already adverted, but by the marked distinction so forcibly put by Mr. North, between the provisions affecting the newspaper during the life of the testator's wife, and after her decease. As to the business, the trustees are to carry it on during the life of the wife; during her life accounts are to be rendered, and distributions made; the newspaper is to be maintained by advances of money, and a reserve fund is to be created. In the face of these arrangements, it is impossible to say that the business was not to be continued during the life of the wife. But after her death there is an end of all this complicated machinery. The single provision is for the sale of all the testator's property, and for the distribution of the proceeds. May not this manifest distinction be fairly taken to imply a difference in the testator's purpose with respect to the business during the life and after the death of his wife, and a design that it should cease to be carried on, and be absolutely sold like his other property, at the earliest moment, when his trustees, in their discretion, should be able to dispose of it to reasonable advantage? The respondents appear to me to have failed in their attempt to escape the effect of the uncertainty involved in their construction, or to show that the testator meant his business, after his wife's death, to be dealt with differently from his freehold and personalty. The clause as to the right of pre-emption in his son only regulates the price to be received when the sale should be resolved on, but not at all the period at which that sale should take place. On this view of the case I am content to rest my judgment, but it is well sustained also by the effect of the difference between the trustees, the invocation of the court, and its active intervention, which, with their legal consequences, were pressed on the attention of the House. But holding the reasons I have given sufficient and satisfactory, I do not wish to occupy time unnecessarily, and I express my concurrence with the noble and learned lords who have preceded me.

LORD SELBORNE.—My lords, after what has been stated by the noble and learned lords who have preceded me, I think it is sufficient to state shortly as to several points in the case the conclusions only at which I have arrived, and as to which I must confess I have felt no doubt or difficulty from the commencement of the argument. First, then, I think that the declaration contained

in the order of Stuart, V.C., of the 24th Nov. 1870, was erroneous, and ought not to have been made. Whatever might be the true construction of the will on the point dealt with by that declaration, the court had full power, on the hearing of the petition then before it, to postpone a sale of the newspaper business and of the real estate of the testator, if it appeared, as it did, to be for the benefit of all parties interested to do so, although one of the *cestui que trust*, William Hobson, who, besides his interest under the will, had an option to purchase, asked for an immediate sale. Secondly, I am of opinion that there was under this will an absolute and imperative trust for sale, taking effect from and immediately after the death of the widow, although with a discretion both as to the manner and as to the time of sale, which was in my opinion to be reasonably exercised by the trustees for the purpose of executing, and not of defeating that trust for sale. Next, I am very clearly of opinion that there was under this will one, and only one, period at which the corpus of the testator's estate, directed by him to be sold, became *de jure* distributable, that period being the time of the widow's death. The counsel for the respondents relied much upon the words in the clause giving the sons an option to purchase the newspaper, "in case under the clause hereinbefore contained it shall be agreed, or any trustees or trustee shall decide, to sell my stock-in-trade and partnership of the *Leeds Times* newspaper, and my sons or any of them shall by writing offer to purchase," &c. These words, it was argued, prove that there was to be no sale of the newspaper unless the trustees should so decide. I am not of that opinion. So far as those words contemplate an event contingent and not certain, it is to be observed that the event so spoken of is a complex one, not simply a decision by the trustees to sell, but together with that an offer by one or more of the sons to purchase. This complex event might never happen, although the trustees might not only be bound to sell, but might actually sell the newspaper. The trustees having a reasonable discretion to exercise as to the time of sale, there could be no actual sale till they decided to sell, although the trust was absolute; and these words, from their association with the alternative of a sale by agreement are used as descriptive only of a sale after the widow's death, when the time of selling would depend on the sole discretion of the trustees, as compared with a sale in the widow's lifetime, when it would also depend upon the consent of other persons. This clause gives no new or separate power at all as to the newspaper property; it simply refers to a sale "under the clause hereinbefore contained." If it could be held to reduce the preceding clause, so far as relates to the newspaper property, from a trust to a mere power of sale, it must have the same effect with respect to all the rest of the testator's real and personal estate. Any such inference from such words seems to me not only unnecessary but altogether unreasonable. In a later clause the testator directs that until all his real and personal estates should be sold and converted into money, the trustees should pay to the *cestui que trust* the income of such part thereof as should for the time being remain unsold or unconverted. This shows clearly enough that the testator fully understood that, in the course of the execution of the trusts of the will, it might

be found necessary or convenient to sell different parts of his property at different times, and that he intended to provide for that case. But it confirms, rather than otherwise, the conclusion that, subject to the exercise of a reasonable discretion as to time, he intended everything to be sold. These points being ascertained, we are brought to the consideration of the divesting clause introduced by these words: "And in case any of my said children shall survive my said wife, and die before he or she shall have received his or her share of my said trust estate," &c. These words, in their *primâ facie* natural sense, from which there is nothing in the context to authorise any departure, relate to the death of a child during the interval between the death of the widow, and the time when that child's share might be actually received, or at least *de jure* receivable. It was decided in *Hutchin v. Mannington* (*ubi sup.*), and *Martin v. Martin* (*ubi sup.*), that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord Loughborough said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell; that in some way the property might be sold immediately; that the court would not inquire when a real estate might have been sold with all possible diligence, but always in such a case considered it as sold the moment the testator was dead (there the trust for sale came into operation on the death of the testator); that where there is a trust that is always considered in equity as done which is ordered to be done; and that the court cannot measure the time. It might be added, that when there is an equitable title vested in possession, without any preceding interest, the possession of the trustee becomes, in the view of a court of equity, the possession of the *cestui que trust*; and that there is no sound distinction in principle between the extension of trust property in specie for the benefit of the *cestui que trust*, though directed to be converted by the will, and the actual receipt of that property, in any way consistent with the continuance of a legal estate in the trustee by the *cestui que trust*. It was argued, however, that when sale was the medium by which the testator meant the *cestui que trust* to be put into possession of their shares, and when the trustees had power to sell at such time as in their discretion they might think fit, the event in which the divesting was to depend might be rendered certain by the exercise of the discretion of the trustees; and that no share was *de jure* receivable until that discretion had been exercised. I cannot accede to this reasoning. The event spoken of in the will is not the completion of any particular sale of particular property, or any other definite act to be done by the trustees, but is the death of a child before receiving "his or her share" of the trust estate, in which case "such share" is given over. The share is spoken of by the testator as a whole. A divesting clause of this nature ought to be construed strictly; certainly it ought not to be extended to any case not properly described by the words, according to their reasonable interpretation. There might be, and the testator takes notice of it, as many sales at different times as there were items of saleable property, according to the exercise of

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their discretion by the trustees. How can it be said that this testator has declared with reasonable certainty an intention, either that part of a share should go over when the whole did not, which is the conclusion of the Lords Justices, or that the whole share should go over in case of the death of a child while any part of his property was retained by the trustees unsold, although payments, which in that case would have to be refunded, might have been previously made on account of that share? It would, in my judgment, be more reasonable to hold, since no part of any share could rightfully be received, except by virtue of a title to the whole, that the rightful receipt of any part would be equivalent, for the purposes of this clause, to the receipt of the whole; and, as the Lords Justices have held, that William Hobson had at the time of his death a right tantamount in equity to actual receipt to one-third share, not only of the policy moneys and other moneys then actually realised, but even of the value of the copyholds which had been only ordered to be sold, and not actually sold in his lifetime; this view would be fatal to the respondent's case, even if the divesting clause so construed could receive effect. I see no ground for holding that the conversion directed by this will was in suspense till the end of twelve months after the widow's death. On this one point I differ from the decision of Hall, V.C. I think it right to add, that even if in some of the questions in this case I had taken a view different from that which I have expressed, I should have been of opinion that the discretionary powers of the trustees came to an end, if not when the decree for administration was made in the suit, certainly when the order of Stuart, V.C., of the 24th Nov. 1870 was made. I should have thought that from the date of that order, at all events, the court must be deemed to have carried on the business for the benefit and in the interest of those persons who would have been then entitled to the proceeds if it had been actually sold, as much as if they had then elected to take their several shares of the newspaper in specie without reversion, and had been put into possession of those shares by the order of the court. I cannot reconcile the conclusion that the operation of the divesting clause as to the newspaper property was prolonged by that order as against William Hobson, with the express declaration of the opinion of the court that it was "for the benefit of all persons interested that the business of the *Leeds Times* should not then be sold."

Order appealed from, reversed, and order of Hall, V.C., restored with a variation.

Solicitors for the appellant, *Whitakers* and *Woolbert*.

Solicitors for the respondents, *W. A. Holcombe*, agent for *T. E. Jones*, Manchester; *Bell, Brod-rick, and Gray*, agents for *Hopps and Bedford*, Leeds; *H. B. Clarke and Son*, agents for *Dunning and Kay*, Leeds.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

ON APPEAL FROM THE ADMIRALTY DIVISION.

(Before JAMES, L.J., BAGGALLAY, J.A., and LUSH, J.)

Thursday, May 4.

CARGO *EX* WOOSUNG.(a)

Salvage—Government ship as salvor—Agreement—Validity of—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 484.

Although the captains, officers, and crews of Government ships are entitled to be remunerated for salvage services to the same extent as officers and crews of merchant vessels would be rewarded under similar circumstances, they are not entitled to impose terms upon the persons whose property they save, and refuse to render assistance unless those terms are accepted.

An agreement so imposed by the captain of a Government ship upon the master of a ship in distress, by which the latter becomes bound to pay a fixed sum for services to be rendered, not merely by the officers and crew, but by the Government ship also, is invalid, as the services of the ship are not to be rewarded under the Merchant Shipping Act 1854, sect. 484.

Semble, that the officers and crew of a Government ship, ordered by Government to render salvage assistance, have no right to make any agreement with the master of the distressed vessel as to the amount of their reward.

A vessel owned by the Bombay Government, and manned by uncovenanted servants of that Government, whose officers carry no Queen's commission, is a "ship belonging to Her Majesty," within the meaning of the Merchant Shipping Act 1854, and no salvage reward is recoverable in respect of services rendered by such a vessel.

This was an appeal from a decree of the High Court of Admiralty of England, in a cause of salvage instituted on behalf of Capt. Elton and the officers and crew of the *Kwangtung*, of the Bombay Marine, against the cargo of the steamship *Woosung*.

Capt. Elton and the other plaintiffs were uncovenanted servants of the Bombay Government, the officers not holding a Queen's commission, but performing duties analogous to those of the officers and crews of despatch boats. The *Woosung* was wrecked in the Red Sea, and news of the wreck was sent to London, when application was made for assistance to the Indian Government. The Secretary of State for India telegraphed to the Resident at Aden to send a gunboat to protect the property, if he thought it necessary. In accordance with these instructions, the Resident at Aden directed the *Kwangtung* to proceed to the assistance of the *Woosung*, giving Capt. Elton the instructions contained in the following letter:—

Sir,—I have the honour to annex for your information a note respecting the steamship *Woosung*, on the island of Kotama, and to request that you will proceed to the spot at full speed, after landing the relief detachment at Perim. You will notice the *Woosung* is said to be holed in several places, and to be full of water. If

(a) Reported by JAMES F. ASPINALL, Esq., Barrister-at-Law.

practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable, to convey to Aden the released detachment of the 2nd Grenadiers, and other details. The *Kwangtung* can return to Kotama, if it should be considered advisable on the receipt of your report, but from the condition of the ship it seems doubtful whether much cargo can be saved.

The *Kwangtung* did proceed to the wreck, and rescued much of the cargo. Capt. Elton, however, declined to undertake the service except under an agreement, which was, after much discussion, signed by the master of the *Woosung*, by which the plaintiffs were to have half the proceeds of the property salvaged. This agreement was upheld by the learned Judge of the High Court of Admiralty (Sir R. Phillimore) and from his decree the owners the cargo appealed.

The facts and arguments are fully set out in the report of the case below: (33 L. T. Rep. N. S. 394; 3 Asp. Mar. Law. Cas. 50).

Sir H. James, Q.C., Cohen, Q.C., and Phillimore for the appellants.

Butt, Q.C., Herschell, Q.C., and Edwyn Jones for the respondents.

JAMES, L.J.—I am of opinion that, having regard to the admitted circumstances of the case, this agreement cannot stand as a final measure of the amount to be paid as a remuneration to the captain, officers, and crew of the ship *Kwangtung*. The circumstances of the case seem very simple. The ship *Woosung* was wrecked on a reef in the Red Sea, and was in a position of imminent peril. The lives of the passengers and crew were saved, but as far as the ship itself is concerned, she was in such peril that she never was rescued, but went to pieces, and the cargo was got out of her when she was on the reef in this state of the most imminent peril. That being so, it so happened that in consequence of a passing ship coming up, a communication was made to London to certain persons interested in the ship and cargo, in the position in which she then was, and thereupon they wrote to the India Office, and the result of this communication was that the office gave directions to the proper authorities at Aden to send a ship to the rescue of the *Woosung*. A letter had been written by the agent of the Salvage Association, making offers to reimburse the expenditure for coal consumed on board the ship to be sent, and to make presents to her officers and crew. It was contended by Sir Henry James that this amounted to an agreement which precluded any right to salvage afterwards. I do not think that it can be fairly said that it in any degree whatever interfered with what otherwise would be the right of the captain as to the salvaging of the ship. What was said was, "We will pay for coals, and make such present to the men as you may think fit." But it cannot be contended that by accepting that offer the men were not to have what they otherwise would be entitled to. They retain their rights as salvors notwithstanding. It was settled in the case of *The Azalea* (a) that, having regard

to the peculiar position of the captain and officers in the Bombay Marine, they are to receive such salvage as would be allotted to the officers and crew of a merchant vessel in similar circumstances. That must be considered as a rule to be applicable to all these vessels, and the men would be entitled to remuneration, like the officers and crew of a merchant vessel. That being so, the Resident at Aden directs Captain Elton to go to the ship. He is to go, according to the letter, to the spot, to the reef, and he is told, "the *Woosung* is said to be holed in several places, and to be full of water. If practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable, to convey to Aden the released detachment of the 2nd Grenadiers, and other details. The *Kwangtung* can return to Kotama, if it should be considered advisable, on receipt of your report, but from the condition of the ship, it seems doubtful whether much cargo can be saved." Then the captain, under that direction, does proceed; and I think it was his duty to render his services—all reasonable services—upon the usual terms, that is to say, on receiving such a salvage reward as would be allotted to the officers and crew of a merchant vessel under similar circumstances. He was there to use his ship in a reasonable manner for the protection of the ship and cargo. When he states that he makes a bargain by which he is to give his services, and those of the officers and men of the ship, for the saving of the fittings of the disabled ship, and for the purpose of saving as much as possible of the cargo, in consideration for which salvage services one sum is to be given, and that is one-half of the salvaged property, that is an agreement which, upon the face of it, cannot stand. If it had been an agreement between the captains of ordinary merchant vessels, beyond all question it would have been for a salvage service to be performed by ship, captain, officers and crew—the price given being for the whole services to be performed. It appears that that alone would show that it would be entirely impossible that this can stand as the price to be paid for the services of the officers and men alone. It is one entire consideration. We have no means of determining what proportion is to go to the ship, and what to the officers and crew. Therefore, we are driven to find some other mode of ascertaining how much the officers and crew are to receive. Independently of that, I consider that it would be *per se* *exempli* if a person placed in the position in which Capt. Elton was, sent by the local Government to this ship to assist it, and not content to take the salvage upon the same footing as on merchant officers, could say to the master of the wrecked ship, "Well, if you do not agree to give me my terms, I will sail away, and leave you here to do

Milward, Q.C., E. C. Clarkson, and Goldney for the plaintiffs.

Brett, Q.C. and Myburgh for the owners of cargo.

Sir R. PHILLIMORE said that although there was no danger from sea or weather, the service was of great merit, owing to the great heat and the state of the cargo, and the liability to sickness to which the salvors were exposed. It was, however, a circumstance that the court must bear in mind, that the *Dalhousie*, being a Government steamer, was not to be considered as a salvor, but, on the other hand, her officers and crew were entitled to salvage reward, and their services must be remunerated, excluding the ship, and that the captain and crew were entitled to 4500*l*.

(a) June 8, 1875.—*The Azalea*.—This was a cause of salvage instituted by the commanding officer, officers, and crew of the *Dalhousie*, another vessel belonging to the Bombay Marine, against the cargo of the steamship *Azalea*, which was also wrecked in the Red Sea on the 26th July 1873. The work was very great, owing to the decomposition of the cargo, which consisted of rice, seed, and hides.

The value of the cargo salvaged was 22,400*l*.

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whatever you can with such assistance as you can get, inadequate as it is; although I have been told to come here for the purpose of assisting you." It would be something odd if that could be said by any public servant who had a public duty to perform, and that he could say, "I will not render those services which I have been ordered to render with a public vessel, unless you come to my terms." Nobody, except under circumstances of enormous pressure, would think of agreeing to pay half the proceeds of the cargo. For all these considerations, I think the agreement cannot stand, but that the captain and the crew are entitled to a full, adequate, and liberal remuneration, of which the amount will have to be considered.

BAGGALLAY, J.A.—I am of the same opinion. I concur with the Lord Justice in thinking Capt. Elton was in no way restricted as to what he might do under the circumstances in which he was placed, by what took place in London between the Salvage Association and the India Office. But that brings me to the second question, which is the most important one in this case—namely, whether Capt. Elton was at liberty to enter into a salvage agreement such as that entered into by him on the 9th March. Now, he was at that time acting under the orders of the Bombay Government, commanding a ship belonging to her Majesty, and was sent to protect property which was on this reef in the Red Sea. Without actually deciding the question, I entertain a strong opinion that it was contrary to his duty as an officer in the service to enter into the agreement in question; and that is borne out by considering the 484th and 485th clauses of the Merchant Shipping Act of 1854. The 484th section provides:—"In cases where any salvage services are rendered by any ship belonging to her Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores or any other articles belonging to her Majesty supplied in order to effect such services, or for any expense or loss sustained by her Majesty by reason of such services." But the 485th section goes on to provide for a claim for salvage services rendered by the officers and crew of one of her Majesty's ships, and no proceedings are to be taken, and "no claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship, by the commander or crew, or part of the crew, of any of her Majesty's ships, shall be finally adjudicated upon, unless the consent of the Admiralty has first been obtained." That authorises the officers and crew to commence proceedings in the Court of Admiralty. Then the 486th clause relates to the various steps to be taken when salvage services have been rendered by her Majesty's ships abroad; and it provides that any officer entering into any port with salvaged property, is to make a statement on oath, specifying so far he can the particulars of the property, and the place, condition, and circumstances in which the ship, cargo, and property was at the time when the services were rendered for which salvage is claimed; and the nature and duration of the services rendered, also the value of the property salvaged, and then the consular officer or a judge to fix the amount of the bond to be given by the owner or master of the salvaged property. That

appears to negative the power of an officer commanding a ship belonging to her Majesty to enter into such an agreement as in question here. But it is unnecessary to decide that question, because it appears that the agreement was not one which could be allowed to stand. Two cases have been referred to in the course of the argument. One is the case of *The Helen and George* (Swab. 368), where it was held, "That salvage would be upheld unless proved to be very exorbitant, or to have been obtained by compulsion or fraud." Therefore, the ground of exorbitancy of the agreement would be sufficient to set it aside. The case of *The Lucas* (Swab. 370) laid down this rule, that a moiety of the property salvaged, with costs, is the maximum remuneration that should be allowed to the salvors. Here is, then, a moiety of the property saved not in the hands of those in whom it ought to be, but claimed for the services of the officers and crew, entirely omitting from consideration any services of the ship employed. That alone would be sufficient to show that this agreement was inequitable. But beyond this we have this fact, that at the same time services are rendered by a Greek trader, who was to receive one-third of the proceeds, and on whom was cast the obligation of providing boats and necessary appliances, and he had to pay a heavy price to secure the services of an interpreter. Therefore the case falls within that of *The Helen and George*, and the agreement cannot stand.

LUSH, J.—I am of the same opinion. Even if Capt. Elton could have entered into any agreement, the agreement before us is not one which could stand. As the learned judges have already delivered their judgments, it is not necessary for me to do more than say that I think that Capt. Elton was precluded from entering into any such agreement. He was an officer sent on that special service, and it was not competent for him to stipulate for payment. Although he was not an officer in the navy, he was not in the position of a merchant captain. The provisions on this subject contained in the Merchant Shipping Act are entirely consistent with public policy, and are such as the Court would act upon without express legislation upon the subject. *Appeal allowed.*

Their Lordships having expressed their opinion that the compensation ought to be on a liberal scale, it was agreed between the counsel for the plaintiffs and defendants that the amount to be paid to the India Office for the master and crew of *Kwantung* should be 6000*l.*; the respondents to have their costs in the court below, the appellants theirs in the Court of Appeal.

Solicitors for plaintiffs, *Kearsey, Son, and Hawes.*

Solicitors for defendants, *Wallons, Bubb, and Walton.*

Friday, May 5.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Ex parte BROWN; Re APPLEBY.(a)

Bankruptcy—Prosecution of accomplices of fraudulent debtor—Ex parte order—Right of appeal—Debtors' Act 1869 (32 & 33 Vict. c. 62), ss. 11, 16—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 71.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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PATTERSON v. GASLIGHT AND COKE COMPANY.

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On an ex parte application by the trustee in a bankruptcy, the Court of Bankruptcy made an order directing the trustee to prosecute the bankrupt, and also B., an alleged accomplice of the bankrupt, for certain alleged offences against the provisions of the Debtors' Act, 1869.

Held, that B. had no right to appeal from the order.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy.

Henry Appleby, formerly a chemist in Tottenham Court-road, was adjudicated a bankrupt on the 18th Dec, 1874. He had been engaged in some transactions with one Joseph Brown, a dyer and money lender, in Brecknock-road, Camden-road.

On the 7th March last, upon an *ex parte* application by the trustee in the bankruptcy, the Registrar made an order that the trustee should be at liberty, and he was thereby directed, to take criminal proceedings against the bankrupt, and also against Brown, for certain alleged offences against the provisions of the Debtors' Act 1869, sect. 11, sub-ss. 1, 2, 4, 6, 9, 15.

From this order Brown appealed.

Fry, Q.C., Robertson Griffith, and Grain, for the appellant.—This case is not governed by *Ex parte Marsden* (34 L. T. Rep. N. S. 700), where your Lordships held that the bankrupt himself had no right to appeal from an order directing his prosecution; but it comes within *Ex parte Dempsey* (28 L. T. Rep. N. S. 860; L. Rep. 8 Ch. 676), where it was held that there is a right of appeal given by the 71st section of the Bankruptcy Act, 1869, from any order of a Court of Bankruptcy. The Registrar had no jurisdiction at all to order Brown to be prosecuted. The 16th section of the Debtors' Act, under which he made the order, empowers the court to order the bankrupt only to be prosecuted, and not any other person. [JAMES, L.J.—I don't think you have any right to be heard.] *Ex parte Dempsey* shows that we have a right to appeal. [JAMES, L.J.—A proper appellant has a right of appeal.] Brown is a proper appellant. The 71st section of the Bankruptcy Act 1869, provides that any person aggrieved by an order of the Court of Bankruptcy may appeal. [JAMES, L.J.—You are not aggrieved by the order. MELLISH, L.J.—The order decides no question of law or fact; it is a mere direction, and does not aggrieve anyone.] As a contributor to the taxes of the country out of which the costs of the prosecution will be paid, Brown is entitled to appeal. They also referred to

Ex parte Thoday, re Ellis, 34 L. T. Rep. N. S. 261; affirmed on appeal, 34 L. T. Rep. N. S. 705.

Rozburgh, Q.C. and Bealey, for the respondent, the trustee, were not called upon.

JAMES, L.J.—I am clearly of opinion that where any proceedings, civil or criminal, are directed to be taken against a person in the administration of a bankrupt's estate, the person against whom such proceedings are directed to be taken is the person above all others who ought not to be heard. The time for him to make his defence is when he is prosecuted, and he has no more right to be heard in a preliminary inquiry of this kind than any other person. Brown was not party to this order, and he has no *locus standi* to appeal from it.

MELLISH, L.J.—I am of the same opinion. The

order appealed from is only a direction by the court to its own officer. It is an *ex parte* order, and the party affected by it is not entitled to be heard. We considered this question very fully the other day in *Ex parte Marsden* (*ubi sup.*). Under the Bankruptcy Act of 1861 the bankrupt had a right to be heard on a matter of this kind, but that course was found to be very inconvenient, and the method of procedure was purposely altered by the Act of 1869. All that the Court of Bankruptcy has now to do is to order the prosecution, and then it comes on in the ordinary way. An order of this kind is really not calculated to prejudice the person ordered to be prosecuted; the only difference it makes is as to the way in which the costs of the prosecution are to be borne. The only persons who could be prejudiced are the persons interested in the bankrupt's estate, and they might appeal from the order in order to prevent wasteful expenditure of the bankrupt's estate. But the person who is ordered to be prosecuted has no more right to appeal from the order than a person ordered at the instance of the committee of a lunatic to be prosecuted at the expense of the lunatic's estate would have to appeal against such an order.

BAGGALLAY, J.A.—I am of the same opinion. I do not think that the appellant is a person aggrieved by the order within the meaning of the 71st section of the Bankruptcy Act 1869. As was pointed out in *Ex parte Marsden*, the effect of allowing the person ordered to be prosecuted to be heard in opposition to the order would be to materially prejudice him, if his case were heard by several courts before his trial, and he were eventually ordered to be prosecuted.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, Tilly and Soames.

Solicitors for the respondent, Miller and Miller.

May 8, 9, 10, 11, 12, 13, and 16.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

PATTERSON v. GASLIGHT AND COKE COMPANY.(a)

Patent—Infringement—Specification—Prior user—Anticipation—Disqualification of plaintiff to be a patentee.

Bill to restrain infringement of patent for improvements in the purifying of gas. Plaintiff claimed as a discovery that in order effectually to clear gas of sulphur compounds other than sulphuretted hydrogen, it was necessary first to take out of it the carbonic acid; and he claimed as a process, that he first submitted the gas to lime long enough to take out all its carbonic acid, then submitted the gas to fresh lime, which took up the sulphuretted hydrogen, and thus became sulphide of calcium, which substance took up the principal of the other sulphur compounds. The defences were that the specification was defective for want of particular or sufficient description; that the theory was not novel; that the patent had been anticipated by Mann's patent in 1871; that there had been a prior user of the process; and that the plaintiff was disqualified from being a patentee by reason of his having discovered what he knew in the course of his

(a Reported by E. STEWART ROCHE, Esq., Barrister-at-Law.

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duties as gas referees, having parliamentary powers to inspect, amongst others, the defendants' works, and see what was going on.

Held (reversing the decision of Bacon, V.C.) that the patent was not valid, the plaintiff having made no discovery of any new principle or process, but only a more skilful and efficient method of working the process which the defendants had been long using.

Quære, whether it was competent for a person holding the plaintiff's position to take out a patent for improvements connected with his official investigations, and which embodied suggestions made in his report.

Bill dismissed with costs.

THIS was an appeal from a decree of Vice-Chancellor Bacon, restraining the defendants, the Gas Light and Coke Company, from infringing the plaintiff's patent for improvements in the purification of coal gas by using the invention described in the plaintiff's specification or any process only colourably differing therefrom, and from using or selling any gas purified by means of such patented process.

The object of the suit was to establish and enforce the right of the plaintiff, Mr. Patterson, late referee under the Metropolitan Gas Act 1868, to an alleged patent taken out on the 9th March 1872.

The patent was for a process of gas purification by which certain insidious and deleterious sulphur compounds which exist in small quantities in ordinary gas, as it comes out of the retort, can be got rid of and the gas be otherwise improved.

The plaintiff's case was as follows: "The principal impurities in crude gas are six, namely, tar, aqueous vapour, ammonia, carbonic acid, sulphuretted hydrogen, and sulphur in other forms. The first two are got rid of by cooling and condensation; the third, ammonia, by passing the gas through damp coke held in vessels called scrubbers; there then remain as impurities carbonic acid, sulphuretted hydrogen, and the other sulphur compounds. The existence of these sulphur compounds was discovered by Dr. Letheby and though they exist in proportionately small quantities, if allowed to pass through the gas-burners they form sulphurous acid in sufficient quantity to cause great damage, particularly to ornamental articles, such as ormolu, and to be very injurious too to health. Both previously to and after the date of the plaintiff's patent the gas was treated with lime and oxide of iron in the form of rusty filings in separate purifying vessels, in order to get rid of the carbonic acid and sulphuretted hydrogen. The plaintiff claimed to have discovered that by the proper management of these purifiers, not only these two impurities could be got rid of, the carbonic acid more effectually than before, but also the more subtle sulphur compounds would be taken out. In his specification, Mr. Patterson stated that his patent was for improvements in the purification of coal gas from sulphur in other forms than sulphuretted hydrogen by means of sulphide of calcium, while the carbonic acid was likewise reduced, with a corresponding improvement in the illuminating power of the gas. His mode was founded on a single use of the chemical tests. First, that lime has a greater affinity for carbonic acid than it has for sulphuretted hydrogen; secondly, that this latter gas, if carbonic acid is not present, and

only then, will combine with lime and form a substance known as sulphide of calcium, which, thirdly, is itself one of the best substances for absorbing the other sulphur compounds. His principal therefore, was to use the lime purifiers before the rust purifiers, and to manipulate the former, which are used in sets by changing them properly, and for this purpose applying tests at the proper places, or that care be taken that all carbonic acid is taken up in the first or first two of a set of lime purifiers, in order that the sulphuretted hydrogen may operate in others on the lime and there take up the other impurities. The gas is lastly treated with oxide of iron to get rid of the sulphuretted hydrogen. The above description applies only to one mode of working the plaintiff's patent out of five described in his specification. The plaintiff alleged that as early as 1860, an Act of Parliament was passed for the purpose of fixing a maximum to the amount of the sulphur to be allowed in gas, and a second Act was passed in 1868, but it was found impossible till his patent was taken out to enforce any limits, but that after his patent had been taken out the gas companies were enabled to reduce the presence of these compounds to a very small amount, which they did by infringing his patent.

In Dec. 1872, the plaintiff wrote to the company stating that they were using his invention, saying that he would be glad to grant a licence on reasonable terms; and if they did not enter into such an agreement, they must cease to use his invention. The answer was that the company did not acknowledge the patent rights of the plaintiff, and on the 2nd of April, 1873, the bill was filed, asking for an injunction to restrain the infringement of the patent.

The answer of the defendants was first a denial that the plaintiff was, either before or at the time of the grant of the letters patent, the true and first inventor of the process which he claimed. Secondly, a denial that no corporation or company, or other person or persons had, previously to the time of the alleged patent, used the plaintiff's so called process. Then they stated that the plaintiff was one of the gas referees with parliamentary powers; that they believed that the plaintiff derived his knowledge of the mode which he pretended to invent from opportunities afforded to him in his official position of inspecting processes employed by the company, and from information supplied to him by persons employed by the company. They also submitted to the court whether it was competent for the plaintiff to make use of the knowledge acquired by him as a public officer in discharge of his duty, for the purpose of taking out a patent.

Many scientific witnesses, including Dr. Olding, Dr. Letheby, Dr. Stevenson, Mr. Heisch, and well known gas managers and engineers gave evidence on either side, and were cross examined. A large part of the evidence related to the question of novelty, particularly as to the practical working at Bow and Beckton, previously to and subsequently to the date of the plaintiff's patent. The defendants relied also on a recommendation made by Dr. Olding on the 28th March 1872, as to purifying by a method practically the same as the plaintiff's, but which he did not know would be successful, and on some remarks made by Dr.

Letheby as early as 1870, in a public lecture on the purification of gas, to show that the plaintiff was not the inventor of the process he claimed.

The most important facts were fully detailed by the Vice-Chancellor in his judgment. After referring to the allegation of infringement and the denial of the validity of the patent, his Lordship said: "The useful and valuable invention of obtaining artificial light by gas produced from distillation of coal, which has been known and practised for more than half a century, has undergone various improvements, which have engaged the attention of the Legislature, and sometimes been the subject of litigation. But, as its great usefulness was not unaccompanied by danger and difficulty, and public and private inconvenience, it has been found necessary at various times to lay down rules for its manufacture and supply. After referring to the Metropolis Gas Act 1860, and the City of London Gas Act 1868, the Vice-Chancellor continued: "Under this statute the Board of Trade appointed three referees, of whom the plaintiff was one. It is notorious, and is admitted on both sides, that the effect of the distillation of coal is to produce a vapour which in its first state is charged with various impurities besides those mentioned in the statute, all of which have to be removed or neutralised before the gas can be brought into that condition which renders it safe and useful. By processes of condensation, washing, and scrubbing, the crude vapour is dealt with so that the remaining impurities are carbonic acid, sulphuretted hydrogen, and various sulphur compounds other than sulphuretted hydrogen. It is to the removal of these elements, and especially the latter, that the invention claimed relates.

After stating the terms of the specification describing the state of knowledge as to the sulphur compounds, his Lordship said their existence and injurious effects were well known, and great care and costs had been employed by the defendants in endeavouring to purify the gas from them, but without success. They called in the assistance of well known chemists, urged by the remonstrances of the surveyor to the referees. In February 1872 the secretary wrote to Dr. Olding and Dr. Letheby, and both those gentlemen visited the works after the date of the letters patent, and each made suggestions which are in evidence. After stating their recommendations and pointing out that these proved that the chemical principles were then well known, his Lordship continued: The learned chemists conclude that the decarbonization of the gas is the most important object, and recommend processes differing somewhat in mode. If these recommendations had been made before the date of the plaintiff's patent, and if the tentative processes which the learned men recommended had been adopted and succeeded the object was accomplished. There can be no doubt that such a discovery, provided the actual means of putting the principle into practical execution had been described and resorted to, would have been a good ground for a patent, and this, it seems to me, is the very invention the plaintiff claims. Not the least important of the defendants' objections is to the specification. It is the law, and perfectly just, that a man who has obtained a patent should be obliged to state the nature of his invention, and the means by which it is to be applied in practice. The construction is to be dealt with strictly but fairly with regard to the subject and terms used.

The Vice-Chancellor having examined the language of the specification to show that it was sufficiently clear and limited, and particularly that it did not mean to claim the use of sulphide of calcium in a general way, continued: The objection that the invention cannot be the subject of a patent does not appear to me to be well grounded, for the plaintiff does not claim the discovery of a principle only, but of a principle combined with a process easily applicable. But then the defendants insist that there is not novelty, and to this point a large proportion of their evidence has been directed. His Lordship gave a summary of the evidence, which he did not consider proved prior user by the defendants. Another ground upon which the novelty of the patent was impeached was, that a patent which had been taken out by William Mann had anticipated the plaintiff's. His provisional specification was filed on the 21st 1871. After describing it his Lordship continued: The fuller specification, which was filed on the 1st June 1872, goes into greater detail as to the processes employed, and concludes by claiming as Mann's invention, "the use of sulphide or sulphides of calcium formed and used in the order and manner there described." Now, the order and manner there described are not only not the same as those mentioned by the defendant, but they are in fact the reverse. It would, however, be enough to say that the specification of Mann, anterior as it is to that of the plaintiff, cannot invalidate the plaintiff's patent, inasmuch as it does not disclose a practical mode of producing the effect which the plaintiff describes. *Betts v. Menzies*, in the House of Lords, is a very distinct authority on the point. Besides, Mann's patent has never been brought into actual operation, but has been suffered to drop, and is no longer in existence. The defendants insist, moreover, that the invention claimed by the plaintiff has been used by them before the date of the patent; and to this end a considerable portion of their evidence and arguments founded upon it have been addressed. They have proved the manner in which the manufacture at Bow was, for several years before the patent, conducted by Mr. Harris, who employed, and still employs, two purifiers to take out the carbonic gas—a fact which, however established, does not touch the plaintiff's invention; for although Mr. Harris's purifiers may have the effect of taking out the carbonic acid by means of lime, that is not the only office they perform, but are part of a general system of purification. I do not say they were employed for the purpose of eliminating carbonic acid in the first place; and with what effect they were employed before March 1872 at Bow, is shown conclusively by the tables, from which it appears that the average impurity at Bow, though probably below that at Beckton, was in March 22.8 grains, which was beyond the maximum; whilst, from causes which the defendants do not attempt to explain, it fell in the next month to 12.5. The defendants have endeavoured to account for the excessive impurity at Beckton by several reasons. They say the condensers were imperfect, that the temperature of the gas was too high, that the purifiers became distorted, and several other things of a similar kind. However that may have been, the excessive impurity continued, and they were unable to reduce or to check it, in spite of all their earnest endeavours, until after

the date of the letters patent, or until they had received Dr. Olding's suggestion, which, although made after, is, beyond doubt, identical with the plaintiff's. Mr. Trewby has stated the experiments he made at various times, which, it was insisted, were an anticipation of the plaintiff's invention. That these, whatever they were, have not been successful, is not disputed. If they had been, the cry of distress which runs through the correspondence would not have been uttered. He gave an account in his letters of numerous experiments which had been made and their failure; and in a letter of the 19th of Feb., he attributed the increase in the amount of bisulphide of carbon to the coals which had been in use, whereby, he said, the sulphide of carbon was no sooner formed and in a state to take up bisulphide, than the carbonic acid took its place. If these repeated experiments had been successful, Dr. Letheby's advice might have been spared, and when Dr. Olding showed Mr. Trewby how to proceed successfully, the reply would have been that he knew it all, and had done it all. On the contrary, on the 21st of March, Mr. Trewby was acting on Dr. Letheby's suggestions, and certainly with a beneficial result, obtained, however, at an alarming cost. And on the 22nd of March, Mr. Trewby wrote to Dr. Letheby, saying that his earlier experiments and results were not what he could have wished. He mentioned a new plan which he had adopted in Feb., which was in operation at the time of Dr. Letheby's visit, whereby he got down to twenty-nine grains, since which he had reduced it to twenty, and he said that at that time they had about forty-two grains which they reduced one half in the way they were working, and he was in hopes that as they extended the system of purification, they would be able to reduce it still more. It might be that Mr. Trewby knew the presence of carbonic acid was the obstacle. Indeed, it is clear, he was making experiments to overcome it, and that he had partially succeeded. But even if it were assumed, which, as a matter of fact cannot be done, that he had conceived the same idea as the plaintiff, it would amount at the most to this, that two were travelling on the same road in search of the same object; the one who first obtained and described it in an intelligible and accurate expression, could not be deprived of it because another had tried to reach the goal before him but did not. Then it has been said that the plaintiff's invention had been published by means of a letter which the plaintiff wrote to Mr. Trewby before the date of the patent, the purport of which was that he requested Mr. Trewby to try certain experiments respecting carbonic acid. It was written at a time when the plaintiff said he was getting materials for his specification, which he shortly afterwards filed, and because he wished to have the experiment he suggested tried upon a large scale, which the Beckton works afforded. Without ascribing to the letter the character of a confidential communication, it was no publication. Mr. Trewby, who did not return any answer to the letter, thought so too, for he denied emphatically that he received from the plaintiff any information which guided him in the experiments which he made, or in the discoveries which were arrived at. It has been suggested, also, in the course of argument, that the patent is invalid in respect of the 3rd, 4th, and 5th heads of invention. Those objections cannot be said to have been put fairly

or sufficiently in issue by the defendants, or that any evidence has been adduced upon which they can be sustained. All the defendants say in their answer is that they have never tried the process purporting to be described in those three heads and have no intention of doing so, that they believe there is no novelty in any of them, and that such processes have no practical value whatever in the purification of gas from sulphur, or for any other purpose. In Mr. Evans's affidavit he says that such processes are all well known to gas engineers and are used in the purification of gas. The statute 15 & 16 Vict. provides that, in actions at law, no evidence shall be admitted unless the objection has been distinctly raised; and the principle of that enactment has been recognised and acted upon in courts of equity. The plaintiff having stated in his specification the object he proposed to attain—viz., the purification of gas from sulphur compounds by means of sulphur in a fine state of division used along with sawdust, or such like substance—says, in his 5th head, that he claims the employment of sulphur in a fine state of division, with an inert substance. Upon that it has been argued that where oxide of iron had been employed to take out sulphuretted hydrogen, some portion of the sulphur must, in that process, have been deposited on the iron, and that upon its being revived, the sulphur so deposited will form sulphur in a fine state of division, with an inert substance. I cannot, however, think that in a just mode of considering the specification, oxide of iron, which is a most active and efficient agent for taking out sulphuretted hydrogen from the whole volume of gas to which it is exposed, can be said to be one of those inert substances, like sawdust, which the plaintiff proposed to employ with sulphur in a fine state of division. The only other objection to the plaintiff's suit is directed against him personally. The answer alleges that the plaintiff, previous to his appointment as gas referee, had no acquaintance with the business processes of manufacturing and purifying gas, and the defendants believed that the plaintiff derived his knowledge of the methods which he pretended to have invented, from opportunities afforded him in his official position, of seeing the processes employed by the company, and from information directly supplied to him by persons employed by the company. The defendants submit to the court whether it is competent to the plaintiff to make use of the knowledge acquired by him as a public officer in the discharge of his duties, for the purpose of taking out a patent. That objection has been earnestly enforced in the course of the argument. I cannot say that I think the plaintiff was disqualified by reason of his employment from availing himself of any discovery which he might have made. His duties as a public officer are very clearly prescribed by the statute under which he is appointed, and he appears to have discharged those duties, in co-operation with the other referees, efficiently, and certainly without any censure or complaint that has been heard of. No doubt he could not have made the discovery in question unless he had obtained extensive knowledge of the manufacture and purification of gas. How much of that knowledge was derived from information afforded to him by the company's officers, and how much of it was the result of his own inspection and observation, need not be inquired into. But whatever

was the extent of the information, it does not seem to have been more than his powers under the statute would reasonably entitle him to acquire, nor to have led to the discovery in any other manner than by the knowledge of known laws and principles which must exist before an invention can have an object to which it can be applied. I have not thought it necessary to go into the report of the referees made on the 27th March to the Board of Trade, because I do not think it affects the real question between the parties. Many authorities have been referred to on both sides; but as the law on the subject is perfectly familiar, and open to no doubt, it is needless to mention them. If the objections taken by the defendants are well founded, then it is clear that the patent cannot be sustained. On the other hand, if those objections have failed, the plaintiff's rights are established by numerous decisions. Having looked through the evidence and considered the arguments, I come to the conclusion that the plaintiff is the inventor of the principle and process by which the purification of gas from what is called the sulphur compounds may be affected to a greater extent than has ever been practically done before the date of the letters patent; that the defendants have adopted, and are now practising that invention; that they have been, and are able to keep down the amount of impurities in gas to an extent and degree very far superior to that which existed before the date when the plaintiff's patent rights were created. They are also able to exercise a much greater control over those impurities than they were able to do previously. The defendants thus having practised the invention without the plaintiff's consent, he is entitled to the injunction prayed for by the bill, and he is also entitled to be paid by the defendants such damages as he has sustained by their unlawful use of that which is his exclusive property; and for that purpose an inquiry must be directed to ascertain the amount of such damages, with costs. Upon the appeal of the company.

Southgate, Q.C., Sir Henry James, Q.C., Davey, Q.C., and Stirling, for the appellants, contended that the plaintiff's patent contained nothing which had not always been done where lime was used. The plaintiff had claimed the general use of alkalis to neutralise an acid, but the application of that principle was well known. They further submitted that if there was any ground for supposing there was anything new disclosed and put into the patent, it was discovered under such circumstances that the invention was not the invention of the plaintiff, who was a salaried servant appointed under Act of Parliament for public purposes; and that under any circumstances the plaintiff having what he thought a new idea, had risked his patent by putting in two or three other ideas. The law was perfectly well settled that if a person united several matters in one patent and one was bad, the patent was useless with respect to the others. In the case of *Jordan and another v. Moore* (L. Rep. 1 C. P. 624), the plaintiff claimed as patentee, every means of combining wood and iron in the manufacture of ships, and went on to make claims involved in what he called the principle. The jury found that one of the things was a new invention, but that the union of wood and iron in ships was not, and it was held that it was a bad patent

because the plaintiff had claimed generally in his first claim. They relied upon the following authorities:

Simpson v. Holliday, L. Rep. 1 H. of L. 315;
Hill v. Thompson, 8 Taunt. 375; 3 Mer 629;
Brunton v. Hawkes, 4 B. & A. 541;
Morgan v. Seaward, 2 M. & W. 544;
Thomas v. Foxwell, 31 L. T. Rep. 116, 164, 180;
 5 Jur. N. S. 37;
Bush v. Fox, 28 L. T. Rep. 240; 5 H. of L. Cas. 707.

Kay, Q.C., Fry, Q.C., Aston, Q.C., and Tremlett, in support of the decision of the court below, contended that the invention was novel, ingenious, and useful. It might be said that the claim of the patentee was the use of sulphide of calcium generally; but the patent was framed upon an authority which had decided that such a claim did not mean the general employment of sulphide of calcium, but the employment in the manner described in the invention. Upon this point they referred to the cases of

Arnold v. Bradbury, 24 L. T. Rep. N. S. 613; L. Rep. 6 C. App. 706;
Beard v. Egerton, 13 L. T. Rep. 305, 426; 8 Com. B. 165;
Kay v. Marshall, 8 Cl. & F. 245;
Haworth v. Hardcastle, 1 Bing. N. C. 182; 4 M. & S. 720.

Those authorities showed that the office of a claim was not to enlarge or describe the invention, but to restrict it to that which was considered to be the novel part of it. They also referred to *Hills v. The London Gaslight Company* (5 Hurl. & Nor. 312, 368), which showed that although a chemical fact were thoroughly well known, the man who practically applied that to a useful purpose to which it had never been applied before, had a right to have a patent for that application. With regard to the alleged anticipation, they submitted that until the time of the plaintiff's patent it was proved to demonstration that no one had brought a practical mode of working lime purifiers for gas into operation anywhere, although the chemicals were well known. Upon this subject they cited *Hill v. Evans* (4 De G. F. & J. 288). This came within a well-known class of cases, namely, that of a known want which existed for a long time, being supplied by a patented invention. They further submitted that in a suit to restrain the infringement of an existing patent, no matter how the patent was obtained, if valid, the plaintiff was entitled to relief. No case had been cited in which a patent had been recalled because it had been obtained by a man whose invention was stimulated by the fact that he had obtained knowledge in an official position. The plaintiff's invention was not the less his own because the facts which led to that invention had been communicated to him while he held a salaried office. They also cited

Finnegan v. James, L. Rep. 19 Eq. 72;
Penn v. Bibby, 15 L. T. Rep. N. S. 385, 397; L. Rep. 3 Eq. 306;
Betts v. Mensies, 7 L. T. Rep. N. S. 110; L. Rep. 10 H. of L. 117;
Neilson v. Betts, L. Rep. 5 H. of L. 1.

JAMES, L.J., who delivered the judgment of the court, after referring to the plaintiff's official position, said: In the performance of his duties, the plaintiff was in constant communication with the managers of the metropolitan gas works, and became intimate with their processes and their results. As the object of the appointment of the referees was to secure for the public gas of the

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utmost purity which could be reasonably required of the companies, it was, of course, their duty to ascertain what, in all the circumstances of each case, would be a reasonable requisition, and, in the performance of this duty, to discuss with and to suggest to the managers, as practical men, and to discuss with and to suggest to one another, the existing impurities, the probable cause of them, and the best means practically available for removing such causes. The gas companies had failed to supply to the public a gas which did not contain a very considerable amount of sulphur, and not only was that amount excessive, but the gas showed, according to the plaintiff, variations in that amount from day to day which the makers could not account for. With the same coal, the same process of manufacture, the same purifying processes, the gas came out sometimes very pure and sometimes very impure. Revolving these things in his mind, the plaintiff says that he discovered the cause of the defect, and with it a simple and effectual means of removing such cause. The discovery may be stated shortly thus: After a certain preliminary process of purification in what are called washers and scrubbers, the gas, which was still very impure, containing a large quantity of carbonic acid, sulphuretted hydrogen, and other sulphur compounds, was passed through purifiers containing lime and oxide of iron. The oxide of iron would absorb and remove sulphuretted hydrogen, but had little or no effect on the other sulphur compounds. The lime was capable of absorbing the carbonic acid, and also the sulphuretted hydrogen, but had no effect, as lime, on the other sulphur compounds, but, in absorbing the sulphuretted hydrogen, it became a sulphide of calcium, in which state it was a very efficient agent for removing the other sulphur compounds. The lime was capable, first as lime and then as sulphide of calcium, of removing the carbonic acid and the sulphuretted hydrogen, and, to a great extent, the other sulphur compounds. But the plaintiff, as he alleges, discovered that a great chemical truth had been overlooked or neglected, namely, that carbonic acid would decompose sulphide of calcium, and set free again the sulphur which had been absorbed, and he, therefore, discovered, what had been overlooked, that it was essential that the gas should be entirely deprived of its carbonic acid in the first instance. The lime in the subsequent purifier or purifiers would then be partly pure lime, partly sulphide of calcium. The lime would go on absorbing sulphuretted hydrogen until it became wholly sulphide of calcium, and the sulphide of calcium would continue taking up the other sulphur compounds. When this truth presented itself to the plaintiff's mind the remedy was very obvious. From the great affinity between lime and carbonic acid it is easy to absorb the latter, and practically speaking, carbonic acid would not escape from a vessel containing lime, unless and until the latter had been converted into a carbonate. Having satisfied himself by deductions and by experiments that the solution of the sulphur difficulty was to be found in the proper use of the affinity between carbonic acid and lime, he confidentially informed his colleagues of his discovery, and, as alleged, it was with his permission that the description of his lime process was given in the report next to be mentioned, and with a perfect under-

standing on their part that he was to take out a patent for his said discovery before the issue of the report. The report contains the first statement of the discovery; it is the first piece of writing in which anything is formulated or stated with respect to it. The report bears date the 31st Jan. 1872, and appears to have been in print about that time. In that report no mention is made by the referees of any special discovery by one of them, or of any intention to patent it by any of them. The report is a long document. It is headed, "Report on Sulphur Purification at the Beckton Gas Works by the Gas Referees." It purports to give an account of what had been done at the Beckton works of the defendants, and under the head "Remedies," it proceeds thus (*inter alia*): "The prime object to be sought is to utilize and perfect the existing processes of purification. The referees feel confident that such a result is obtainable. From experiments which they have made they can state that lime in the form of sulphide of calcium—i.e., saturated with sulphuretted hydrogen—is a perfectly adequate purifying agent for sulphur. The referees feel assured the perfect results would be obtainable from the lime process of purification if carbonic acid were excluded from the purifiers." The experiments are described as their experiments, made at their office, and all the recommendations and suggestions are made as the official recommendations and suggestions of the whole body, based upon facts officially ascertained for and by them, and the whole report purports to be the production of the whole body, each of them applying, as in duty bound, his intellect and mind to the subject. The report was kept back from the official authorities until the 26th of March, and a few days afterwards it was circulated among the gas companies and generally. It would have been immediately the duty of the officers of the gas companies to adopt the suggestions of the report (if they had not previously done so), and it became immediately the duty of the referees to fix the maximum of impurity to be permitted, having regard to the means suggested by them. The plaintiff says that in fact this was done; that such a maximum was fixed, and that the defendant company did adopt, and with great success, the plan of the referees. For months the report was discussed, written about, and lectured upon as the referees' report, and they themselves in subsequent reports referred to it by that designation. It was an official document emanating from the plaintiff and others, inviting, and intended and calculated to compel the gas companies to use the means therein described, and without any intimation that there was any patent right or private property of the plaintiff or anyone in that, which to all appearance, was given to the public as public property. It appears, however, that on the 9th of March, the plaintiff had presented his petition for letters patent for improvements in the purification of coal gas, lodging the usual provisional specification. Letters patent were sealed on the 28th of May. On the 11th of Sept. the complete specification was lodged, and then it appeared that the plaintiff had obtained a patent for that which was in substance and effect the referees' report, and he has filed a bill against the defendants for having infringed such his patent rights by doing the very things which they were so officially instructed, invited, and, in effect,

commanded by him to do. Although it is not necessary for the determination of this suit to pronounce any final decision on this point, we deem it right to say that we think it, at the very least, very questionable whether it can be competent for a member of an official commission or committee to take out a patent for the subject matter of their official investigation, for the results of such investigation embodied in their official report to the public authorities, or to treat as piratical infringers those who have followed the suggestions and directions contained in such report. The suggestion that the report was kept back for the purpose of enabling one of the referees to apply for a patent is not entitled to much favour. It is to be borne in mind that the report when made belonged absolutely to the State. Every fact and figure in it had been ascertained and obtained at the public expense; every hour of every referee and of the secretary employed in the production of it was public time. It was, of course, printed at the public cost. The withholding or wilful delaying of it was a plain breach of public duty, and it is difficult to see how the plaintiff can be in a better position than if he and his colleagues had done their duty and duly presented their report as soon as it was completed. The consideration for every patent is the communication of useful information to the public. What consideration is there when the information was already the property of the State? The specification of the patent claims five different matters. If one of them is bad, as there has been no disclaimer, of course the patent must fail, and the defendants insist that every one of them is bad. His Lordship then read the first claim and continued:—There is really in this nothing but the enunciation of a chemical truth, that pure sulphides of calcium will absorb the sulphur carbons. The plaintiff believed that he had discovered the chemical truth, although it had been taught for many years in many books, and was well known to chemists. There is no invention of any particular process or means of employing the pure sulphide of calcium. If pure sulphide of calcium is to be used, it must be used in some separate holder of it, and the thing holding it would be a separate purifier; and there is nothing, therefore, in any previous part of the specifications to limit the universality of the claims to the employment of sulphides of calcium for the removal of sulphur other than sulphuretted hydrogen. It is obviously impossible to support such a claim as that which was plainly based on the plaintiff's mistaken idea that he had discovered that peculiar property in sulphide of calcium. Passing over for the moment the second claim, which has been the principal subject of controversy in evidence and argument, the defendants challenge absolutely the novelty and utility of the other three. The plaintiff challenged has failed to produce any evidence that they are of the slightest value. The defendants' evidence is, in general terms, that they have been tried and abandoned. The plaintiff has wholly failed to prove either the novelty or utility of anything claimed under any of the three heads. The great controversy of fact and argument, as before stated, has related to the second head of claim. There is in that no suggestion of any new apparatus—of any new process. There is no device or scheme of any kind. Lime purifiers in succession were in

general, almost universal, use wherever lime could be freely used. The gas entered one, passed from that to another, and then generally, or sometimes, to a third; the gas, partly purified in the washers and scrubbers, passed through the series of lime purifiers into an oxide of iron purifier. That was the process before, and that is to remain the process after and under the plaintiff's patent. What he claims to have discovered is, that if the carbolic acid, which is the first thing taken up by the lime, is not wholly taken up at the beginning, and is allowed to enter the last purifier or purifiers, it, in fact, poisons the latter, decomposes the sulphide of calcium already formed, disengages the other sulphur absorbed by the sulphide, and of course fills the gas again with the sulphur impurities which had been removed. This is a very valuable caution and direction, but it is impossible to make anything more of it than a working caution and direction. It really amounts to nothing more than a direction to be sufficiently liberal in the use of the caustic lime in the first stage, and an instruction that the moment it is so far carbonated as not to arrest the carbonic acid, it should be removed and a fresh supply of lime got. It may be a direction and instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent. It does not differ in principle, although it does differ enormously in scale, from a cook's instructions and directions as to the best means of manipulating articles of food. How could the infringement of such a patent be predicated? No one has a right to prevent a workman from using care to keep his tools in the most efficient state. No one has a right to prevent a manufacturer from cleansing his vessels and throwing away the useless contents whenever he likes, or to ask him his motives or intentions in doing so. Besides this, however, the defendants insist that what they are doing now, and which is alleged to be the infringement of the patent at their Beckton Works, they were doing at those works before the date of the patent, and that what they are doing at their Bow Works they had been doing for years. The evidence on this subject on behalf of the defendants is absolutely overwhelming. It is direct, positive, and unequivocal, and, if false, it must be wilfully false and perjured within the knowledge of scores of persons, and against this there is merely the speculative conclusion derived from results. The plaintiff says, up to a certain time, before you knew of my process as described in the referees' report, you failed to purify your gas properly; since you became acquainted with my process you have purified your gas effectually. The conclusion is inevitable that you have made some change, and as you are now confessedly using my process, you must have been using something not my process before, and your evidence to the contrary must be disregarded. We cannot so deal with such a body of witnesses and such a mass of evidence, including unmistakable documentary evidence, which was in existence before the existence of the letters patent. Whether the defendants have sufficiently accounted for the difference in the results produced in different parts of the year 1872, or what was or were the cause or causes of such difference, opens a field of speculation into which we are not called upon to enter. It cannot

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PILE v. PILE; *Ex parte* LAMBTON AND Co.

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affect the fact (as to which there is no legitimate ground for doubt) that prior to and on the 9th March 1872 the process described in the plaintiff's specification was in actual use and work at Beckton, and that a process in principle and substance the same was in actual use and work at Bow. It is possible, indeed probable, that the company became more liberal in the supply, and the managers more careful in the use of the lime. But that is, in our judgment, wholly immaterial. The plaintiff's case has, in our judgment, wholly failed, and his bill must be dismissed with costs, including the costs of the appeal.

Solicitors for appellants, *Curtis and Bedford.*

Solicitors for the plaintiff, *Bevan and Whitting.*

Monday, May 29.

(Before JAMES, L.J. and BAGGALLAY, J.A.).

PILE v. PILE; *Ex parte* LAMBTON AND Co.(a)

Compensation under Lands Clauses Act—Mortgagees—Compensation for loss of trade profits—Graving dock.

P. mortgaged a leasehold graving dock with the plant, machinery, &c. to L. and Co. A railway company then gave notice to take part of the dock for their railway. Before the compensation was settled P. died, and a bill was filed to administer his estate. In the meantime the mortgagees took possession and required the compensation to be settled by arbitration. The umpire having made his award, and having stated how much of the sum awarded was for trade profits, and the company having paid the money into court.

Held (affirming the decision of V. C. Hall) that the mortgagees were entitled to the portion of the fund representing compensation for trade profits as well as to the rest of the fund.

THIS was an appeal from a decision of Vice-Chancellor Hall, under the following circumstances: By a lease dated the 3rd Nov. 1869, a shipbuilding yard and graving dock, called the Bridge Graving-dock and premises at Monkwearmouth-shore, in the county of Durham, were, with their appurtenances, excepting all the public ways and certain other rights and powers, demised by Sir Hedworth Williamson to William Pile, the testator in this cause, his executors, administrators, and assigns for the term of twenty-one years, from the 23rd Nov. 1869 at the yearly rent of 340*l.*

By an indenture of mortgage, bearing date the 7th Nov. 1872, William Pile assured certain hereditaments and premises and real and personal estate, including the premises comprised in the lease of the 3rd Nov. 1869, to the petitioners, who were his bankers, by way of mortgage, to secure the sum of 40,000*l.*, or other the amount of the balance which, on the account current between William Pile and the petitioners, should, for the time being, be owing by the said William Pile to the petitioners. This mortgage contained a covenant that any buildings, engines, machinery, implements, utensils, fixtures, real or personal property, which should be erected, placed, or used upon the said lands or hereditaments, or any part thereof during the continuance of the security, either in lieu of or addition to any buildings, engines, machinery, implements, utensils, fixtures,

real or personal property then standing or being thereon, should be included in the security, and be subject to the provisions and covenants of the mortgage.

In Jan. 1873, the North-Eastern Railway Company took, for the purposes of their undertaking, part of the graving dock, buildings, &c., comprised in the mortgage; and as they declined to pay the amount claimed by Pile, he gave them notice that he desired the amount of compensation payable by them to be settled by arbitration. This had not been done when William Pile died in June 1873, having appointed his wife and four other persons executors of his will, and being indebted in large sums on simple contract to various persons. The bill in the suit was filed by beneficiaries under William Pile's will, against his executors for the administration of his estate; and the usual decree had been obtained.

It appeared that the executors had no funds available for the purpose of carrying on the testator's business, and certain ships which were unfinished at the time of his death were completed by the persons for whom he had contracted to build them. Subsequently, however, a manager and receiver was appointed to continue the business and complete the testator's contracts. Shortly after the death of the testator the petitioners took possession of the premises by virtue of a power in their mortgage, and they then gave notice to the railway company that they were mortgagees in possession, and that they desired the amount of compensation payable by the company in respect of the premises required by them to be settled by arbitration. Accordingly the company appointed one arbitrator, and the executors and the petitioners together appointed another, but they were unable to agree. An award was therefore made on the 1st Sept. 1874 by their umpire, Mr. E. J. Smith, who awarded and determined that the compensation to be paid by the company to the defendants Isabella Pile, Alfred Austin Rickaby, and Thomas Collie Stamp, the executors and the petitioners, for the leasehold interest of the said parties in the said lands and hereditaments so required as aforesaid, and for the damage that might be sustained by them by reason of the execution of the works for which the said lands and hereditaments were so required as aforesaid, and of the exercise as regarded such lands and hereditaments of the powers vested in the said company, by their Acts, and for the trade profits of the defendants Isabella Pile, Alfred Austin Rickaby, and Thomas Collie Stamp, and for the machinery on the said lands and hereditaments, should be the sum of 11,950*l.* The petitioners and executors jointly were represented by one counsel and the company by another in the arbitration, and, after the award, the arbitrator, at the request of the petitioners and executors, gave the following certificate:—"I certify that the question of trade profits was argued before me in this arbitration by Mr. Kay, Q.C., and Mr. Hugh Shield, that their gross annual amount was finally agreed between the parties and put before me as an item to form part of the total amount awarded, and that such item was, therefore, specially named by me in my award. It was placed by me at 2800*l.*, and was given in respect of the trade profits which would have accrued if the premises had not been taken by the North Eastern Railway Company."

(a) Reported by E. STEWART ROCHER, Esq., Barrister-at-Law.

The company duly paid 12,466*l.* 4*s.* 4*d.*, being the amount awarded, with interest, into court to the credit of the cause, and this sum was now invested in consols. The petitioners, whose debt amounted to 51,955*l.* 18*s.*, and a large additional sum for arrears of interest, claimed the whole of the 12,466*l.* 4*s.* 4*d.*, and accordingly prayed that that amount might be transferred to them, and that the costs of their petition might be paid by the plaintiffs. On the other hand the executors claimed on behalf of the testator's estate so much of the consols as represented the 2800*l.* which had been awarded in respect of trade profits. The manager and receiver and other persons who had used the graving dock since the testator's death to complete the unfinished ships, had paid rent to the petitioners as mortgagees in possession. In the court below,

Graham Hastings, Q.C. and *Oswald*, for the petitioners, contended, on the authority of *Re Harper* (32 L. T. Rep. N. S. 214; L. Rep. 20 Eq. 39), that the court would disregard the direction of the umpire as to the persons to whom part of the money should be paid, and would direct the whole of it to be paid to the petitioners, who were solely entitled to it. What was mortgaged was the whole of the business premises, including plant, fixtures, and machinery, and the court would not separate the goodwill from the premises. "Future profits" amounted to the same thing as "goodwill," and in the case of docks as in the present instance, it would be local goodwill, which unlike personal goodwill, was inseparable from the premises. This case was stronger even than *Chisum v. Deves* (5 Russ. 29) which was a case of an equitable mortgage of the plant and machinery, including all that might be put on the premises during the security. In the case of *England v. Downs* (6 Beav. 269) the goodwill was held to attach to the license and stock, and not to the house. Here they had what was equivalent to the licence and stock, namely, plant and machinery. With regard to the form of the award, the umpire was not wrong in directing the money to be paid to the executors as representing the testator's estate; for though he had no jurisdiction to decide the rights of the parties, he was justified in assuming that the mortgage would be paid off.

Eddis, Q.C. and *Stevens*, for the plaintiffs, contended there was a pointed distinction between the portion of the compensation in which the executors and mortgagees were jointly interested, and the portion in which the executors alone were interested. According to the award, the money went to the estate. The umpire could not alter or prejudice the rights of the parties, but there was a distinct finding by him of the sum of 2800*l.* as compensation for trade profits which might have been made by the executors. The mortgage was one of the docks and fixed machinery, but not of the loose timber and materials, which were worth from 40,000*l.* to 50,000*l.* The case of *Chisum v. Deves* did not apply. The company had not taken the business away, and had not taken the whole of the premises. The goodwill still attached to the remaining portion of the premises, but the umpire thought that the business to be carried on there in future might be hampered or injured by reason of the loss of part of the premises, and the 2800*l.* was awarded in respect of such injury done to the business. *England v. Downs* only

showed that the court would regard the peculiar circumstances of the case before it.

The Vice-Chancellor was of opinion that the sum of 2800*l.*, as well as the rest of the compensation money, must be considered as belonging to the mortgagees and not to the executors. If the property had been sold under the decree of the court, would not the sum in question have gone to the purchaser? Mr. Pile, being dead, could not have carried on business in competition with a purchaser, and the goodwill necessarily went with the property. Did the fact that only part of the property had been sold make matters worse for the mortgagees? Certainly not; they were entitled to the trade profits in respect of the portion which had been taken, and his Lordship did not see how the appointment, with their consent, of a receiver who paid them rent for the premises, could prejudice them. The whole fund must be transferred to the petitioners, and the amount of their costs be added to their debt; the costs of the other parties to be costs in the cause.

On the appeal,

Eddis, Q.C. and *T. Stevens*, for the plaintiffs, who appealed.

Dickinson, Q.C. and *J. T. Humphry* for the executors.

Hastings, Q.C. and *Oswald*, for the petitioners, the mortgagees.

JAMES, L.J., said that it seemed to him the decision of the Vice-Chancellor in this case was quite right. The mortgagees were the absolute owners in possession of everything, and they were the only persons who could have made profits of the business. The arbitrators and the umpire had to ascertain what was the proper compensation for the land and for the damage, payable under the Act of Parliament by reason of the Railway Company exercising their powers. In ascertaining that they used the words "compensation of severance," and so on, for the profits of the business. What must be supposed to have been meant was that in estimating the value they estimated the diminished capacity of the property to make profits for the future. The 2800*l.* was the estimate—that was to say, treating it not merely as a leasehold property, but as a leasehold property upon which a business was carried on, they said: "We think that for that property and the business which can be carried on upon it, we will give that sum." The appeal must be dismissed with costs.

BAGGALLAY, J.A., concurred.

Solicitors, *J. W. Hicks*; *George Dixon*, agent for *Ranson and Nelson*, Sunderland.

Wednesday, July 19.

(Before *JAMES* and *MELLISH*, L.J.J., and *BAGGALLAY*, J.A.)

THE REPUBLIC OF COSTA RICA v. ERLANGER AND OTHERS.(a)

*Practice—Foreign government—Plaintiff—Further security for costs—Rules of Feb. 1876, rule 7. In a suit commenced under the old practice of the court, the foreign plaintiffs were required to give security for costs in the usual way, and did pay 120*l.* into court for that purpose. Upon an application by the defendants for an order directing*

(a) Reported by *E. STEWART ROCHER*, Esq., Barrister-at-Law.

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THE REPUBLIC OF COSTA RICA v. ERLANGER AND OTHERS.

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the plaintiffs to give further security for costs under rule 7 of the rules of the Supreme Court of Feb. 1876:

Held (reversing the decision of Vice-Chancellor Malins), that the rules of the Supreme Court of Feb. 1876, applied in causes under the old practice as well as in actions under the new practice, and that further security for costs might be ordered to be given.

THIS was an appeal from a decision of Vice-Chancellor Malins. A suit was instituted against Baron Erlanger, Messrs. Knowles and Foster, and others, with reference to a loan which they had undertaken to negotiate for the Republic of Costa Rica. The bill was filed after the passing of the Judicature Acts, but before they came into operation. The plaintiffs were required to give security for costs in the usual way; and in May 1874 they were ordered to pay, and paid 120*l.*, into court for that purpose. The 7th rule of the rules of the Supreme Court, Feb. 1876, provides as follows:—"In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the court or a judge shall direct." The defendants Knowles and Foster had put in their answers to the bill containing very full accounts of the moneys received, or which might have been received by them, and having regard to the great expense already incurred, and which would have to be incurred in this suit, they applied to the court below for an order directing the plaintiffs to give a further security for the costs in a sum of 2000*l.* The Vice-Chancellor, in refusing the order, said this application was one of considerable importance as affecting the practice of the court. It asked that a foreign Government which had instituted proceedings in this country after the passing of the Judicature Acts, but before they came into operation, should give additional security for costs. The case made by the plaintiffs, the Republic of Costa Rica, by their bill in the suit against Baron Erlanger, Messrs. Knowles and Foster and others, was briefly that they were agents of the Republic to raise a large loan for it in this country, but that the defendants had so contrived that, although a very large sum was raised, a very insignificant portion of it alone reached the plaintiffs. When the bill was filed the rule of that court was perfectly clear. Every foreign Government, whether the Emperor of Russia, the Emperor of Brazil, the King of Greece, or a Republic, was, if a plaintiff in these courts, bound to give security for costs. In the present instance security was asked for and an order was made that 120*l.* should be deposited by the Republic of Costa Rica in court as the security, which was done. It was manifest that in so weighty a cause as this proved to be so small a sum could not possibly meet the exigencies of the case. But the plaintiffs having given that sum in 1874 in accordance with the then existing practice of the court, were in a position to go on with the suit. They had done so, and great expense had been incurred on both sides. His Lordship would say nothing as to the merits of the case. The plaintiffs might succeed in it, or they might utterly fail. He was bound, for the moment, to assume that they might succeed; but if they failed, and the bill was dismissed with costs, it would be unfortunate for the defendants,

against whom in that case unfounded charges would have been made, if they should not obtain all their costs. That was a difficulty that was seriously felt at common law. There, the rule as to giving security for costs was different from that in equity. At common law substantial security in accordance with the nature of the case was insisted on; but in equity the rule was arbitrary, and 100*l.* or 120*l.* was all that was required. Under the Winding-up Acts, however, in the case of a company, the court was armed with a discretion to fix the amount of the security as high as it might think proper, and his Lordship had so done in a recent case, and had also stated the time for which it was to endure, viz., till after the defendants had put in their answer to the bill. He then referred to the rule of Feb. 1876, above mentioned, and said that no doubt in cases commenced after the Judicature Acts came into operation the court had the fullest discretion both as to the time and the amount of the security to be given, and might exercise that discretion even to the extent here asked, of 2000*l.* If this suit had been instituted after the passing and after the coming into operation of the Acts, he would have ordered further security to be given by the plaintiffs, and would have allowed them a time within which to furnish it, but would not have stayed the proceedings in the interim. But the rule must be cautiously acted on, for otherwise a defendant might, the moment he was sued by a foreigner, call for security for costs, and delay the proceedings. The Republic of Costa Rica had in this case complied strictly with the existing rules of our courts, and it would be strange, if having done so, it should find itself stopped by a new rule of our practice. The new rule was an extremely beneficial one; but his Lordship thought it only applied to actions commenced after the Judicature Acts came into operation, and that the plaintiffs should be allowed to go on with their suit under the old rules of the court. It was to be observed that the new rule spoke of any cause or matter in which security for costs "is" required, and here it had been required and was given. On the other hand, it was said the rule applied to any case in which security must be given. There was much force in the first argument, though either interpretation of the rule might, perhaps, be relied upon as good. He thought that, having regard to this particular case, it was not one in which further security should be given, and the application must be refused accordingly.

On the appeal by the defendants,

J. Pearson, Q.C. and Romer, for the appellants, submitted that the court would put a liberal interpretation upon the Judicature Acts and the rules under them; and contended that it had jurisdiction to order further security to be given under rule 7 of the Rules of the Supreme Court Feb. 1876. They relied upon

Budding v. Murdock, L. Rep. 1 Ch. Div. 43;

King of Greece v. Wright, 6 Dowl. 12;

Emperor of Brazil v. Robinson, 5 Dowl. 522.

Glasse, Q.C., J. N. Higgins, Q.C., and Lockett Webb, Q.C., for the respondents, contended that the plaintiffs having complied with the requirements of the rules under which the suit was instituted, they could not now be called upon to give further security for costs under the rules of the Judicature Acts.

JAMES, L.J., said that in his opinion the rule of

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Feb. 1876, was intended to meet such a case as this. Under the old practice a plaintiff abroad, whether a sovereign state or a private individual, might be ordered to give security for costs, but as a matter of practice the amount had been fixed centuries ago at the sum of 100*l*. At that time 100*l*. represented something very different from what it did now. Not only had the value of money changed, but the expense of Chancery suits had changed also. Consequently it had been thought fit to introduce a change in the practice, and that had been done by rule 7 of the Rules of the Supreme Court of Feb. 1876, which was as follows: "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the court or a judge shall direct." That rule was intended to assimilate the practice in all the divisions of the High Court to the practice which formerly prevailed in the Common Law Courts, insisting on a substantial, and not merely a nominal, security for costs when security was required from a plaintiff out of the jurisdiction, and this was such a case. It would be impossible to admit the contention that the plaintiffs had, by the deposit which they had been already called upon to make, purchased a vested right to go on without being liable to be called upon for further security. Additional security would, however, only be ordered to be given for future costs, and not for costs already incurred. Under the circumstances, 500*l*. would be sufficient as a further security, but with leave for the defendants to apply again, if it became necessary. The order would not prevent the plaintiffs from amending their bill; it would only disentitle them to call upon the defendants to take any step or incur any expense before the security was given.

MELLISH, L.J., was of the same opinion. No plaintiff had any vested interest in defects which might exist in the procedure of the courts, and consequently if, in the course of his suit, the procedure was changed, no injustice was done to him. This was clearly a case to which the new rule applied, and in which security ought to be given.

BAGGALLAT, J.A., also concurred. The only possible question was as to the applicability of the new rule to pending suits. It appeared, however, that sects. 22 & 23 of the Judicature Act 1873, made special provision as to the applicability of the new procedure to pending causes, and enabled the court to make an order under the new rule in the present case.

Solicitor for the appellants, *G. N. Clements*.

Solicitor for respondents, *A. C. Edwards and Co.*

July 13 and 20.

(Before JAMES and MELLISH, L.JJ. and BAGGALLAT, J.A.)

Ex parte ARNOLD; Re WRIGHT.(a)

Bankruptcy—Order and disposition—Dealing with bankrupt after act of bankruptcy—Protected transaction—Notice of intention to commit act of bankruptcy—Taking possession under bill of sale—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 15, sub-sect. 5; s. 94, sub-sect. 3.

A debtor gave a bill of sale of certain stock-in-trade to a creditor in February to secure the payment of certain overdue acceptances given in payment for goods. On the 9th March the debtor's solicitor wrote to the holder of the bill of sale, as well as to other creditors, stating that the debtor intended to file a liquidation petition. The holder of the bill of sale received this letter on the 10th, and thereupon sent an agent to take possession of the goods comprised in the bill of sale, and possession was taken on the morning of the 11th. The debtor had actually filed his petition on the 10th, but of this the debtor was not, nor was his agent, aware at the time when possession was taken:

Held (reversing the decision of Bacon, C.J.), that as the seizure was only the completion of the security given by the bill of sale which had been executed for valuable consideration, it was a dealing protected by sect. 94, sub-sect. 3 of the Bankruptcy Act 1869, and that to bring such a transaction within the protection of the clause it is not necessary that money, or something of value, shall have passed to the debtor at the time when the seizure is made.

Held, also, that the notice of the debtor's intention to commit an act of bankruptcy, having been given bona fide and not in pursuance of any prior understanding between the debtor and the holder of the bill of sale, did not invalidate the title of the latter, such notice not being equivalent to notice of the commission of an act of bankruptcy, and in no way binding him to make inquiries before seizing the goods comprised in the bill of sale.

THIS was an appeal from a decision of the Chief Judge in bankruptcy.

The facts of the case were shortly as follows.

On the 16th Feb. 1876, Edward Wright, a builder at Burgess Hill, near Brighton, executed a bill of sale of certain building plant and stock-in-trade (not the whole of his property) to G. E. Arnold, who carried on business as a timber merchant in Austinfriars and at Woolwich under the firm of G. E. Arnold and Co., to secure a debt of 262*l*.

This debt was due in respect of building materials supplied to Wright by Arnold. Bills of exchange drawn by the debtor and accepted by his uncle, one Blundell, were given to Arnold, who in Jan. 1876 held such bills for sums amounting to 262*l*. Being unable to meet these bills when they fell due, the debtor on the 1st Feb. offered to give Arnold a bill of sale as security. This offer Arnold at first refused, but he subsequently accepted it, on the assurance of Wright that if he were not pressed for payment he would be able to complete a building contract for which he was to receive 400*l*.

The bill of sale was duly registered under the Bills of Sale Act.

Some days after the execution of the bill of sale the debtor paid Arnold 35*l*.; and he also paid 60*l*. to another creditor.

On the 9th March the debtor's solicitor wrote a letter to Arnold, stating that the debtor "having, from want of capital and other causes, been compelled to dismiss all his workmen and stop his works, and having, therefore, no prospect of being able to pay his creditors their demands in full, has requested me to file a petition for him under the liquidation clauses of the Bankruptcy Act. This will be done as soon as possible, but mean-

(a) Reported by H. PRAT, Esq., Barrister-at-Law.
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while he wishes me to give you notice of his intention."

This letter was received by Arnold on the 10th March.

The debtor's liquidation petition was, in fact, prepared and signed on the 9th March, and was filed in the Brighton County Court on the 10th March.

On receiving the letter, Arnold consulted his solicitor, by whose advice he sent his manager down to Burgess Hill that same night to take possession of the property comprised in the bill of sale, but it was not till nine o'clock on the morning of the 11th March that possession was actually taken by Arnold's manager, who first made a formal demand for the amount due to Arnold.

Arnold did not actually know that the petition had been filed till a few hours after the seizure, nor did Wright mention the fact to the manager when he made the formal demand for payment.

Under these circumstances the trustee under the liquidation claimed the property seized as having been in the debtor's order and disposition at the commencement of the liquidation with Arnold's consent, and he obtained an injunction to restrain Arnold from selling the property.

Arnold subsequently applied to the Judge of the Brighton County Court for an order directing Arnold to deliver up the property to him. The County Court judge refused the application, but on appeal the Chief Judge in bankruptcy made the order asked for.

From this order Arnold now appealed.

Winslow, Q.C. and *Finlay Knight*, for the appellant.—The seizure of this property is a dealing within the protection of sect. 94, sub-sect. 3 of the Bankruptcy Act 1869, which provides that nothing in the Act shall render invalid "any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." *Graham v. Furber* (14 C. B. 134) shows that this seizure would have been protected by the protection clause of the Bankruptcy Act 1849, s. 133, which differs somewhat in language from that of the Act of 1869, but not materially. *Ex parte Montagu*; *Re O'Brien* (34 L. T. Rep. N. S. 197; L. Rep. 1 Ch. D. 554), shows that even an unsuccessful attempt by the holder of a bill of sale to take possession on the eve of his debtor's insolvency is enough to take the goods out of the debtor's order and disposition. *Bird v. Bass* (6 Man. & Gr. 143) shows that notice of an act of bankruptcy means knowledge of it, and it is clearly proved here that Arnold had no actual knowledge that the petition had been filed at the time when possession was taken.

Miller, Q.C. and *Francis Turner*, for the respondent, the trustee.—Whether the appellant had or had not notice of the act of bankruptcy, this is not a "contract or dealing" with the bankrupt within sect. 94, sub-sect. 3, of Bankruptcy Act 1869. The corresponding section of the Act of 1849 is much wider, and protects "contracts, dealings, and transactions, by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat;" it says nothing about valuable consideration, and we contend that money, or something of value, must pass to the

bankrupt at the time of the seizure to bring a case of this kind within sect. 94, sub-sect. 3. [*Winslow, Q.C.*—In *Ex parte Butcher, re Stead* (33 L. T. Rep. N. S. 541; L. Rep. 7 E. & I. 839), the House of Lords explained the meaning of valuable consideration in the Bankruptcy Act 1869, in a sense favourable to our contention.] Then the transaction is invalid as a fraudulent preference, for such was the effect of the letter of the 9th March. Again, the bill of sale itself was an act of bankruptcy as an assignment of all the debtor's property, with immaterial exceptions:

Ex parte Fosley, re Nurse, 28 L. T. Rep. N. S. 862; L. Rep. 3 Ch. 515;

Ex parte Hawker, re Keeley, 26 L. T. Rep. N. S. 54; L. Rep. 7 Ch. 214.

We also contend that the seizure was illegal, because a reasonable time for payment was not allowed after demand:

Toms v. Wilson, 8 L. T. Rep. N. S. 779; 32 L. J. 382, Q. B.

Winslow, Q.C., in reply.—It is too late now to raise the point that the letter of the 9th March was a fraudulent preference, that point not having been raised before the Chief Judge or in the County Court, where the parties were examined, and might have been cross-examined on the point. The letter of the 9th March was only notice of an intention to commit an act of bankruptcy, and such a notice has always been distinguished from notice of an act of bankruptcy: *Ex parte Halifax, re Ridge* (2 M. D. & De Gex. 544). He also referred to

Brewin v. Short, 5 Ell & B. 237;

Conway v. Nall, 1 C. B. 643;

Ex parte Glyn, re Ridge, 6 Jur. 839;

Ex parte Redfern, re Ball, 19 W. E. 1058.

JAMES, L.J.—We will dispose of this case the next time we sit in bankruptcy.

July 20.—Their Lordships having in the interval intimated their wish to hear further evidence as to the letter of the 9th March, the appellant, the debtor, and his solicitor, Mr. Andrews, now attended in court and were examined. The appellant deposed that the letter was not sent in pursuance of any prior understanding between him and the debtor, and Mr. Andrews deposed that he sent the letter to the appellant, in common with the other principal creditors of Wright, not in pursuance of any special instructions from Wright, but in accordance with his (Andrews') ordinary practice in similar cases.

Miller, Q.C. was then heard in reply on the cases cited by *Winslow* in reply.—This case is distinguishable from all those in which notice of an intention to commit an act of bankruptcy has been held not to amount to notice of an act of bankruptcy, for here the presumption was that the intention to commit and the commission of the act were simultaneous.

JAMES, L.J.—The evidence given this morning has completely removed from my mind a grave doubt which I previously entertained as to the *bonâ fides* of the transaction. I had a suspicion that the letter of the 9th of March was an intimation from the debtor, equivalent to saying, "I am about to become bankrupt, come and take possession." But from the evidence which has been given this morning, it is quite clear that everything was done *bonâ fide*, and if the goods in question were in the order and disposition of the debtor when the liquidation petition was filed, they were taken out of it by a *bonâ fide* dealing

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with the appellant before he had notice of the act of bankruptcy. The order of the Chief Judge must therefore be discharged.

MELLISH, L.J.—I am of the same opinion. The Chief Judge decided the case on the ground that the goods were at the date of the filing of the petition in the order and disposition of the debtor with the consent of the appellant. I agree that this was so; but what we have really to decide is whether the effect of sect. 15, sub-sect. 5 of the present Bankruptcy Act is modified by sect. 94, sub-sect. 3. Sect. 15, sub-sect. 5 provides that the property of the bankrupt divisible amongst his creditors shall comprise "all goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner." Now, is that provision modified by sect. 94, sub-sect. 3, which provides that nothing in the Act shall render invalid "any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication by a person, not having at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication"? Now, it was settled law before the passing of the present Bankruptcy Act, under sect. 133 of the Bankruptcy Act of 1849, that if goods were taken out of a bankrupt's order and disposition after the commission of an act of bankruptcy, but before an adjudication had been made, and at a time when the real owner of the goods had had no notice of the act of bankruptcy, that was a dealing and transaction with the bankrupt which was protected; and the question now to be decided is whether there is any difference in the construction of that sect. 133, and sect. 94, sub-sect. 3 of the present Act. The main difference between the two sections is this: that sect. 133 speaks of "dealings and transactions," while sect. 94 is confined to "dealings." No one can suppose that that was intended to make any difference. In many instances in the present Bankruptcy Act the language of the older Acts has been modified, when it was clearly not intended to make any change in the law. Then, moreover, the words "for valuable consideration" have been introduced into sect. 94. In the present case there was, in our opinion, a valuable consideration—the bill of sale was founded on that. What was meant by the introduction of these words was that a mere gift of the bankrupt's property should not be protected. Probably this would have been equally so under the old Act, as such a transaction would have been held to be not *bona fide*; but it was thought better to express this. But, in my opinion, a taking away of the bankrupt's goods under a bill of sale given to secure debt is a dealing for valuable consideration, and, therefore, is protected. I agree also with Lord Justice James that the letter of the 9th March was sent *bona fide*. If it had been sent with the express intention of giving Arnold warning to take possession, the result might possibly have been different; but it is not necessary to decide that. The only other question is whether the letter amounted to notice of an act of bankruptcy, and, as to that, I think that the court ought to follow the old

cases, which decided that notice of the intention to commit an act of bankruptcy was not notice of an act of bankruptcy, but that an execution creditor who had received notice of such an intention was not bound to stop in his proceedings or to inquire whether an act of bankruptcy had been committed. These cases apply equally in principle to the holder of a bill of sale. I, therefore, think that this transaction was protected, and that the appellant has a good title to the goods.

BAGGALLAY, J.A.—I am of the same opinion. At the date of the filing of the petition the property comprised in the bill of sale was actually in the possession of the debtor, and would have passed to the trustee unless the transactions between the debtor and the appellant concerning that property were within the protection of sect. 94, sub-sect. 3 of the Bankruptcy Act 1869. In order to bring them within the protection of that clause three things must concur; the dealing must have been in good faith, it must have been for valuable consideration, and it must have been without notice of an act of bankruptcy. I am satisfied by the evidence that the appellant had no notice of an act of bankruptcy at the time of the seizure, and that the transactions between the debtor and the appellant, taken as a whole, were for valuable consideration. The only other question is whether they were carried out in good faith. And although I at first entertained considerable doubt as to this, my doubts have been entirely removed by the evidence which we heard this morning.

Solicitors for the appellant, *Bellamy, Strong, and Bennett*.

Solicitors for the respondent, *Walter, Moojen, and Son*.

July 6 and Aug. 3.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Ex parte THE MANCHESTER AND COUNTY BANK;
Re COLLIE.(a)

Bankruptcy — Partnership — Secured creditor — Joint and separate estate — Bank shares belonging to firm, but registered in name of one partner — Lien of bank — Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 16, sub-sect. 5, s. 40.

At the commencement of the bankruptcy of the firm of A. and W. there were standing registered in the name of A. certain shares in a bank, whose articles of association provided that all the shares of every shareholder should be subject to a lien in favour of the bank for any debt due to the bank from him alone or jointly with any other person. The shares in question, which were originally the private property of A., became partnership assets when he entered into partnership with W., but the bank had no notice that anyone but A. was interested in the shares. The bank sought to prove against the joint estate of the firm for a large debt contracted after the shares became partnership assets:

Held, by Mellish, L.J. and Baggallay, J.A. (James, L.J. expressing a qualified assent) that the lien of the bank on the shares was a security on the joint estate, and that the bank could not prove for the amount of their debt without deducting the value of the shares.

CT. OF APP.]

Ex parte THE MANCHESTER AND COUNTY BANK; *Re* COLLIE.

[CT. OF APP.]

Ex parte Connell (3 *Mont. & Ayr.* 581; 3 *Dea.* 201, *followed*).

This was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

The facts of the case were shortly as follows:

At the commencement of the bankruptcy of the firm of Alexander Collie and Co. 133 shares in the Manchester and County Bank were standing registered in the name of Alexander Collie alone.

These shares were allotted to Alexander Collie in 1862, and they had remained in his name ever since, although, as between himself and his partners, they had been treated as partnership assets since the year 1865, when the partnership was formed. The bank, however, had no notice that anyone but Alexander Collie was interested in the shares.

The 26th clause of the articles of association of the bank, which is fully set out in the judgment of Mellish, L.J. *infra*, provided that all the shares of every shareholder should be subject to a lien in favour of the bank for any debt due to the bank from him alone or jointly with any other person.

At the commencement of the bankruptcy the firm of Alexander Collie and Co. were indebted to the bank in the sum of 85,824*l.*, which debt had been contracted since the shares had become partnership property.

The bank sought to prove against the joint estate of the firm for the whole of this debt, but the trustee had disallowed the proof to the extent of 5320*l.*, being the value of the 133 shares which the bank claimed to hold as a separate security for the debt.

The matter then came before Mr. Registrar Murray, sitting as chief judge, and he held, on the authority of *Ex parte Connell* (3 *Dea.* 201) that the lien of the bank on the shares was a security on the joint estate, and that the bank could only prove for the balance of their debt after deducting the value of the shares.

From this decision the bank appealed.

Finlay Knight (with him *Little Q.C.*), for the appellants.—The bankrupts, in effect, made a representation to us that the shares were the sole property of Alexander Collie. On the faith of that representation we allowed them to contract this debt by overdrawing their account, consequently the bankrupts, and those claiming through them, are estopped from saying that the shares were not the sole property of Alexander Collie. We have therefore a right to treat the shares as a separate and collateral security for our debt. We had no notice that the shares had become partnership assets, and the paramount lien created by our articles of association cannot be destroyed by an arrangement to which we were not parties, and of which we had no knowledge. It is true that *Ex parte Connell* (3 *Mont. & Ayr.* 581; 3 *Dea.* 201) is against us, but that was not an unanimous judgment of the court, for Sir John Cross differed from the other two judges, and it is open to this court to review that decision. They also referred to

Lindley on Partnership, 3rd edit., p. 1220.

Roxburgh, Q.C. and *J. Linklater*, for the respondent.—The firm having become bankrupt, the shares, which are clearly proved to be part of the

partnership assets, must be treated as joint estate, and no contract entered into with the bank by Alexander Collie personally can avail to take the shares out of the rule of administration in bankruptcy that a secured creditor must deduct the value of his security before proving for his debt. *Ex parte Connell*, which was decided by the Court of Review so long ago as 1838, and which has never been overruled or questioned, is decisive in our favour. They also referred to

Re Plummer, 1 *Phill.* 56.

Finlay Knight, in reply, referred to
The Bankruptcy Act 1869, s. 37.

Our. adv. vult.

Aug. 3.—The following written judgments were now delivered:

JAMES, L.J.—The question in this case is whether the appellants', the bank's, security is on the property of Alexander Collie or on that of his firm, the property being shares in the bank standing in his name, but being, unknown to the bank, the property of the firm. If I were quite free to act on my own opinion I should give my voice in favour of the appellants, on this broad general ground, that that which has been represented to a man and *bona fide* acted on by him as true, ought, as between him and the person making, or privy to, the representation, to be deemed to be true. In this case the bank acted on the belief, induced by that which was, I think, in effect equivalent to the representation of Alexander Collie and the successive firms of which he was a member, that the shares were his, and that they, therefore, had a security on shares which were the separate property of Alexander Collie. This representation, as I deem it to be, was not made or acted on with any view to evade any rule of the bankrupt law, or with any view to bankruptcy at all, and I should have thought that the bank were entitled to the full benefit of that representation as being the real truth, whatever the legal consequences. But, even if my colleagues agreed with me, it would not, perhaps, be proper to overrule a decision pronounced by a majority of the judges in the year 1838, not since brought into question, and which was necessarily followed by the registrar from whom the appeal is brought.

MELLISH, L.J.—The question to be determined in this case was, whether Mr. Registrar Murray was right in holding that the proof of the Manchester and County Bank against the joint estate of Messrs. Collie ought to be reduced by the sum of 5320*l.*, being the value of certain shares in the bank registered in the name of Alexander Collie alone. By the articles of association of the bank, it was provided, by clause 26, that "All the shares of every shareholder, and all dividends and profits from time to time payable to him out of the funds of the bank, shall be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone or jointly with any other person;" and by clause 27, that "The bank shall be entitled to have the lien made available by sale of the shares, and to retain and apply the moneys arising by the sale, and any such dividends or profits, in or towards repayment of the moneys so due to the bank, and in case of any action or suit being brought by the

shareholder or his representative against the bank for the recovery of any such dividends or profits, the bank may plead this regulation in justification of the retention thereof." The shares were originally the private property of Alexander Collie, but when he entered into partnership with his brother William Collie, and before any part of the debt sought to be proved was contracted, the shares became partnership assets, and continued to be partnership assets subject to the charge upon them in favour of the bank up to the time of the bankruptcy. There is, however, no evidence that the bank had any notice that anyone but Alexander Collie had any interest in the shares. Under these circumstances it was held by the registrar, upon the authority of *Ex parte Connell* (3 Dea. 201), that the 5320*l.* ought to be deducted from the proof, and I am of opinion that his decision ought to be affirmed. The case of *Ex parte Connell* is directly in point, and I am not aware that it has ever been overruled, or even disapproved of. The bank seeks to prove against the joint estate of Messrs. Collie. They are, as it appears to me, secured creditors within the 5th sub-section of the 16th section of the Act of 1869, and the 40th section. They hold a charge on a part of the joint estate as a security for the debt due to them, because it is a security over property which, if the security had not been given, would have been part of the joint estate, and which is now part of the joint estate subject to the security. It was contended, no doubt, on the part of the bank that the effect of the articles of association was that, as between them and the Collies, the shares were to be treated as the sole property of Alexander Collie. The question, however, seems to me to be, not what was the contract between the bank and the Collies, but what are the respective rights of the bank and the other joint creditors, and I think the other joint creditors are entitled to say it is nothing to us what the bankrupts may have represented or what contracts they may have entered into. They cannot, by anything they may have said or done, prevent their estate being distributed according to the law of bankruptcy. If the security they, or either of them, gave, was really a security on the joint estate, it follows that the creditors cannot realise that security, and also prove, without deducting its value, against the joint estate. The question does not relate to the validity of the security given by the articles of association. The security of the bank upon the shares for the joint debt remains the same according to either view. The question relates exclusively to the right of proof in respect of that part of the debt which is uncovered by the security, and it seems to me that must depend upon the right of proof which the law gives in the actual circumstances, and cannot depend on the representations or contract of the bankrupts. If the real debt due by a bankrupt is 100*l.*, he cannot, by any contract or representation he may have made, give a particular creditor a right to prove and receive dividends for 200*l.* as a security for the payment of 100*l.* Nor can he, in my opinion, by calling what is really joint estate separate estate, give a right to realise a security upon the joint estate, and at the same time a right of proof without deducting the security on the joint estate.

BAGGALLAY, J.A.—I concur in the opinion that the decision of the registrar in this case ought to

be affirmed, and for the following reasons. When William Collie became a member of the firm of Alexander Collie and Co., at the close of 1869 or the beginning of 1870, Alexander Collie had 133 shares in the Manchester and County Bank standing in his own name, which he had purchased or acquired at his own sole charge, and which were his own property; and under the provisions of Article 26 of the deed of association of the bank, these shares were subject to a lien thereon in favour of the bank for all moneys which from time to time should be due from Alexander Collie to the bank in respect of any debt or liability to the bank from him alone, or from him jointly with any other person. At the date of the adjudication against Alexander Collie and Co., a large sum was due to the bank from Alexander Collie jointly with William Collie, who, under the firm of Alexander Collie and Co., had a largely overdrawn account at the bank. Apart, then, from the provisions of the partnership articles, and under the articles of association of the bank itself, the bank had a lien upon these shares for the amount of the overdrawn joint account. If, however, the matter had rested here, the shares in the hands of the bankers would, in my opinion, have been a separate security for the joint debt; but it appears that under the articles of partnership, these shares became, upon its formation, partnership property; and this was before any portion of the joint debt was incurred; consequently, at the date of the adjudication the bank were, in my opinion, secured creditors of Alexander Collie and Co., within the meaning of the 5th sub-section of sect. 16 of the Bankruptcy Act 1869, and, as such, must, under the 40th section, give credit for the value of the shares before proof can be allowed. I prefer to rest my decision in this case upon the provisions of the Bankruptcy Act, rather than upon the decision in the case of *Ex parte Connell* (3 Dea. 201), as to which I feel bound to say that my own views are more in accordance with those expressed by Sir John Cross than with those which influenced the decision of the majority of the court; though, after the lapse of time since that case was decided, and having regard to the absence of any subsequent decision impugning it, I should not have felt myself justified in dissenting from it.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Phelps and Sidgwick*, agents for *Sale, Shipman, Seddon, and Sale*, Manchester.

Solicitors for the respondent, *Travers, Smith, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER of the ROLLS.)

Saturday, April 1.

Re JONES' SETTLEMENT TRUSTS.(a)

Marriage settlement—Covenant to settle future property.

A married woman was entitled in reversion expectant on the death of the tenant for life to a third share in a fund. In her marriage settlement there was a covenant to settle after acquired property to which during the coverture, she or her

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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Re JONES' SETTLEMENT TRUSTS.

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husband in her right should become beneficially entitled in possession or reversion or in any manner whatever. She died before the tenant for life having by her will devised and bequeathed all the real and personal estate to which at her death she should be entitled or which she had power to appoint, to her husband, who took out letters of administration with the will annexed. The tenant for life died.

Held, that the fund was not subject to the covenant in the settlement and passed to the husband or his wife's representative.

Re Viant's Settlement Trusts (30 L. T. Rep. N. S. 544) dissented from and not followed.

PETITION.

Mary Jones, by her will dated the 19th May 1842, appointed and bequeathed the sum of 500*l.* and 1000*l.* bank three per cent. annuities unto John Jones, Thomas Burlton, and Charles Thomas Fearnley, their executors, administrators, and assigns, upon trust for the testatrix's daughter, Sophia Fearnley, for her life, and after her decease upon trust for all and every the children of the said Sophia Fearnley, as therein mentioned, and in case there should be no such children or child of the said Sophia Fearnley, (which event happened) then upon trust for all other the testatrix's children who might be then living, and the issue of any child or children who might then be dead leaving issue; all such children and issue to take as tenants in common; but so nevertheless that the issue of any deceased child should take and be entitled only to the share which his, her, or their deceased parent would have been entitled to, if living, and their respective executors, administrators, and assigns. And the testatrix appointed the said John Jones, Thomas Burlton, and Charles Thomas Fearnley, executors of her will.

The said Mary Jones died on the 4th July 1842, and the said will, together with a codicil thereto, not affecting the above disposition, was duly proved, on the 30th Aug. 1842 in the Prerogative Court of the Archbishop of Canterbury.

The said Sophia Fearnley died on the 6th June 1875 without ever having been married.

The testatrix had five children other than the said Sophia Fearnley, viz.: First, Mary Burlton who survived the testatrix and died in the lifetime of the said Sophia Fearnley, leaving children who survived the said Sophia Fearnley; and secondly, Sarah Fearnley, and thirdly Harriet Grover, who both died in Sophia Fearnley's lifetime without ever having had a child; fourth, the said Charles Thomas Fearnley, who is still living; and fifth, Emma Eliza Fearnley, who married Michael Tunnacliff, and died on the 20th July 1856, having had issue one child only, Florence Mary Dimont, wife of the petitioner, the Rev. Charles Harding Dimont.

On the 5th Aug. 1869, the said F. M. Dimont then F. M. Tunnacliff was married to the petitioner, the Rev. C. H. Dimont; and two settlements were executed previously to the marriage, the trustees of which were the then trustees of the said will of Mary Jones. By one of the said settlements certain interests of the said F. M. Dimont under the said will, not including her interests in the said sums of 1000*l.* and 500*l.*, were settled as therein mentioned. And in the said indenture of settlement was contained a covenant in the following words:

And this indenture further witnesseth that in pursuance of the agreement in that behalf, and in consideration of the said intended marriage, each of them the said Charles Harding Dimont and Florence Mary Tunnacliff doth hereby for himself and herself, and his and her heirs, executors, and administrators, covenant with the said Charles Thomas Fearnley and Randall Glynes, their executors and administrators, that if the said intended marriage shall take place, all the real and personal property (if any) not hereinbefore settled, to which the said Florence Mary Tunnacliff or the said Charles Harding Dimont, in her right, shall, at any time during the said coverture, become beneficially entitled in possession or reversion, or in any manner whatever, derivable, directly, or indirectly from the said Mary Jones, deceased, or which shall have at any time passed to any person or persons under her will, (except furniture, jewellery, and household effects, which it is declared shall belong to the said Florence Mary Tunnacliff for her sole and separate use) shall as soon as circumstances shall permit and at the cost of the trust estate, be assured and transferred unto or otherwise vested in the trustees or trustee for the time being of these presents, upon trust to sell and convert the same into money in like manner and with the like discretion as is provided concerning the freehold and leasehold estates mentioned and comprised in the before-mentioned indenture of even date herewith, and to stand possessed thereof and of the proceeds of any such sale and conversion upon the same trusts as are herein declared.

The said F. M. Dimont died on the 3rd May 1874, having by her last will, dated the 24th Jan. 1871, devised and bequeathed all her real and personal estate which she should be entitled to at the time of her death, or which she should then have any power to appoint or dispose of by will, unto the petitioner absolutely, and she appointed him sole executor of her will. And letters of administration of the estates and effects of the said F. M. Dimont, with the said will annexed, have been granted to the petitioner.

The said F. M. Dimont had issue one child and no more, Charles Tunnacliff Dimont, now an infant of the age of three years.

On the 25th Feb. 1876, the said Charles Thomas Fearnley and Randall Glynes filed their affidavit stating the above facts, and that they had, since the death of the said Sophia Fearnley, realised the securities whereon the said sums of 500*l.* and 1000*l.* Bank Three per Cent. Annuities were invested, and that the clear moneys thereby produced amounted to 1397*l.* 16*s.* 3*d.*, one-third of which they had paid to the said C. T. Fearnley, and had retained one-third for the children of the said Mary Burlton, and that they purposed to pay the sum of 451*l.* 2*s.* 1*d.*, being the remaining one-third thereof, after deducting costs, to the credit of the share of F. M. Dimont, deceased, in the trusts of the said sums of 500*l.* and 1000*l.* And they stated that to the best of their knowledge and belief the persons entitled to or interested in the said sum of 451*l.* 2*s.* 1*d.* were the petitioner, as his wife's administrator, and themselves, the said C. T. Fearnley and Randall Glynes, as trustees of the said indentures of settlement. The said sum has been paid into court, and stood to such credit as aforesaid.

The petition prayed that after payment of costs the said sum might be paid to the petitioner.

B. B. Rogers, for the petitioner, cited:

Archer v. Kelly, 1 Dr. & Sm.; 2 L. T. Rep. N. S. 796;

Re Brown, L. Rep. 7 Eq. 231;

Re Clinton's Trusts, L. Rep. 13 Eq. 295; 26 L. T. Rep. N. S. 139;

Re Pedder's Settlement, L. Rep. 10 Eq. 585.

Freeman, for the infant, C. S. Dimont, relied on:

Re Vian's Trusts, L. Rep. 18 Eq. 434; 30 L. T. Rep. N. S. 544.

Oree for the trustees.

Sir G. JESSEL, M.R.—I regret that I must add one more decision to the numerous ones which already exist. It is quite impossible to avoid expressing regret that the question which both Sir William James and myself think was virtually decided by *Re Pedder's Trusts*, should be reopened by the decision on *Re Vian's Trusts*. This is the case of a covenant in a marriage settlement by which all the real and personal property which the married woman, or her husband in her right, should "at any time during the said coverture become beneficially entitled to in possession or reversion, or in any manner whatever," was settled upon the trusts of the settlement. The question really is whether, the tenant for life having survived the wife, so that the wife was entitled to a reversionary interest at her marriage, and at the time of her death, no change having taken place during the coverture, she or her husband became beneficially entitled during the coverture. The wife certainly did not. Did the husband? I cannot see that he did. He could have no title to a reversionary interest, because he could not reduce it into possession. He never became entitled during the coverture, though he did after the wife's decease. But then, when you read the covenant, he does not fulfil the literal words of the condition. All that he acquired by the marriage, and possessed during the coverture, was an inchoate title, i.e., no title at all, though he might have assigned it. He had the mere expectancy of a title; but he does not get a title. The question is settled by authority, and I am not at liberty to give an opinion. All that I can do is to refer to *Pedder's Trusts*, and to say that authority has decided, such a title is not a title acquired by the husband during coverture. The cases referred to, modern decisions, are all one way, down to the most modern. Then comes *Vian's Settlement Trusts*, which, with great respect for Vice-Chancellor Bacon, I am unable to follow. The fund must be paid to the petitioner.

Solicitors: G. A. Hall; *Oree*.

Saturday, May 20.

DYMONDS v. CROFT.(a)

Practice—Default of appearance—Orders XIX., r. 6; LIII., r. 3; XVI., r. 6; LVI., r. 1.

In cases where the defendant does not appear, and judgment cannot go by default, owing to the complexity of the claim, the filing of notice of motion for judgment, which is a document under Order XVI. r. 6, amounts to a delivery of notice to the defendant under Order LIII., r. 3. That order is in such a case complied with by the observance of Order XIX., r. 6, which directs the filing of notice of motion.

FORECLOSURE ACTION.

The writ was issued 2nd March, and an order for substituted service obtained on the 21st March. The defendant did not appear, and in accordance with Order XIX., r. 6, the statement of claim was

issued by being filed. On the 12th May, the plaintiff under the same order filed his notice of motion for judgment, without stating that he was going to bring the case on as a short cause, in accordance with the notice given in the Weekly Notes, 29th April, p. 233. The cause was, however, marked short, and was brought on as a short cause.

The defendant did not appear.

Cozens-Hardy for the plaintiff, submitted that the filing of the notice of motion for judgment amounted to a delivery to the defendant under Order XIX., r. 6; notice of motion came within that order, and this case came within the exceptions in Order LIII., r. 3; this notice was a document to be delivered in accordance with Order XVI., r. 6. In *Shepherd v. Beam* (W. N., 1876, p. 61), this had been decided by V.C. Hall, though in *Cook v. Day* (W. N., p. 122), he ruled otherwise, on the ground that in the former case his attention had not been called to Order LIII., r. 3.

Sir G. JESSEL, M.R.—I am not sure that the Vice-Chancellor's attention was so thoroughly drawn to all the rules on the subject that I am bound to follow his decision. The rules provide that you may in certain cases proceed without notice to the parties affected thereby—that is, not without notice given, because you may give notice by delivery, and you may also give notice by filing the document. The reason of the thing is entirely with you, and the words are large enough to cover this case, and I am bound to decide as I think best. The scheme is this: In what may still be called a common law action, where there is a simple demand, and the defendant does not appear, judgment goes by default. In what are called Chancery Division actions, or in Probate actions, which are more complicated, instead of allowing the plaintiff to obtain judgment, as under the previous rules, in cases of pecuniary demand, damages or debt, if the party served does not appear, the action may proceed as if he had appeared. Then to relieve you of the difficulty of serving notice every time, in cases when you could not sign judgment in default, Order XIX., r. 6 says, that if the defendant does not appear, he must go to the office to inquire; the only object being that the court should see that the right order is made. Then as to the notice of motion for judgment. It is in writing, by Order LVI., r. 1, therefore it is a document. It amounts to a notice in writing delivered to the party, if a solicitor to the solicitor; if not to the person concerned. Order LIII., r. 3, which provides that except in special cases notice must be given to the parties, is sufficiently carried out by compliance with Order XIX., r. 6.

Solicitors: Munton and Morris, for S. Johnson, Sheffield.

(Before Vice-Chancellor HALL.)

Monday, March 13.

FAIRER v. PARK.(a)

Will—Construction—Satisfaction—Bequest—Specific or general.

A testator bequeathed to his wife and his son 1500*l.* upon trust as to 1000*l.* for his daughter E. for life and her separate use, and after her death for her children at twenty-one, and as to

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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500*l.* for his daughter A. and her children in like manner. The son, the surviving trustee, never set apart the sums, but paid the interest during his life to his sisters. By his will he directed a certain estate to be sold, and 1000*l.* to be paid to his sister E., and 500*l.* to his sister A. He also bequeathed to his wife all his personal estate, "together with all the furniture, farming implements, stock and crop belonging to the A. estate."

Held, that the bequests in the son's will to his sisters was not in satisfaction of his debt to them as trustee of his father's will, and that the bequest of furniture, &c., was not specific.

JAMES PARK by his will bequeathed to his wife Esther Park, and to his son George Park, whom he appointed executrix and executor of his will, the sum of 1500*l.* upon trust as to 1000*l.* part thereof to pay the interest at 4 per cent. per annum to his daughter Elizabeth Guy, for life, and for her separate use, and after her decease, upon trust for her children, who being sons should attain the age of twenty-one years, or being daughters should attain that age, or previously marry, with the benefit of survivorship, share and share alike. The 500*l.*, remaining part of the 1500*l.*, was to be held upon similar trusts in favour of the testator's daughter Agnes Waller, and her children.

Esther Park died in 1847; George Park, the surviving trustee of James Park's will, regularly paid the interest of the two sums of 1000*l.* and 500*l.* to his sisters Elizabeth Guy and Agnes Waller, respectively. But the plaintiffs believed that he never appropriated out of the testator's estate funds to answer the legacies.

George Park made his will in Jan. 1870, whereby, after bequeathing to his wife all his personal property, sums of money, furniture, farming implements, stock, and crop, belonging to his Asby Hall estate, he continued as follows: "I desire that the whole estate known as 'Asby Hall,' and the lands belonging to that estate, may be sold after my decease, and that the sum of 1000*l.* sterling be paid to my sister Elizabeth Guy, of Asby, and the sum of 500*l.* sterling to be paid to my sister Agnes Waller, of Hartley, out of the proceeds of the sale of the aforesaid estate."

By a codicil made in Oct. 1871, the testator appointed the two plaintiffs executors, and desired them to pay his debts, funeral, and testamentary expenses.

The said George Park died in Dec. 1871. This was an administration suit against Agnes Park, Mrs. Guy, and Mrs. Waller and others. The question arose whether the bequests in George Park's will of 1000*l.* and 500*l.* was intended to be in satisfaction of the legacies left by the will of James Park. The chief clerk certified that the 500*l.* was a debt due from the testator, George Park's estate, on which interest at 4 per cent. was due, from 4th Aug. 1871; and also that Esther Park assented to the legacy of 500*l.*, and in Jan. 1832, handed to George Park securities and money amounting to 1500*l.*, which he applied to his own use. The chief clerk submitted to the court whether the direction expressed in George Park's will amounted to independent bequests of 1000*l.* and 500*l.* respectively to his two sisters, or was merely a direction to pay the debt of 1500*l.* in the proportions in which his sisters were entitled to the same.

Mrs. Waller stated in her answer that her brother, on the 29th Feb. 1868, gave her a memorandum that he had that day paid her 10*l.*, due on the 2nd Feb. 1868, half a year's interest on the sum of 500*l.* which he had belonging to her.

There was also a question whether the bequest of the furniture, farming implements, stock, and crop of the testator, George Park, to his wife Agnes Park was specific or general, and consequently whether it would be liable or not to satisfy, with the other personalty, the bequest of 1500*l.*

Ince, Q.C. and *Everitt*, for the plaintiffs.

Eddis, Q.C. and *Heysham*, for the defendant, Agnes Park.—Mrs. Grey and Mrs. Waller are put to their election, as far as their life interests are concerned. The legacies must be taken to be in satisfaction of the debt, as the testator knew that that exact sum was owing from him. (*McCarogher v. Whieldon*, L. Rep. 3 Eq. 236). But even if there be no satisfaction, the legacies are not chargeable upon the personal estate, as it is specifically bequeathed to the widow:

Vaughan v. Buck, 1 Phill. 75;

Sutherland v. Cooke, 1 Coll. 498;

Bethune v. Kennedy, 1 My. & Cr. 114.

O. Morgan, Q.C. and *D. Jones* for John Park, another defendant in the same interest.—The indentures of Feb. 1868, is admissible as evidence to show that the testator, learning his indebtedness, intended the two sums to be in satisfaction of their claims:

Atkinson v. Littlewood, 31 L. T. Rep. N.S. 225;

L. Rep. 18 Eq. 595;

Edmonds v. Low, 3 K. & J. 318;

Watkin v. Smith, 4 Madd. 325.

They distinguished:

Cole v. Willard, 25 Beav. 568;

Pinchin v. Simms, 30 Beav. 119;

Charlton v. West, 5 L. T. Rep. N. S. 16; 30 Beav. 124;

Alley v. Alley, 2 Ves. sen. 37;

Bartlett v. Gillard, 3 Russ. 149.

Townsend for G. Park, jun.

Dickinson, Q.C. and *Speed*, for Mrs. Guy, were only heard on the second question, viz., whether the bequest of furniture, &c., was specific. They contended it was not. The mere enumeration of articles in a gift of residue does not make those articles specific bequests. They distinguished:

Bethune v. Kennedy and *Vaughan v. Buck* (vide *supra*).

Dryden, *Dundas Gardiner*, and *Smart* for other parties.

Eddis, Q.C., in reply,

The VICE CHANCELLOR.—As to the last question, it does not appear to me on a further inspection of the will and codicil that there is any specific gift of money, or of the furniture, farming implements, stock, and crops belonging to the Asby Hall estate to Agnes Park. The form of disposition is first of all his personal property, to which he superadds the words I have read, which as I read they are thrown in, not for the purpose of making anything specific, but to settle the question what he intended to be included in the term "personal property." In the same will the testator disposed of the Asby Hall estate, and without that specification it occurred to him that the things which he wished his wife to have might go with the Asby Hall estate, unless he gave a direction to the contrary. So he put those words in to show that he meant them to go with his general personal estate. I do not think that is sufficient to enable me to hold

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that the things so enumerated were given specifically. The other question is as to whether two debts owed by the testator to his sisters and their children were satisfied by two gifts to his sisters. It is to be observed that in respect to the gift to them, there is 1000*l.* to be paid to Elizabeth, and the 1000*l.* is to be raised out of the proceeds of the sale of personal estate. There is no gift except out of the proceeds of particular property. The surplus proceeds are given in the third clause. This circumstance is not unimportant. The position is this: the 1000*l.* which the testator held under his father's will for one sister was held upon trust to pay her the income for life for her sole and separate use, and after her decease in trust for her children at twenty-one, or such of her daughters as should marry under that age. The 500*l.* was held by the testator upon similar trusts for the other sister. The gift of the 1000*l.* to Elizabeth Guy was a simple and absolute gift. It is not held upon trust. There is no reference to a debt owing to the testator. It is not given as a satisfaction of the debt or on the terms of being held by her on the trusts of the will of James Park. It is not for her separate use. Her husband became entitled to it. He has died without reducing it into possession, but for this purpose it is the same as if he were living. There is no trust. There is a difference in this respect, and also in there being in the one case a mere life interest and in the other a gift of the capital. There are, therefore, differences so material as to rebut this presumption of satisfaction. There are no authorities which oblige me to hold that the one is to be given as the satisfaction of the other to the extent of the life interest. As regards the authorities *Campbell v. Campbell* before Vice-Chancellor Wood (L. Rep. 1 Eq. 383) was decided on the ground that there were double portions. It was a Scotch case, and the law of Scotland raises a presumption against double portions. *McCarogher v. Whieldon* (L. Rep. 3 Eq. 236) was a peculiar case. There the testator was under a covenant, by will or otherwise, to do something. There was found in the will separated from the obligation a disposition in favour of the son. That was a case where the covenant was to leave by will a certain definite share of the property. The testator, by his will, gave one-fifth of his property, but not in such a manner as to be a satisfaction of the covenant. It was unlikely that the four-fifths was to be divided into fifths. The court held that there was no satisfaction of the interest taken by the son's wife and children, but that there was satisfaction as to the son's share. The other authorities are authorities with reference to the separate use. What I have said as to the difference, in my judgment, between the two gifts, prevents the one from being a satisfaction of the other, without the aid of this distinction, that there is the separate use in the one case and not in the other. But the separate use is certainly not unfavourable to my view. If the law as to separate use be not in itself sufficient, I cannot hold that it is not to be taken into consideration. The cases which have been referred to I will only just mention. It seems to me that the present case comes within what is stated by the Master of the Rolls in *Fourdrin v. Gowdey* (3 M. & K. 410.) The Master of the Rolls said that "this was a question not of satisfaction but performance. The husband, by the condition on which he took the general

residuary property of his wife was bound either to pay these pecuniary legacies in his lifetime or to provide for their payment after his death." Then we have the case of *Rowe v. Rowe*, before Knight Bruce, V.C. (2 De G. & S. 298) in which he seems to have adopted and followed *Bartlett v. Gillard* (3 Russ. 149), and *Edmunds v. Low* (3 K. & J. 318), where Vice-Chancellor Wood takes the same view. It seems to me, therefore, that the one gift is not a satisfaction of the other. The circumstance of the two gifts corresponding in amount is not such a presumption as weighed against the other counter-presumption will enable me to say the gift by this will was meant to be a satisfaction of the testator's liabilities under the will of James Park.

Solicitors: Gray, Johnson and Mounsey for E. Hulis, jun., Appleby; W. H. Tattam for J. H. Preston, Kirkby Stephen; Nicholson and Jones for Bleynmin and Shepherd, and for G. B. Thompson, Appleby; J. C. Rutter and Son for Cant and Fuirer, Penrith.

March 14 and 15.

CORNELL v. KEITH. (a)

Marriage settlement—Covenant to settle after acquired property.

Covenant in an ante-nuptial settlement by the intended wife to settle any property to which she or her husband in her right "now is or at any time or times during the said intended coverture shall become entitled by gift, descent, succession, or otherwise howsoever."

Held, to include a reversionary interest in the woman upon the death of herself and her husband without issue.

M. W. CARRUTHERS died intestate and unmarried in March 1838. His legal personal representatives were his mother Mary Carruthers, his brother Charles Bladen Carruthers, and his two sisters, Mary Jane and Fanny E. Carruthers. Letters of administration of his estate were on the 21st Jan. 1839 granted to C. B. Carruthers.

The mother died in Jan. 1845, having bequeathed the residue of her personal estate to her four children.

Fanny died in Oct. 1845, intestate and unmarried. Letters of administration of her estate were granted to C. B. Carruthers.

By an indenture of settlement made in Dec. 1852, on the marriage of Mary Jane Carruthers with James Buchanan, certain property of Miss Carruthers was settled upon trust for the benefit of herself and her children (if any), and in case there should be no child, then if Mary Jane Carruthers should die before James Buchanan, upon trust for Charles Bladen Carruthers absolutely. And James Buchanan and Mary Jane Carruthers entered into a joint and several covenant with the trustees, "that if the said M. J. Carruthers or James Buchanan, in her right now is or at any time or times during the said intended coverture, shall become entitled by gift, descent, succession, or otherwise howsoever to any real or personal estate, property, or effects, of the value or to the amount of 100*l.* or upwards at any one time (other than and except interests which are or shall be restricted to the life of the said Mary Jane Carruthers, or which whether so restricted or not, are or shall be settled and limited to her separate use

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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and disposal), the same shall be forthwith, at the costs of the trust estate, conveyed, transferred, assured, and paid to the trustees for the time being of the settlement upon the trusts declared concerning the property settled and assured by Mary Jane Carruthers or such of them as shall be subsisting or capable of taking effect."

Mary Jane Buchanan died the 1st Sept. 1869, without having had any child.

C. B. Carruthers died the 29th Sept. 1869, having made his will, of which the plaintiffs were trustees and executors, and which was proved on the 13th Oct. 1869.

James Buchanan died the 2nd June 1875. The defendants were executors of his will, which was proved on the 14th July 1875.

M. W. Carruthers, at the date of his death, was entitled in remainder, on the death of Mary Jane Carruthers, afterwards Mrs. Buchanan, and subject to the life interest of any husband she might marry, to one moiety of one-fourth part in the residuary estate of David Carruthers; and also to one moiety of the share of the said M. J. Carruthers in another fourth part, on the death of Fanny E. Carruthers, unmarried.

At the date of the marriage settlement, C. B., Carruthers and M. J. Carruthers were the next of kin of the said M. W. Carruthers.

On the death of Mrs. Buchanan, C. B. Carruthers became the next of kin.

The fourth of David Carruthers' residuary estate, including the share in another fourth part amounted to a sum of 15,413l. 11s. 10d. Three per Cent. Consolidated Bank Annuities. Half of this sum belonged to C. B. Carruthers in his own right. In the other half, at the date of the settlement, C. B. Carruthers and Mrs. Buchanan were beneficially interested in moieties, in remainder expectant on the death of Mr. and Mrs. Buchanan without issue. The question arose as to Mrs. Buchanan's share in this latter fund. Was it subject to the covenant in the marriage settlement, in which case the representatives of C. B. Carruthers became entitled, or did it pass to the husband James Buchanan in his marital right?

Dickinson, Q.C. and F. C. J. Millar, for the plaintiffs.—The question is one purely of construction of a covenant. Does it apply to a reversionary interest? We submit that it does. *Dering v. Kynaston* (18 L. T. Rep. N. S. 436; L. Rep. 6 Eq. 40) is not really adverse to us. In that case the objection was, not the interest being reversionary, but its being contingent. *Graftley v. Humpage* (1 Beav. 46), and *Re Viant's Settlement Trusts* (30 L. T. Rep. N. S. 544; L. Rep. 18 Eq. 436), are strong authorities in our favour. So are *Re Clinton's Trusts* (26 L. T. Rep. N. S. 159; L. Rep. 13 Eq. 295); *Re Mackenzie's Settlement Trusts* (16 L. T. Rep. N. S. 138; L. Rep. 2 Chan. 345). They also referred to

Atcherley v. Du Moulin, 2 K. & J. 186;

Caldwell v. Fellowes, 22 L. T. Rep. N.S. 225; L. Rep. 9 Eq. 410;

Re Pedder's Settlement Trusts, L. Rep. 10 Eq. 495;

Re Hughes's Trusts, 4 Giff. 432.

Eddis, Q.C. and F. A. Lewin for the defendants.—The brother in this case is a volunteer. The covenant is in most cases to prevent the marital right from attaching; but here it could never attach. It is the case of a wife's *chose in action* which could never be reduced into possession during

the coverture. No change in the title could take place during the coverture. Such a covenant has only been extended to cases like the present where the words have been much more inclusive, and expressed an intention to sweep in everything. In *re Clinton's Trusts* (*vide supra*), "any estate or interest whatsoever" was included. *Re Mackenzie's Settlement Trusts* (*vide supra*) does not cover a case like the present. *Atcherley v. Du Moulin* (*vide supra*), and *Dering v. Kynaston* are strongly in our favour.

Dickinson, Q.C. in reply.

The VICE-CHANCELLOR.—I have had an opportunity of further looking at the authorities cited yesterday, and it appears to me that the plaintiffs are entitled to the fund. I will first consider how the matter stands irrespective of authority. The settlement first deals with certain funds which the wife had in possession, and these no doubt were transferred to the trustees, when the deed was executed or immediately afterwards, and held upon trusts in which the husband had no interest whatever. The husband, as I understand, brought nothing into settlement. The intention of the settlement was only to protect the wife; and I collect that the trusts are for the benefit of children of that particular marriage only. We start, therefore, with an intention to exclude the marital right altogether, as to the funds in possession. The clause we have to consider is, as to future or after acquired property, and the question is whether this particular fund comes within the scope of the covenant. Was it in the same position as the property which was specifically settled? If it were not included the husband would be left to take it as the legal personal representative of his wife. If we had to consider probabilities, nothing, it seems to me, would be more improbable than that this fund, not specifically settled, but which on the happening of certain events would fall into possession, should not be liable to be disposed of by the wife, even though it should not fall into possession until after her death, that though the husband should not be entitled to anything out of the present fortune, yet that something should be left derelict so as to be taken by the husband as the legal personal representative of his wife. But, however, that might be, it would not affect my judgment, if on the true construction of this clause the husband was fairly intended to take. It is a joint and several covenant by both the husband and wife, with the trustees, that if the wife then was, or at any time should become (but I may leave the latter words out of consideration) entitled to any real or personal property of the value or to the amount of 100l. or upwards at any one time, it should be transferred to the trustees upon the trusts declared. Now, stopping there for a moment, it has been decided that these words as to value do not mean the actual value of the thing, if reversionary, but the value of the property as if in possession. The covenant is a contract that such real and personal property as the wife then was entitled to should be settled, and I apprehend that according to the ordinary construction of language this reversionary interest was personal property to which she was in one sense or another entitled. It should be observed that there was an exception from the settlement of the wife's property settled and limited to her separate use and disposal. The object of the settlement being

merely to exclude the marital right of the husband, it would be extremely improbable that the wife should not deal with any reversionary interest and exclude his marital right. Now I may observe that the trusts were for the lady for her life, and for her children, and failing them (an event which happened) on her predeceasing her husband, ultimately for C. B. Carruthers, her sole next of kin, instead of the usual clause for next of kin generally. It has been suggested that C. B. Carruthers is merely a volunteer. But he was as much the object of the marriage contract as the wife and children were. There is no favourable consideration, it is true, but still the lady has covenanted that under certain circumstances (which have happened) the property shall be held in trust for him; therefore, there is nothing in that argument. Having, then, arrived at what was meant so far, we have then the direction that the property shall be "forthwith transferred," and this is not inconsistent with a reversionary interest being included, because it would only mean, with respect to such an interest, immediately upon its falling in, which it might do at any time. Now, it is to be observed that there are trusts of this future property, corresponding to those declared concerning the property specifically settled, and there is no trust for conversion, but the property is to be held "upon such of the trusts as shall be then subsisting or capable of taking effect." Those words themselves in my opinion, point to reversionary property; because there is a supposition that some of the trusts might no longer exist, when the reversionary interest fell into possession. To exemplify this, I suppose the case of a lady entitled to a fund which could not fall into possession till after her own death. There could, I apprehend, be no doubt, that under a covenant like this such a fund would be swept in for the benefit of her children; and applying that to this case, if the preceding trusts for children have failed, why should not the trust for C. B. Carruthers be within the words and scope of this covenant? I apprehend it clearly is so. Then we have the words as "nearly as the nature of the property will admit," and those words may fairly be interpreted to refer to the property being real or personal estate. I have now gone through the words of the covenant, and it seems to me that, irrespective of authority, the broader construction is the sounder one to put upon them. Of course authorities may be and should be cited, but each case of this sort must depend largely on its own terms and circumstances. Upon the best construction which I have been able to give to the cases and the general course of the decisions, I think they are not opposed to, but that they support, the conclusion at which I have arrived. In *Acherly v. Du Moulin* (2 K. & J. 186), some observations of Wood, V.C., may seem to make for the defendants, but the circumstances were different in many respects; the words "now is" do not appear in that case; then there was a recital in that case, but not in this; the trust there was to convert and invest, that is not so here; and on the other hand, the words "or such of them as shall be capable of taking effect," which we find here, did not occur in that case; moreover, the Vice-Chancellor admitted that the word "entitled" might include a contingent interest, although not in that particular case; and therefore his observations, so far as they are applicable to this case, do not make

against my present decision. The next case cited was *Dering v. Kynaston* (L. Rep. 6 Eq. 210), decided by Romilly, M.R. In that case the Master of the Rolls thought that reversionary and contingent interests might be included, but for the special circumstances upon which his judgment there depended. But the trusts in that case were not qualified by the words "or such of them as shall be then subsisting or capable of taking effect," therefore that case was not similar to the present; moreover, with great respect, I do not think that the circumstance on which he relied of there being estates tail, which might be barred, preceding the gift, would be a sufficient ground for excluding the operation of the covenant. The next case is *Caldwell v. Fellowes*. In that case there was a recital that it had been agreed that certain stocks and sums of money and other property, as well real as personal, to which the lady "is entitled and may be entitled," should be settled; and a covenant to the same effect. At the date of the settlement, the lady was joint tenant in fee with her sisters of real estate in reversion, which was held to be included in the covenant. In that case it was held that the literal meaning of the words must be followed, and not a conjectured intention, and it seems to me to be an express authority in support of the plaintiff's case. [His Lordship then went through *Mackenzie's* case, and said that that case also seemed to support his view of the present case.] Then we come to the case of *Re Pedder's Settlement Trusts*, and there also the literal words were followed; that is the sole effect of that decision, and it is quite consistent with the earlier authority of *Caldwell v. Fellowes*. Then lastly there is the case of *Re Clinton's Trusts*. The question there was, what, having regard to the context in that particular case, was the meaning of the words "become entitled"; that is the only use of that decision, the only purpose for which it can be cited here, and therefore it corroborates what I have said. That disposes of the authorities. In looking through the bill I have observed that the personal representative of Mary Carruthers is not before the court, and therefore the bill had better be amended by stating who the personal representative of Mary Carruthers is, and making that person a party. Then the decree will declare that the representatives of C. B. Carruthers are entitled to the property in question, subject to such duty and to such debts and funeral and testamentary expenses, if any, of the mother Mary Carruthers, the sister Fanny E. Carruthers, and the brother Matthew W. Carruthers as remain unpaid. The costs of all parties to come out of the fund. I may take this opportunity of saying that I am by no means inclined to put a narrow construction on such clauses as this, because modern conveyances have struggled to make them sweep in every kind of property; though in this particular case we need not have recourse to any such construction.

Solicitors, *Walton, Bubbs and Walton, Lewin and Co. for Daubeny and Wilson, Bath.*

[ADM.]

THE PARANA.

[ADM.]

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 23.

THE PARANA. (a)

*Objection to registrar's report—Damage to cargo—
24 Vict. c. 10—Measure of damages—Loss of
market.*

Where, through the negligence of a carrier by sea, goods carried by him are not delivered in a reasonable time, the owner of the goods or assignee of the bill of lading for the goods is entitled to recover as damages from the ship-owners the difference between the market value of the goods when they ought to have been delivered and the market value when they actually were delivered.

THIS was an objection to a report of the registrar (H. C. Rothery, Esq.) in a cause referred to him by the court.

The cause was instituted under the Admiralty Court Act 1861 (24 Vict. c. 10), s. 6, on the 4th Dec. 1873, in the High Court of Admiralty, on behalf of Joseph Samuel, of London, the assignee of certain bills of lading for goods (sugar and hemp) forming part of the cargo of the steamship *Parana*, against that vessel, her tackle, apparel, and furniture, and the freight due or payable for the transportation of the cargo, and against William Malcolmson, of Portland, in Ireland, her owner, intervening. After the pleadings in the cause had been concluded, and witnesses had been examined by commission at Manila and Hong Kong, the defendant, on the 14th April 1875, admitted his liability, and consented to a reference of the accounts to the registrar and merchants.

On the 14th Dec. 1875 the plaintiffs brought into the registry a claim containing three items: First, loss of market in respect of the hemp; secondly, loss of interest; and thirdly loss by drainage of sugar by reason of the unusual length of the voyage. The defendant, before the registrar, admitted that there was some unreasonable delay, and that he was ready to make good any damages necessarily resulting therefrom. The facts of the case, which were not disputed, are detailed by the registrar in his report as follows:

"The *Parana* was a trading steam vessel of 1372 tons gross and 1027 net register, and she was of 180 horse power nominal, which the master stated was a small power for a vessel of her size. When she left England she was, according to the master, 'frightfully deep,' having from 1000 to 1300 tons of iron as dead weight, and she was filled up with light goods.

"She took ninety days to get to Hong Kong, and having there discharged her cargo was docked, surveyed, and repaired. She thence proceeded in ballast to Manila, where the master entered into a charter-party with Messrs. Engster and Co. to load a cargo at Manila and Ilo-Ilo, and to proceed therewith to London, passing through the Suez Canal.

"In pursuance of the charter-party she took on board some parcels of hemp and sugar at Manila, and having sailed to Ilo-Ilo she then took in further parcels of sugar, but as the charterers were not able to supply her with a full cargo it

was agreed that she should be at liberty on the homeward voyage to call in at Singapore to fill up. She left Ilo-Ilo on the 24th July 1873, but owing to the defective state of the boilers she was obliged on the 30th of the same month to put into Labuan for repairs. Thence she proceeded to Singapore, where she took in some cargo and a large quantity of coals, and having effected some further repairs to the boilers she again proceeded on her voyage. On the 18th Aug., owing to the state of the boilers, she was obliged to put into Acheen, and after effecting repairs she again proceeded. On the 1st Sept. she had to alter her course for Point de Galle, it being found that she could only carry 11lb. steam. She arrived in Point de Galle on the 4th Sept., and, having completed her repairs, she left again on the 9th. On the 1st Oct. she arrived at Acheen, where further repairs were done to her boilers, and again at Port Said, at Malta, and at Gibraltar, so that it was not until the 28th Nov. 1873, 127 days after leaving Ilo-Ilo, that she arrived in the Port of London.

"As to the lamentable state in which this vessel's boilers were there can be no two opinions. It seems that after the vessel had discharged her cargo she proceeded to Greenock, where her boilers were taken out. We have no information as to what may have been the condition of one of the boilers, as it was broken up before the surveyors saw it; but the other was examined by two practical engineers, who reported that of the eighty-three tubes of which the boiler originally consisted, one had never been used, twenty-one others had been plugged up with either iron covers or wooden plugs, so that only sixty-one tubes were at all effective. It was found also that the backs of both furnaces had been patched with large patches, and that there were traces of considerable leakage on the crowns of the furnaces. There were also numerous patches on the shell of the boiler varying from 4ft. by 2ft. 3in. wide to 12in. long by 8in. wide. The rivets also were worn away by long use, so that they had but little hold of the plates, and some of the plates were worn away by corrosion to half their original thickness. They further said that although this boiler, when new, was constructed to bear a pressure of from 30lb. to 35lb. of steam to the square inch, they thought in that condition in which they found it she could not with safety have borne a pressure of more than 10lb. or 12lb. There is no reason to suppose that the boiler which had been broken up was in any better condition. A more lamentable state of affairs can hardly be imagined to anyone at all acquainted with the construction of steam engines. It is apparent that with engines originally of small power, with a tubular boiler, of which twenty-two out of eighty-three of the tubes were perfectly useless, of which the plates were so much worn away that they would bear only 10lb. or 12lb. instead of 30lb. to 35lb. to the square inch, and with the crowns of the furnaces leaking badly, the available power to contend with the S. W. monsoon must have been very small, and it can therefore hardly be wondered at that the vessel made on an average but four knots an hour, and that she had frequently to put into port for repairs, and to replenish her stock of coals."

The reference was concluded on the 27th Jan.,

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the 14th Feb., and 13th April 1876. Evidence was taken both by affidavit and by oral examination, and the registrar, after hearing counsel on both sides, made a report and gave his reasons, saying, *inter alia*, "that the plaintiff would have had no reasonable grounds of complaint, if the voyage from Ilo-Ilo to London had lasted ninety days. But it did, as a fact, take 127 days. We think, therefore, that the ship's owner is, by his admission, liable for the excess of thirty-seven days, during which the voyage lasted, beyond what may be called a not unreasonable time. Taking thirty-seven days then as the measure of the unreasonable delay in the voyage, let us consider what damages may be said to have resulted directly from this delay." He then proceeded to discuss the three different items of the claim, and allowed, first, for extra loss occasioned by drainage of the sugar during the thirty-seven days $1\frac{1}{2}$ per cent. in the original shipment of 500 tons equal to $7\frac{1}{2}$ tons at 12*l.* 10*s.* per ton or 93*l.* 15*s.*; secondly, for interest 5 per cent. for thirty-seven days on the invoice value of the cargoes, 19,959*l.* 9*s.* 11*d.* or 101*l.* 3*s.* 3*d.*

On the third point the registrar's report is as follows:

"There remains the last, and by far the most important question, namely, whether the plaintiff is entitled to any compensation for the alleged loss of market by reason of the non-delivery of the cargo within a 'reasonable' time. The question does not arise on the sugar, in regard to which no claim has been made for loss of market, but on the hemp only."

It was said by the plaintiff that, had the vessel arrived by the middle of October, or even by the 22nd or 23rd Oct., which would be about ninety days after leaving Ilo-Ilo, the hemp could have been sold for about 41*l.* 10*s.* per ton, but that not having arrived until the 28th Nov., it was impossible to get the hemp landed and placed on the market before the middle of December, and that it was then impossible to get within 20*s.* a ton of that price. It was said that the owner continued to hold the hemp in hopes that the market would rally, but that it never did, and that ultimately he had to sell it at a considerable loss. He claimed, not, indeed, the difference between the price at which he might have sold it, had it arrived in October, and the price at which he ultimately did sell it; but the difference between the former, and the price which he might have got for it, immediately after it had been delivered. It was shown that during November and in the first week of December there was a fair demand for hemp at 41*l.* 10*s.* per ton, and that price might have been obtained for it. It was also shown that it would have taken about three weeks after the vessel's arrival to have got the hemp sampled and put upon the market; that by that time there was no demand for it, and that, although the prices current had not altered much, a seller forcing any quantity upon the market would have had to submit to a reduction of at least 20*s.* in the ton. It was proved, also, that after Christmas the market continued to fall, owing to large shipments of hemp brought to Liverpool, so that, as one of the brokers observed, the market was knocked all to pieces.

"Assuming, then, that by the delay in the delivery there was a loss of market, the question arises whether this is an item which can be properly allowed in a claim of this description;

whether, in fact, a claim for loss of market can be allowed on account of an unreasonable delay in the delivery of the goods. The case must have frequently arisen in this court, as, for instance, when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs; and yet I think that I may say with certainty that no such claim has ever yet been preferred in this court, certainly not during the time I have held this office, now nearly twenty-three years. It may be, however, that we have hitherto proceeded on a wrong principle, and as the point has been very strongly urged in this case by a counsel who is not wont to maintain an untenable position, I propose to examine carefully all the authorities which have been cited in support of that position, as well as the grounds upon which it has hitherto been thought that a claim for loss of market cannot properly be allowed."

The Registrar then referred to and discussed the following cases:

The St. Cloud, Br. & Lush. p. 4;
Josling v. Irvine, 6 Hurl. & Nor. 512;
Collard v. South-Eastern Railway Company, 7 Hurl. & Nor. 79;
Fraser and others v. Telegraph Construction and Maintenance Company, L. Rep. 7 Q.B. 566;
Hadley v. Bazendale, 9 Exch. 341;
Smeed v. Foord, 1 Ell. & Ell. 602;
Horne v. Midland Railway Company, L. Rep. 8, C.P. 131;

and concluded his report as follows:

"It seems to me that the cases of *Hadley v. Bazendale*, *Smeed v. Foord*, and *Irvine and another v. The Midland Railway Company* (*ubi sup.*), are conclusive on the point; and that the practice of the Court of Admiralty, in refusing to entertain any claim for loss of market in such cases, is in entire accordance with that of the courts of common law, and I shall refuse to alter that practice until I am corrected by superior authority. I may add that the merchants by whom I am assisted, entirely concur with me in the conclusions to which I have come."

As to the costs of the reference, the report was as follows:

"The general rule in collision cases is that where more than one-third is taken off, the claimant shall pay the costs of the reference. But this rule does not apply to cases of this description. The defendant in the first instance denied altogether his liability, and set up several pleas, which he afterwards withdrew; the condition of the boilers of his vessel was most discreditable, and he entailed heavy losses on the plaintiff; he has, moreover, made no tender on account of the sums which the latter was undoubtedly entitled to recover. On the other hand, the plaintiff has failed in the main issue, the question of loss of market. On the whole, we think that justice will be done by leaving each party to pay his own costs of the reference, but the reference fees will have to be paid by them in moieties."

A motion was heard in court in objection to the report of the Registrar, "to modify and alter the same so far as it disallows the sum of 289*l.* 5*s.* 9*d.*, claimed as damages for the defendant's breach of contract in respect of the depreciation in value by loss of market on 2403 bales of hemp, weighing 5785 cwt., forming part of the cargo of the above-named steamship,

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because the disallowance of such damages is based upon a misapprehension of law, and is erroneous, and the plaintiff is legally entitled upon the facts of the case appearing by the Registrar's report to recover such damages, and also to alter the said report so far as it orders the plaintiff to bear his own costs of the reference, and to make such order as shall be meet and right in and about the premises, and to condemn the defendant in the costs of this motion."

Clarkson, in support of motion.—It is admitted that the speed of the *Parana* was defective, and the plaintiff claims 285*l.* 5*s.* 9*d.* for the loss of market. The Registrar has allowed nothing in respect of this claim. The only cases in which loss of market has been disallowed as the measure of damages, are those in which it has been occasioned by a special sub-contract, unknown, and not in the consideration of both parties: In *Smeed v. Foord* (1 Ell. & Ell. 602) the wheat claimed for was not the subject matter of the contract, which was for the delivery of thrashing machines, not to deliver wheat; here the subject matter of the contract was the carriage and delivery of the hemp; the plaintiff could have recovered on the thrashing machines if he had procured others at a higher price. The Registrar relied also on *Hadley v. Baxendale* (9 Exch. 341), but that case is in my favour, for the fluctuation of the market is a matter in the knowledge of both parties. [Sir R. PHILLIMORE.—There are two criteria (1) Was it in contemplation of the parties? (2) Was it the natural result of the negligent delay of the defendant?] *Fraser v. Telegraph Construction and Maintenance Company* (L. Rep. 7 Q.B. 566) lays down the law under which damages of this description may be recovered. The breach of contract there was in not supplying a vessel whose principal moving power was steam; here it is for delay in delivery of goods occasioned by defective power of ship, and the loss occasioned thereby is the difference of price caused by the delay. *Horne v. Midland Railway Company* (L. Rep. 8 C. P. 131) is really in favour of the plaintiff; the reason that the extra sum there claimed for loss upon the contract by delay could not be recovered was because the defendants had not notice of any special sub-contract which would increase the ordinary loss caused by non-delivery in time. In *Borries v. Hutchinson* (34 L. J. 169, C. P.) the question was what was the proper measure of damages where, from the delay of the carrier, the plaintiff lost his market altogether, and there, also, Willes, J. says, "In ordinary cases, the measure of damages is the difference between the contract price and the market price." In *O'Hanlan v. The Great-Western Railway Company* (34 L. J. 154, Q. B.) the general principle is the same, and in *The Great-Western Railway Company v. Redmayne* (L. Rep. 1 C. P. 329) the court held that the market value of the goods at the time was the true test of the measure of damages. In *Collard v. The South-Eastern Railway Company* (4 L. T. Rep. N. S. 410; 7 H. & N. 79) also, the plaintiff, a hopgrower, was held entitled to recover the difference between the market value and the contract price.

Walkin Williams, Q.C. and *G. Bruce*, in support of the report.—The principle adopted by the Registrar is the only correct one. The shipowner cannot be taken to know the pur-

pose for which the cargo is intended, and ought not to be involved in questions concerning the rise and fall of the market. The only questions are, whether the fall of market occasioning the loss was in the contemplation of the parties when the contract was made, and whether the goods have depreciated intrinsically. *Hadley v. Baxendale* (9 Exch. 341) settled, at all events, that complete compensation for such a loss could not be claimed. There must also be some general principle applicable to all cases, and that the Registrar has correctly stated in his report. *Cory v. Thames Iron Works and Shipbuilding Company* (17 L. T. Rep. N. S. 495; L. Rep. 3 Q. B. 181), is not a question between carrier and sender, it is true, but I especially rely on the judgment delivered therein by the Lord Chief Justice. It is necessary to look at the nature of the contract and the circumstances under which it was made, to see if the damage resulting was such as was in contemplation of both parties. Here it was not in contemplation of shipowner that loss of market would ensue; some loss was contemplated, certainly, and that is fairly represented by the five per cent. on the value of the cargo allowed by Registrar. *The British Columbia, &c., Saw Mills Company (Limited) v. Nettleship* (L. Rep. 3 C. P. 499), is directly in point; there the non-delivery of a certain piece of machinery stopped the whole work, but the defendant was held not to be liable for the loss arising therefrom, but only of the price of replacing the goods which he had lost, and interest at the rate of five per cent. for the delay occasioned by his negligence, and this is the true principle to allow a rough mercantile profit. Any other rule would lead to complications practically insoluble by the court. The actual amount of damage cannot be looked to, as it is not and cannot be in the contemplation of the parties. The cases cited for the plaintiffs are all cases between vendor and purchaser, and therefore do not apply. The plaintiff's contention is opposed to the universal practice of this court and to the analogy of insurance law, by which underwriters in goods are never made responsible for loss of market. The plaintiff cannot recover such damages as these without notice to shipowner that he wanted the goods to be delivered for a particular market:

Horne v. Midland Railway Company, L. Rep. 8 C. P. 131;

Wilson v. Lancashire and Yorkshire Railway Company, 30 L. J. 232, C. P.; 9 C. B., N. S., 632;

O'Hanlon v. Great Western Railway Company, 34 L. J. 154, C. P.;

Borries v. Hutchinson, 34 L. J. 169, C. P.;

Great Western Railway Company v. Redmayne, L. Rep. 1 C. P. 329;

Collard v. South-Eastern Railway Company, 7 H. & N. 79; 4 L. T. Rep. N. S. 410;

Smeed v. Foord, 1 Ell. & Ell. 602.

Clarkson in reply.

In addition to the cases mentioned above, the following authorities were cited in the course of the argument.

Jackson v. Union Marine Insurance Company, L. Rep. 10 C. P. 125;

The Lucy, 3 C. Rob. 208;

Phillimore's *International Law*, vol. 3, p. 699, 2nd edit.;

Smith's *Leading Cases*, vol 2, *Vicar v. Wilcox*, 6th edit., p. 503.

Cur. adv. vult.

June 13.—Sir R. PHILLIMORE.—I have taken time

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to consider my judgment in this case, partly on account of the great number of reported cases to which I was referred, but more especially because, unfortunately, I am unable to agree with the very elaborate and carefully reasoned opinion of the Registrar from whose ruling this appeal has been prosecuted. It is admitted in this case that the carrier must make some compensation to the merchant for the loss sustained by him in consequence of the delay in the execution of the contract; the question is, what are to be the items of that compensation. The registrar has found that these items are 93*l.* 15*s.* for deterioration in quality of a portion of the cargo and 101*l.* 3*s.* 3*d.* for loss of the interest, during the detention in consequence of the delay, at five per cent. on the value of the cargo. The merchant also claims, in addition to these items, the ascertained difference between the market value of the goods at the time when they might have been sold, if the carrier had not unreasonably delayed the fulfilment of his contract, and their value at the time when they did actually arrive, and the justice of this claim is the sole subject of this appeal. The law applicable to this question has apparently been difficult to ascertain and the application of it when ascertained more difficult. The general rule of law is stated with his usual clearness by M. Massé in the last edition of his *Droit Commercial*, vol. 3, p. 239, edit. 2, Lib. 5, Tit. I. Ch. 3, sect. iv., § 1. The principle of this rule is in different words expressed in the English and American judgments. In accordance with this principle the carrier has been held liable to pay damages on the hypothesis that he contemplated payment of a certain kind of compensation in the event of his not executing, or his unreasonably delaying to execute his part of the contract. Another form of stating that proposition is to be found in the judgment of the Lord Chief Baron in the Exchequer Chamber in *Horne v. Midland Railway Company (Limited)* (L. Rep. 8 C. P. 135) decided in the year 1873. "The principle clearly to be declared for all the authorities is that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable results of the breach of it." The last English judgment which I have been able to find is one delivered by the Lord Chief Justice in 1876, in the case of *Sampson v. The London and North-Western Railway Company* (L. Rep. 1 Q. B. Div. 274). It is the only English case, I think, for the knowledge of which I am not indebted to the industry of counsel. "The law," the Lord Chief Justice says at p. 277, "as it is to be found in the reported cases, has fluctuated, but the principle is now settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the future of that object." The latest American decision, I believe, is that of *Ward v. The New York Central Railroad Company* (47 N. Y. 29), it is thus stated in a note to the last

edition of Sedgwick on Damages (p. 430): "It is here held, that where a carrier from mere negligence, or plain violation of duty, omits to transport merchandise within a reasonable time, and its market value falls in the meantime, the true rule of damages is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery, the court observing that sagacious men rely upon their own ability to judge of the market in undertaking large commercial projects, and according to their views of the market send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit. The court further remarked, had the goods been injured by reason of improper exposure by the carrier, and thus become depreciated in their market value, the carrier would be liable for the loss. Here his negligent delay caused the loss; the injury also is natural and direct; arriving later by the carrier's negligence, these goods, measured by the only standard that regulates value, were not worth as much as at the time when they should have arrived." I do not refer to other cases besides those two, but I have read them all with care; most of them will be found in the notes to Mr. Sedgwick's valuable work on the Measure of Damages (6th edit., chap. 3, p. 81; chap. 13, p. 430), to which I have already referred. The result of the reported decisions is, that this merchant may claim to be indemnified for the actual loss in the value of the goods shipped (*perte qu'il a fait*)—*damnum emergens*, and from loss of profit, gain (*dont il a été privé*)—*lucrum cessans*—when such loss is the direct consequence of the carrier's default. Why should not the ascertained difference between the market price, when the goods might have been sold had there been no delay, and the market price which they would fetch after the delay, be a reasonable measure of the loss of the merchant's profits; the depreciation is the direct consequence of the carrier's default; in other words, he must be taken to have known or contemplated that the merchant desired a safe and quick transport of his marketable goods to their intended market. This is the ordinary knowledge with which a carrier receives goods, and it is on this principle, as it appears to me, that in *Horne v. The Midland Railway Company (Limited)* (L. Rep. 8 C. P. 135), already cited, the difference between two market prices was considered to be the proper measure of the damages. The case before me is not one of a special private speculation or particular mercantile operation in which delay may inflict as much injury on the shipper with respect to the market value of the goods as their deterioration from want of requisite appliances or improper exposure during the passage. Upon the same principle the carrier is responsible for both injuries, the depreciation in the market value of these goods has been in my opinion the natural consequence of the carrier's unreasonable delay—*Propter rem ipsam non habitam*, as the civilians say—and for reasons already alleged, I think the shipper is entitled to have included in his damages the difference between the market price at the time when the goods did arrive and at the time when they ought to have arrived. I must therefore direct that the registrar's report be varied by adding to the damages allowed the sum of 289*l.* 5*s.* 9*d.*, which represents the loss of market. I think that the

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justice of the case demands that the plaintiffs have their costs of the appeal and of the reference.

Solicitors for plaintiffs, *Hillyer, Fenwick, and Stibbard*.

Solicitors for defendants, *Parker, Watney, and Clarke*.

Tuesday May 30.

THE SISTERS.(a)

Limitation of liability—Practice.

A vessel under arrest in a cause of damage was liberated on payment into court of the amount to which her liability was limited under 25 & 26 Vict. c. 63, s. 54, together with a sum to cover costs and interest, and subsequently she was found solely to blame for the collision. The owners, who had instituted a suit for limitation of liability moved for a decree in that suit, and that the money in court should be transferred to the credit of that suit.

The court granted the prayer of the first part of the motion but not of the latter, holding it to be not necessary.

On the 15th Oct. 1874, the *Sisters*, a barge, in company with two other barges, the *Volunteer* and the *Alfreda*, were cruising up Halfway Reach in the river Thames. A steamer called the *Thames* was going down the river, and after just avoiding doing serious damage to the *Sisters*, ran into and sank the other two barges with their cargoes, and caused the death by drowning of two of the three persons on board the *Alfreda*. The *Volunteer* instituted an action against the *Thames*, which was dismissed on the ground that the *Thames* had been obliged to adopt the course she had done to avoid the imminent danger of collision with the *Sisters*, which was occasioned by the improper navigation of that vessel. The *Alfreda* then, on the 2nd Feb. 1875, instituted an action against the *Sisters* and arrested her; the owners of the *Sisters* on the 22nd Feb. 1875 instituted a cause of limitation of liability, and on the 2nd March 1875 moved the court to release that vessel on payment into court of 960*l.* 7*s.*, that being the amount at 15*l.* per ton, for which the owners were liable under 25 & 26 Vict. c. 63, s. 54, and the court, after hearing counsel, permitted the release on that sum and a further sum of 329*l.* 8*s.* to cover interest and costs, being paid into court, and the *Sisters* was released accordingly. On the hearing of the cause of damage the *Sisters* was found alone to blame, and that decision was confirmed on appeal (34 L. T. Rep. N. S. 338; 3 Asp. Mar. Law Cas. 122).

F. W. Raikes, on behalf of the plaintiffs in the limitation of liability suit, the owners of the *Sisters*, now moved the court for a decree in that suit limiting the plaintiff's liability to 15*l.* per ton and the costs incurred in the causes of damage and limitation of liability, for a stay of of proceedings in the cause of damage, and that the sums paid into court in that suit should be transferred to the credit of the suit for limitation of liability. He pointed out that as the jurisdiction in cases of limitation of liability was originally vested in the Court of Chancery, by the Merchant Shipping Act 1854, § 514, and was only transferred to the Court of Admiralty in certain cases, by the Admiralty Court Act 1861, § 13, the pay-

(a) Reported by F. W. RAIKES, Esq., Barrister-at-Law.

ments out of court must be in the limitation of liability suit and not in the cause of damage, and that for that purpose the money in court should be transferred to that suit.

E. C. Clarkson, for the defendants in the limitation of liability suit only required that whatever cause the court pursued with reference to the money in court, that the defendants' costs in the limitation of liability suit which had not yet been taxed should be secured.

Sir R. PHILLIMORE, after consultation with the registrar as to the practice, made the decree prayed for in the limitation of liability suit, the plaintiffs' solicitors undertaking that the costs in that suit should be paid, and ordered a stay of all further proceedings in the damage suit, but as to latter part of the motion made no order, on the ground that whatever might have been requisite had the cause for limitation of liability been in another division of the high court, the money being in the division it was immaterial which suit it stood to the credit of.

Solicitors for the plaintiffs, *Deacon, Son, and Rogers*.

Solicitors for the defendants, *Ingledeu, Ince, and Greening*.

NOTE.—Since the decision in *The Clutha* (inf.), it appears that separate suits for limitation of liability are no longer necessary where the original suit of damage is in the Admiralty Division, as the question can be raised by way of counter-claim, and money paid into court would stand to the credit of the joint suit.

Tuesday, Aug. 1.

THE CLUTHA.(a)

Pleadings—Limitation of liability—Counter claim.

*Under the system of pleading established by the Judicature Act and rules, the defendant, where he admits his liability for the damage done by a collision, but claims to have his liability limited to 8*l.* or 15*l.* per ton of his vessel under the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), s. 54, can so claim by counter claim instead of by instituting a separate suit for limitation of liability:*

Semble, when liability is not admitted a similar course may be adopted in the alternative.

In this case actions were commenced against the *Clutha* and her owners by the owners of the Russian barque *Tovernus*, and of a portion of the cargo laden on board her, for damages sustained by a collision between the vessels whilst the *Tovernus* was at anchor in the river Clyde on the 23rd Dec. 1875. The *Tovernus* was sunk by the collision, and three of her crew drowned.

These actions were, by order of the court, consolidated and statement of claim in the consolidated action delivered on the 26th June 1876.

On the 14th July 1876, the defendants delivered a statement of defence and counter claim, which so far as material was as follows:

Between Richard Janssen, of Parga, and others, the owners of the Russian barque *Tovernus* (plaintiffs), and the owners of the steamship or vessel *Clutha* (defendants) (by original action), and between William Stowell and others, the owners of the said steamship or vessel *Clutha* (plaintiffs) and Richard Janssen, of Parga and others, the owners of the Russian barque *Tovernus* and

(a) Reported by F. W. RAIKES, Esq., Barrister-at-Law.

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the owners of the cargo lately laden on board the said barque, and the survivors of her crew, and the legal personal representatives of such of her crew as are deceased, and against all and every person or persons whomsoever claiming or being entitled to claim in respect of damage or loss to the said barque *Tovernus* or her boats, or to any goods, merchandise, or other things on board of her at the time of the collision, in the statement of claim mentioned, or in respect of any loss of life or personal injury occasioned by the said collision . . . (defendants) (by counter claim).

Statement of defence and counter claim.

1. The defendants in the said original action admit the statements contained in the statement of claim, and that the said collision was occasioned by improper navigation of the said steamship or vessel *Clutha*, and by way of counter claim the said defendants may as follows :

2. The said defendants were before, and at the time of the said collision, the owners of the said steamship *Clutha*, which is a duly registered British steamship.

3. On the 27th June 1876, another action, numbered 1876 O No. 330, was commenced against the said steamship *Clutha* by the said owners of cargo, laden on board the said barque and in the statement of claim mentioned, to recover damages for the loss of the said cargo in the said collision, and such action has by order of the court been consolidated herewith.

4. No other action or suit save as aforesaid has yet been brought against the said defendants or the said steamship *Clutha* or her freight in respect of the said collision, but the defendants apprehend other claims in respect of a damage to goods, merchandise, and other things on board the said barque *Tovernus*, and also in respect of loss of life and personal injury caused to persons on board of and carried in the said barque *Tovernus* at the time of the said collision.

5. The said collision took place without the actual fault or privity of the said defendants, or either or any of them, and the said defendants submit that they are entitled to the benefit of the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Acts Amendment Act 1862, for limiting their liability in respect of the said collision.

6. The gross tonnage of the said steamship *Clutha*, without deduction on account of the engine room, is 514 ⁷⁰/₁₀₀ tons.

7. The said defendants are willing, and they hereby offer to pay in such manner as the court shall direct, the amount to which they are liable in respect of the said collision, regard being had to the provisions of the Merchant Shipping Act 1854, and the Merchant Shipping Acts Amendment Acts 1862.

The said defendants claim

1. A declaration that the defendants are not answerable in respect of loss of life or personal injury caused by the said collision, together with loss or damage to ship's boats, goods, merchandise, or other things to an aggregate amount exceeding 15*l.* for each ton of the gross tonnage of the said steamship *Clutha*, without deduction on account of the engine room, nor in respect of loss or damage to ship's goods, merchandise, or other things on board the said barque *Tovernus*, caused by the said collision to an aggregate amount exceeding 8*l.* for each ton of the gross tonnage of the said steamship *Clutha* without deduction on account of the engine room.

2. That the said defendants may be at liberty to give bail for such an aggregate amount and for such interest as the court may think fit to award.

3. That upon the filing of the bail bond all further proceedings in the said actions, numbered 1875 J. No. 106, and 1876 O, No. 330 respectively, may be stayed, and the respective plaintiffs in the said actions, and all and every other person and persons claiming in respect of damage or loss to the said barque *Tovernus*, or to her boats, or to any goods, merchandise, or other things on board her, or in respect of loss of life or personal injury occasioned by the said collision, may be restrained from bringing any other action or actions in respect of these said losses or injuries.

4. That all proper directions may be given by the court for ascertaining the persons who have any just claim in respect of loss or damage to ships, goods, merchandise, and other things caused by the said collision, and in respect of loss of life and personal injury caused by the said collision, and for the exclusion of any claimants who shall not come in within a certain time to be fixed for that purpose.

5. That the amount of the said defendant's liability may be rateably distributed among the several persons who may establish a claim thereto.

6. Such further and other relief as the nature of the case may require.

On the 19th July the plaintiffs replied by not admitting the truth of the 5th and 6th paragraphs of the counter-claim, and on the 1st Aug. 1876 the case came on for hearing.

Clarkeon, for owners of barque *Tovernus*.

Phillimore, for owners of part of cargo.

Aspinall for defendants, mentioned the matter to the court, as the pleadings were new to the practice of the court, but he submitted that under the Judicature Act and rules the defendant was entitled to raise the question of the limitation of his liability by counter-claim to the original action, instead of instituting a special suit for the purpose, the affidavit and copy of register usual in such suits being filed in this. He referred to Order XIX., rule 9, Order XXII., rule 5, and Supreme Court of Judicature Act 1873, sect. 24, sub-sects. 4, 6, 7; Merchant Shipping Act 1854, sect. 514; Common Law Procedure Act 1860 (23 & 24 Vict. ch. 126, sect. 35), and the Admiralty Court Act 1862 (24 Vict. c. 10, s. 13).

Clarkeon and *Phillimore* argued that it was now the proper course to pursue.

Sir R. PHILLIMORE said that doubtless that course could now be pursued, and that under the circumstances it was the proper one to adopt, and ordered all proceedings in the actions to be stayed except for taxation and payment of costs, 8*l.* per ton, on the gross tonnage of the *Clutha*, to be paid into court, and bail to be given for the remainder up to 15*l.* per ton on the gross tonnage of the *Clutha*, with costs and interest.

Solicitor for the plaintiffs, *Thomas Cooper*.

Solicitors for the owner of the cargo, *Stokes, Saunders, and Stokes*.

Solicitors for defendants, *Pritchard and Sons*.

Judicial Committee of the Privy Council.

March 14 and 21, May 29, and July 11.

(Present: the Right Hons. the LORD CHANCELLOR (Cairns), LORD HATHERLEY, LORD PENZANCE, SIR BARNES PEACOCK, and SIR MONTAGUE SMITH.)

MARSTERS v. DURST.(a)

ON APPEAL FROM THE COURT OF ARCHES.

Ecclesiastical law — Ornaments of the church — Moveable cross — Retable.

A moveable cross of wood placed on a "retable," or wooden ledge, fixed to the wall at the back of the Communion Table, and close above it, so as to appear at a short distance to be one entire table, with the intention that it should remain there permanently, is forbidden by law.

Judgment of the court below reversed.

Westerton v. Liddell (Moore's Special Report) and *Liddell v. Beal* (14 Moo. P. C. 1; 3 L. T. Rep.

N. S. 218) explained and followed.

THE appellant in this case, Saddleton Marsters, was

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the parishioners' churchwarden of the parish of St. Margaret's, in the borough of King's Lynn, in the diocese of Norwich.

The respondent, the Rev. John Durst, was the vicar of the parish.

On or about the 27th May 1875, the respondent of his own motion, without any faculty, and without the consent of the appellant, placed, or caused to be placed on a retable immediately behind and above the Communion Table of the church, a moveable cross made of wood, which was so placed there as to appear to form one of the ornaments of the Communion Table.

The appellant, in his capacity of churchwarden, subsequently removed the cross as having been placed on the retable without lawful authority, and as not being one of the church ornaments prescribed or allowed by law.

The respondent thereupon instituted criminal proceedings in the Court of Arches against the appellant, and filed articles against him for having so removed the cross, and prayed not only that he should be admonished for removing the cross, but further that he should be admonished to restore the same to the retable.

The appellant filed a responsive allegation, wherein he admitted that he had removed the said cross, and in so far as he might have offended against ecclesiastical law therein submitted to the judgment of the court, but prayed the court not to require him to restore it to its former position, alleging in Article 4th as follows:

"That the defendant objects to an order being made as prayed by the promoter for the restoration of the said cross so removed by the defendant as in the fourth article alleged on the following grounds:

"(1) That the said cross, which is removed and made of wood, was on or about the 27th May 1875 introduced into the parish church by the promoter, and placed by him or under his authority, where it remained until removed by the defendant, on a shelf or retable at the back of and immediately above the Communion Table in the said church, without a faculty or other lawful authority.

"(2) That the said moveable wooden cross, before the same was removed by the defendant, was placed on the said shelf or retable, which is fixed immediately behind and above the Communion Table of the said church, and was so placed as to appear to form one of the ornaments of the Communion Table that such moveable cross, by reason of its not being one of the ornaments of the church prescribed in the rubrics or subservient in or subsidiary to the performance of the services of the church, is not a lawful church ornament, and cannot lawfully be replaced on the said retable.

"(3) That the restoration of the said moveable wooden cross on the retable would offend the conscientious feelings of a large number of the parishioners of the said parish who are members of the old Church of England."

The respondent objected to the admission of the 4th and 6th Articles of the Responsive Allegation.

Sir Robert Phillimore, the late Dean of the Arches, on the 20th Oct. 1875, by his interlocutory order or decree, rejected the 4th and 6th Articles of the Responsive Allegation with costs (L. Rep. 1 P. & D. 123).

The case came on for hearing in March last, but, as it appeared that there was no dispute as to the facts, their Lordships ordered them to be stated in the form of a special case.

May 29.—*J. F. Stephen, Q.C.* and *Dr. Tristram*, for the appellant, contended that this was an attempt to evade the law as laid down in the cases of *Westerton v. Liddell* (Moore's Spec. Rep.) and *Liddell v. Beal* (3 L. T. Rep. N. S. 218; 14 Moo. P. C. 1). The cross was not a mere architectural decoration, as it was moveable, and was therefore illegal, as not being an "ornament" prescribed by the rubric, or subservient in, or subsidiary to the performance of the services of the church:

Martin v. Mackonochie, 19 L. T. Rep. N. S. 508; L. Rep. 2 P. C. 365;

Elphinstone v. Purchas, 23 L. T. Rep. N. S. 446; L. Rep. 3 A. & E. 66.

A. J. Stephens, Q.C. and *W. G. F. Phillimore*, for the respondent, argued that to pronounce this cross illegal would be to interfere with the main principles of the decisions in *Westerton v. Liddell* and *Liddell v. Beal*, which were practically indistinguishable from this case. A distinction is to be drawn between things used in the services and things "inert," or not actively used. The "ornaments rubric" does not apply to furniture such as this cross, its legality consists in its inertness. They also referred to *Phillipotts v. Boyd* (32 L. T. Rep. N. S. 73; L. Rep. 6 P. C. 435), and the case of the Rev. Parkes Smith, decided by the Bishop of Exeter in 1847, and reported in *Stephen's Laws of the Clergy*, vol. 2, p. 1083.

J. F. Stephen, Q.C. in reply.

Cur. adv. vult.

July 11.—Their LORDSHIPS gave judgment as follows: This is a criminal suit promoted in the Court of Arches against the appellant, who is one of the churchwardens of the parish of St. Margaret, in the borough of King's Lynn, for having removed from the church, without a faculty, a certain moveable cross of wood which had been placed on a ledge called a "retable," at the back of and above the Communion Table. The respondent is the vicar of the parish, and the cross was placed there by his authority, but without the sanction of a faculty. In the court below exception was taken to certain passages in the responsive allegation filed by the appellant, and they were ordered to be struck out. The present appeal is in form an appeal from that order, but on the case being opened it appeared to the parties that, as the facts were not really in dispute, it would save both expense and delay if they agreed to a statement of fact in the form of a special case, and took the decision of the Court of Appeal upon the merits of the case. Their Lordships consented to that course being pursued, and the case has been fully argued upon the special case so stated. The question which their Lordships are thus called upon to decide is the single one of the legality of a cross of this description in the place which it occupied when the appellant removed it from the church. The special case states that the cross is above three feet in height; that it is a moveable one; that it was placed by the respondent's orders on a structure of wood called a "retable," consisting of a wooden ledge at the back of the Communion Table, having a front of wood about eight inches deep, coming down to within five-sixteenths of an inch of the surface of the Communion Table, and that this structure is fixed to

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the wall by nails. A photograph is appended to the special case, from which, and the statements in this case, it is plain that the Communion Table and the "retable" would at a very short distance bear the appearance of one entire table or structure. It is further stated that the cross was placed on this ledge with "the intention that it should remain there permanently." On the part of the respondent it was contended that the cross was a moveable one, and constituted part of the church furniture; that it was not one of the "ornamental instruments" used in the church services; and that it fell within the category of things "inert," which were mere architectural decorations. On the part of the appellant it was contended, amongst other things, that the case fell within the principle of the well-known decision in the cases of *Liddell v. Westerton* (Moore's Special Rep.) and *Liddell v. Beal* (14 Moo. P. C. 1); and as their Lordships are of that opinion, it will not be necessary to go again into the subject at large, or do more on the present occasion than point out what it was that those cases really decided, and give reasons for the conclusion that the present case cannot in principle be distinguished from them. The two cases in question concerned the church of St. Paul and the chapel of St. Barnabas. In both instances there had been placed on the Communion Table a cross, and in both instances these crosses were held to be illegal. It is important, therefore, to consider what the character of these crosses was, and on what grounds they were ordered to be removed. In the Chapel of Ease of St. Barnabas the things complained of were first a rood-screen and a cross thereon, which cross was held to be lawful; and secondly, "a stone table or altar with a metal cross attached thereto," and this cross was held to be unlawful. The cross complained of in the Church of St. Paul was attached to the Communion Table, and is thus described in the judgment at page 2:—"Their Lordships understand that this table, described as an altar or Communion Table, is made of wood, and is not attached to the platform, but merely stands upon it; that it is placed at the east end of the church, or the chancel, according to the ordinary usage as to Communion Tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the table; that upon this ledge, which is termed 'super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooden cross, which is let into and fixed in the super-altare so as to form part of what is thus described as the altar or communion table." It will be observed that this description closely tallies with the description as given in the special case of the Communion Table in the present case. There is here, as there, a moveable table, and a ledge of wood raised above the table at the back of it, and on this ledge two candlesticks, and a cross between them. The differences are that in St. Paul's Church the ledge of wood was called a "super-altare," while in this case it is called a "retable;" in St. Paul's Church the ledge stood upon the table, while in this case it is fixed to the wall and does not quite touch the table, being separated by about a quarter of an inch from it; and finally, that in St. Paul's Church the cross was "let into and fixed" in the ledge, while in the ledge, while in the present case it was not fixed, but placed on the ledge, "with the intention that it

should remain there permanently." It is upon these differences of structure that the respondent relies, and he points particular attention to a passage in the judgment relating to the cross in St. Paul's Church, which is as follows: "Next with respect to the wooden cross attached to the Communion Table at St. Paul's. Their Lordships have already declared their opinion that the Communion Table intended by the canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which or around which the communicants might be placed in order to partake of the Lord's Supper; and the question is whether the existence of a cross attached to the table is consistent either with the spirit or with the letter of those regulations. Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the decree complained of should be affirmed." It is argued by the respondent that their Lordships must have intended to have condemned only crosses which were "fixed" to a ledge standing on the Communion Table or to the Communion Table itself, and that the two circumstances in the present case, of the ledge being a quarter of an inch above the table, and the cross not fixed in the ledge but moveable, are sufficient to take it out of the principle of that judgment. Their Lordships are unable to accept or approve so narrow and limited a view of the conclusion arrived at in those important cases. It is hardly to be conceived that a distinction should have been intended to be drawn between a cross "attached" to the table (or the ledge above the table) and a cross occupying a "permanent" position upon it; and still less that the lawfulness or unlawfulness of the cross should be declared to reside in such a distinction. Upon such a view of the law further refinements would be inevitable; for, on the one hand, a cross might be "let into and fixed" in the "retable" in such a manner as to be easily removed if and when desired, and therefore practically moveable; and, on the other hand, it might be ponderous, not easily moved, and intended to remain permanently in its place, and yet not actually "fixed" in the sense of being fastened to the ledge or table on which it stands. To hold that such refined differences as these constitute the distinction between what is lawful and what forbidden by the law would be to give every importance to matters which are trivial and incidental, to the exclusion of those which are substantial and of serious import. To any stranger entering the church, the present structure is not perceptibly different from that which was presented to the eye in the Church of St. Paul. The flat table, the narrow ledge rising above it, the candlestick at either end of this ledge, and the cross in the middle, constitute the apparent structure in both cases. It would be only by a minute inspection, instituted close at hand, that any difference would be revealed between them. For those who attend the services in this church, therefore, these differences do not practically exist, and whatever objection attended the Communion Table with its cross in the case of St. Paul's Church is equally present here. When the judgment in the above cases is carefully considered, it is very apparent what that objection was; and why the crosses on the altar or the Communion Table in both cases were declared unlawful. Speaking of the

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altar in St. Barnabas, their Lordships said, "the question was, whether the structure was a Communion Table within the meaning of the law," and with respect to St. Paul's, "whether the existence of a cross attached to the table is consistent either with the letter or the spirit" of the regulations made by law. To answer these questions their Lordships inquired at length into the character and appearance of the Roman Catholic altar as it existed before the Reformation—the doctrines respecting the Holy Communion which that altar was designed to subserve, and to which it was intended to conform—the change in these doctrines which was effected by the Reformation, and the consequent substitution of the plain flat moveable table of wood for the fixed altar with its super-altare, its crucifix, and candlesticks at either end. It was upon a careful review of these facts and considerations, and not upon any refined distinction as to the mode in which the cross was connected with the table, that their Lordships, construing the legal regulations bearing on the subject; came to the conclusion that a Communion Table such as that in the Church of St. Paul, was not warranted by those regulated by those regulations; and their decision, therefore, applies to and governs the present case, in which the structure complained of is, their Lordships think, in no substantial or essential feature distinguishable from it. Some additional light is thrown on the meaning and intention of the judgment above discussed by the subsequent proceedings in one of the cases (*Liddell v. Beal*) to which that judgment gave rise. It was thought by Mr. Beal that the monition of the court for the removal of the cross in the Chapel of St. Barnabas had not been complied with by removing the cross from the altar and placing it on the sill of the great eastern window of the church, immediately above the Communion Table, though at a distance of five feet from it, and he instituted proceedings complaining of this as an evasion. Their Lordships thought differently, and expressed themselves as follows: "Now there was formerly a cross which stood upon the stone table, and was in a sense at least affixed to it, which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross, but the cross has been placed in another part of the church, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church . . . and does not conflict with the order contained in this monition." It will here be observed that no stress is laid on the fact that the cross was no longer alleged to be "fixed," which, if the respondent's view of the principal decision were correct, would at once have determined the question; but the retention of the cross in its new position is justified upon the ground that it was not "in any sense upon the table, nor in any sense in communication, or contact, or connection with it." It is plain, therefore, that, in the decision of the principal case, it was not to the cross itself that any objection was made, nor to the particular means or fastenings by which it was retained in its place, but to its connection with the Communion Table; and if, instead of removing the cross to a place several feet above the table, and quite unconnected with it, Mr. Liddell had simply made the cross a moveable

one, and fixed a retable to the wall (such as in the present case) for it to stand upon, it is inconsistent with the language just quoted to suppose that their Lordships would have held the monition to have been complied with. Their Lordships are therefore of opinion that the cross in the position which it occupied while in the church is forbidden by law; and they will advise her Majesty that the present snit should be dismissed; but, as both parties have been in the wrong in acting without a faculty, without costs.

Proctor for the appellant, *W. G. Jennings*, agent for *E. M. Beloe*, King's Lynn, Norfolk.

Proctor for the respondent, *G. H. Brooks*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Jan. 22, March 15 and 18.

(Before *JAMES* and *MELLISH*, L.JJ., and *BAGGALLAY*, J.A.)

Re THE HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY (LIMITED) (HEAD AND WALTER'S CLAIMS.). (a)

Company—Promoters—Fraud—Concealed agreement—Preliminary expenses—Services rendered by promoters after formation of company.

If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain, and the company proves abortive and is ordered to be wound-up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after its registration.

*The owner of certain ironworks entered into an agreement with a solicitor and an accountant that if they succeeded in forming a company for the purchase of the ironworks according to a valuation to be made by a certain engineer, he would pay them out of the purchase money 1500*l.* for promotion money, and that such payment should not prevent them obtaining from the company payment for their services in getting up and registering the company. The company was formed, but proved abortive, and the purchase was never carried out nor was the promotion money paid. The articles of association provided that the directors should pay all expenses incurred in getting up and registering the company. The agreement with the promoters was not disclosed to the subscribers of the memorandum of association who were the only shareholders in the company.*

In the winding-up of the company the promoters, who had been appointed solicitor and secretary of the company, claimed to prove for certain sums on account of their professional services both prior and subsequent to the registration of the company.

(a) Reported by *H. PRAT*, Esq., Barrister-at-Law.

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Held (reversing the decision of Hall, V.C.) that as the company had proved abortive, the fraudulent concealment of the agreement as to promotion absolved the company from any liability to pay the claims for services prior to the registration, and was also a defence in equity to the claims in respect of services rendered by the promoters subsequent to the registration of the company.

The engineer who had been employed by the promoters to make a valuation of the ironworks, and who was no party to the scheme of the promoters, claimed to prove for the costs of the valuation:

Held, that his claim was legally against the promoters, and that as the latter were not entitled to recover the expenses of promotion from the company, he had no equity to prove against the company in respect of the cost of the valuation.

THIS was an appeal from an order made by Hall, V.C., in Chambers.

The facts of the case were shortly as follows:

On the 29th April 1872, Hubert Ellis Smith, who was the owner of certain ironworks at Hereford, entered into an agreement with H. J. Walter, an accountant in London, and S. H. Head, a solicitor in London, which provided that if Walter and Head should succeed in forming a joint-stock company for the purchase of the interest of Hubert Smith in the works known as the Hereford Ironworks, as per an inventory already delivered, according to a valuation thereof to be made by Mr. Bramwell, C.E., Smith would out of the purchase money pay to Walter and Head the sum of 1500*l.* for promotion money; that Smith would forthwith execute an agreement to sell his said interest to the said company at the price aforesaid, such price to be paid as follows, namely: one half in cash, and the other half in fully paid-up shares in the said company; that if the said company was not formed and the requisite capital subscribed within three calendar months' this agreement should be void; that the said promotion money should not prevent Walter and Head obtaining from the company payment for their services in getting up and registering the company.

On the 6th May 1872, Mr. Bramwell valued the property at 14,974*l.* 10*s.*, and there was no question as to the *bona fides* of the valuation, nor was the valuer privy to the agreement of the 29th April 1872.

On the 3rd June 1872, a deed was executed between Smith and Walter, as trustee on behalf of the intended company, by which Smith agreed that he would sell the property to the company for 5000*l.* in fully paid-up shares, and, 9974*l.* 10*s.* in cash.

The company was not formed within the three months specified in the agreement, but Walter and Head ultimately succeeded in inducing seven gentlemen, from whom the agreement of the 29th April 1872 was kept concealed, to sign the memorandum of association, and the memorandum and articles of association were registered in Dec. 1872.

The company was incorporated under the name of the Hereford and South Wales Waggon and Engineering Company (limited), with a nominal capital of 100,000*l.*

The articles of association adopted the provisions of the deed of the 3rd June 1872. The 21st clause provided that the directors should pay all expenses incurred in getting up and

registering the company, and the 31st clause appointed Head the first solicitor and Walter the first secretary of the company.

A prospectus was issued, but very few persons offered to subscribe for shares, and it was clear that there would not be enough capital to carry on the business. No shares were allotted, and the deposits made on application for shares were returned to the applicants, in the compulsory winding-up of the company, an order for which was made in February 1874, so that the only contributories were the seven subscribers of the memorandum of association.

The 1500*l.* promotion money was never paid, the purchase of the property not having been completed.

Various claims were made in the winding-up. Some of these, which were in respect of expenses incurred by order of the board of directors, were not disputed, but the following claims were disputed: A claim by Mr. Bramwell for 312*l.* for valuing land, plant, &c., and machinery; a claim by Head for 270*l.*, of which 100*l.* was for professional services both prior and subsequent to the registration of the company, and 170*l.* for expenses during the same period; and a claim by Walter for 193*l.* 1*s.* 3*d.*, of which 100*l.* was for professional services as accountant up to the registration of the company, and from that date to the day of dismissal, 69*l.* 19*s.* 8*d.* for expenses out of pocket prior to the registration of the company, and 23*l.* 2*s.* 1*d.* for expenses out of pocket, subsequent to the registration of the company.

These disputed claims having been allowed by the Vice-Chancellor, the liquidators, who were two of the subscribers of the memorandum of association, appealed.

Dickenson, Q.C. and Romer, for the appellants.—We were induced to subscribe the memorandum of association by the representation of Head and Walter, who fraudulently concealed from us the agreement as to the promotion money; had we known of that agreement we should never have had anything to do with the proposed company. We have derived no benefit whatever from their services, and their fraud absolves us from paying these claims. As for the valuer's claim, we did not employ him; he made the valuation before the formation of the company, and must look to those who employed him.

Crossley, for the respondents.—The company not having been formed within three months from the date of the agreement of the 29th April 1872, that agreement became void, and the 1500*l.* was never paid. If it had been paid to us, we might have been compelled to repay it, and that is the only remedy a court of equity can give in respect of a concealment of this kind. The articles of association expressly provide that the directors shall pay all expenses incurred in getting up and registering the company, and they are bound to do so, although the company has proved abortive. He cited:

Re Tilleard, 3 De. G. J. & S. 519;

Re The Kensington Station Act, 32 L. T. Rep. N. S. 183; L. Rep. 20 Eq. 197.

Dickinson, in reply.

March 18.—MELLISH, L.J. now delivered the following written judgment of the court. After stating the facts of the case, his Lordship continued: Under these circumstances we have to determine whether Messrs. Head and Walter are

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entitled to prove against the company in respect of their professional services, either those before or those after the registration of the company. With respect to their professional services before the formation of the company, they would not have been entitled to maintain an action on legal grounds against the company, because the company was not in existence at the time the services were performed; and the 21st of the articles of association only gives an authority to the directors to pay these costs, and does not constitute a contract to pay them as between the company and Messrs. Head and Walter. We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them, and Messrs. Head and Walter would be entitled to prove for them. With respect to the services subsequent to the registration of the company, Messrs. Head and Walter would be entitled to maintain an action against the company in respect of those services, unless the company have a defence upon some legal or equitable ground. The defence of the company to both claims entirely depends upon the effect of Messrs. Walter and Head having concealed from the seven gentleman who signed the memorandum of association the agreement of 29th April 1872. We think it is clearly established that the company was formed by Messrs. Walter and Head, in pursuance of a scheme formed between them and Smith to carry out the two agreements of the 29th April and the 3rd June 1872. As between Smith and Walter and Head, these two agreements obviously constituted only one agreement, but they were divided into two, in order that the part of the agreement which related to the payment of the 1500*l.* to Walter and Head out of the purchase money might be concealed from the company. There can be doubt that the concealment of this part of the agreement from the company was a fraud upon the company. It is similar to many transactions with which the court has, unfortunately, become familiar, and amounts to an agreement by a vendor with an agent of an intending purchaser to give him a bribe to betray his principal's interests. The question we have to determine is whether the fraudulent concealment is so connected with the claim of Messrs. Walter and Head to prove against the company that it affords a ground for rejecting the proof. It was argued on behalf of Messrs. Walter and Head that, as the company was not registered within three months from the 29th April, the agreement of that date had come to an end before the formation of the company. We are satisfied, however, that, notwithstanding the three months had elapsed, the parties were still carrying out the entire scheme they had entered into. Mr. Smith might, no doubt, if he had pleased, have abandoned the scheme upon the expiration of the three months, but he could not practically go on with it and prevent Messrs. Walter and Head retaining the 1500*l.* out of the purchase money, and the fact that the company was formed proves to us that the scheme was going on. It was next argued on behalf of Messrs. Walter and Head that, although if the company had been successfully started, and the contract with Smith carried out, and the 1500*l.* paid to Walter and Head, they might have been compelled to repay it, that was the only remedy which a court of equity would give in respect of a fraudulent concealment of this nature. We cannot

agree with this argument. If the company had been successfully started, and it had suited them to ratify this agreement with Smith and go on with the business, notwithstanding the concealment, it may be that their only remedy would have been to retain or recover the 1500*l.*, and that they could not have avoided paying Walter and Head for any services from which the company had received benefit. But it does not at all follow that, in the events which happened, the company having become wholly abortive, they are bound to pay Walter and Head for services which have been of no value whatever to the company. It seems to us that the fraudulent concealment is directly connected with the formation of the company itself. The seven gentlemen who signed the memorandum of association were asked to form a company to carry out an agreement made between Smith and Walter for the sale of the iron-works to the intended company, while a material part of the agreement was fraudulently concealed from them. Nobody can tell what effect it would have had on their minds if they had known that Walter and Head were not the disinterested persons they pretended to be in recommending them to join the company. We think they are entitled to say, "We were induced by fraud on the part of Walter and Head to form the company; we were induced by fraud to consent to the articles; and it was by those articles that Walter and Head were to be paid for their services in promoting the company, and were appointed solicitor and secretary of the company." We think, therefore, that the company have a defence to the claim of Walter and Head in respect of their services in promoting the company, upon the ground that the company have received no benefit from those services, and that it would be inequitable to allow them to recover in respect of those services from the company, which is composed entirely of the seven gentleman whom they have by fraud induced to join the company; and we also think that the company have a defence to the claim of Walter and Head in respect of their services as solicitor and secretary subsequent to the formation of the company, upon the ground that the seven gentlemen, and therefore the company, were induced by fraud to appoint them solicitor and secretary, and have received no benefit from their services. We are of opinion that we are justified in holding, and that we ought to hold, that if the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself which, if the company was successful, it would be unjust and inequitable to allow him to retain, and the company proves abortive, and is ordered to be wound-up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after the company was registered. With regard to the claim of Mr. Bramwell, he was employed by Walter and Head to make the valuation months before the company was formed. It is perfectly plain that at law his claim would be against Walter and Head, and he could only have a claim against the company on the ground that Walter and Head would be entitled to be paid by the company the cost of the valuation as part of the expenses of promotion. But, they having been

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held not to be entitled to recover those expenses from the company, Mr. Bramwell has no independent equity of his own against the company. He was no party to the scheme of Walter and Head, and there is no reason to doubt that his valuation of the property was a perfectly *bond fide* one. But if the company had never been formed his claim would have been only against Walter and Head, and it must be equally so under the existing circumstances. All the three claims must be disallowed, and the liquidators will have their costs in the court below and of the appeal.

Solicitors for the appellants, *O. C. Ellis and Co.*
Solicitor for the respondents, *S. H. Head.*

Tuesday, April 25.

(Before JAMES and MELLISH, L.JJ. and BAGGALLAY, J.A.)

GILBERT v. SMITH.(a)

Practice—Admissions in pleadings—Motion for decree—Partition decree—Further consideration—Rules of Court 1875, Order XL., rule 11—Form of decree.

An order equivalent to a judgment may on admissions in the pleadings be made under the Rules of Court 1875, Order XL., rule 11.

In an action for partition of real estate the defendants by their statement of defence admitted the facts stated in the plaintiff's statement of claim showing the plaintiff's title:

Held (reversing the decision of Malins, V.C.), that on motion under Order XL., rule 11, the plaintiff was entitled to an order directing the usual inquiries as to the persons interested in the property.

This was an appeal from a decision of Malins, V.C. The action in this case was commenced in Jan. 1876 for the partition of certain real estate devised by the will of William Ballard, deceased.

By their statement of claim the plaintiffs stated that they were entitled to one-eighth of the estate, as to which a certificate had been made in an administration suit of *Pitt v. Pitt*, certifying the rights of the persons entitled to all the shares of the estate, except one-sixteenth, the question of the title to which was by the certificate submitted to the court.

By their statement of defence the defendants admitted the several deeds and facts stated in the plaintiffs' statement of claim.

On the 23rd March the plaintiffs moved before Malins, V.C. for an inquiry, "Who are the persons now interested in or entitled to the freehold hereditaments described in the schedule to the certificate of the 1st of June 1874 in the plaintiff's statement of claim stated, and in what shares and proportions, and whether such persons are all parties to this action, or have been served with notice of this order, and that the further consideration of this action may be adjourned?"

The Vice-Chancellor thought that the action ought to have been set down as a short cause, and offered the plaintiffs the option of having that done, but the plaintiffs refusing to adopt this course unless the defendants would agree to its being so heard, he refused the motion with costs.

From this order the plaintiffs appealed.

Bristowe, Q.C. and F. A. Lewin, for the appellants.—The defendants refused to consent to have

the action set down as a short cause; it must, therefore, go into the general paper, and the hearing may be delayed for months. By the Rules of Court 1875, Order XL., r. 11, any party to an action may at any stage apply for such order as he may upon any admissions of fact in the pleadings be entitled to, without waiting for the determination of any other question between the parties. Under the 9th section of the Partition Act 1868 (31 & 32 Vict. c. 40), we are entitled to a decree for inquiries, and this is just the kind of case to which Order XLVII. was intended to apply. Hall V.C., made such an order as we ask for in *Bennett v. Moore* (L. Rep. 1 Ch. D. 692). Both time and expense will be saved by making the order upon motion. [BAGGALLAY, J.A., referred to *Turquand v. Wilson* (L. Rep. 1 Ch. D. 85.) They also referred to

Williams v. Games, L. Rep. 10 Ch. 204;
Rules of Court 1875, Order XXXIII.

John Pearson, Q.C. and Bardswell, for persons who had obtained leave to attend.—The order asked for is really the decree, and cannot be obtained in this way. Moreover, this course would be very inconvenient, and would necessitate a further hearing after the inquiries had been answered, and would thus cause unnecessary expense. The proper course is that adopted in *Mildmay v. Quicke* (L. Rep. 20 Eq. 537).

Glaspe Q.C. and Woodroffe, for the defendants.

Bristowe, in reply.

JAMES, L.J.—I am of opinion that the application of the plaintiffs in this case was well warranted by the rules to which our attention has been called. It is quite clear that it was intended by the new practice, and by the rules which have been framed for carrying it out, to save delay and expense as much as possible. It was intended that if there really was anything which could be shown to the court not to be the subject of litigation and dispute, then whatever other things there might be, if there was anything admitted upon which something ought to be done, then the party might come as soon as possible, by way of motion, to have that thing, the right to which was clearly admitted, immediately granted, so that the parties may not be obliged to undergo delay and to go on incurring expenses for which there is no necessity. In this case the suit is one for partition. It is clear that in the ordinary case of a partition suit the plaintiff, bringing only some of the parties before the court in the first instance, is entitled, *ex debito justitiae*, to have a decree for an inquiry as to who the other parties are who are interested in the property, with a view to a decree for a sale or partition on further consideration. That is the right of the plaintiff. In this case the plaintiffs file their bill, and have made certain persons defendants to that bill. Their right to a share of the property is admitted, and the right of the defendants to other shares of the property is also admitted. That being so, we have exactly the case which would at the hearing, with nothing further, entitle the plaintiffs to an ordinary decree for an inquiry as to who the other persons entitled were; and the plaintiffs say, Give us an order equivalent to that decree. It may be said, that is a decree; they may as well wait and have a decree in due form. But the answer to that is that the plaintiffs might be thrown over for twelve months, and that the persons on the other side might say, "We

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insist upon arguing the case; we will not allow it to be treated as a short cause; we will put in a quantity of affidavits and we will fight it; although we have admitted all that is requisite for the present purpose, still we will fight it out, so that it will be thrown into the general paper. And therefore the plaintiffs say that they will simply ask for the inquiry in the first instance. Now it appears that this very question, in effect, though not in a partition suit, has been before other branches of the court in other matters, and they seem to have taken this view of the meaning of the rule and of the practice that ought to be adopted. In the case of *Bennett v. Moore* (L. Rep. 1 Ch. D., 692), before Hall, V.C. (which also refers to an unreported case of *Lendram v. Rooke*, before the Master of the Rolls), upon a similar application to this, an order was made which amounted to a full decree, for the execution of the trusts of a settlement with an inquiry as to properties and accounts, and an order that a defaulting trustee should pay money into court. Then it was proposed that the order should reserve further consideration, but the registrar objecting that further consideration could not be reserved on the hearing of a motion, the Vice-Chancellor considered the point, and following the practice laid down by the Master of the Rolls in the unreported case of *Lendram v. Rooke*, decided that it could, and in order that it might be quite clear that there was to be no necessity for any preliminary order, he says, "without requiring any further prior hearing than this motion of the said cause, [the further hearing of the said cause is adjourned." So that that is in terms declaring upon the order that the hearing on motion was equivalent to the original hearing, and that the order was to be equivalent to the original decree. That order, which seems to have been adopted by two branches of the court, is certainly more consistent with the spirit, at all events, of the rule, than the view which the Vice-Chancellor in the particular case now before us has taken. I am, therefore, of opinion that it ought to be followed in this case, and that the order asked by the notice of motion ought to be granted, adding those words that were inserted by Hall V.C., in the case of *Bennett v. Moore*, and adding further (as it is said that it may be necessary to come back on further consideration), "with liberty to either party to apply to the court that the further hearing may be in chambers," so that they may get the order for sale in chambers, if they should think it is a case for doing so.

MELLISH, L.J.—I am of the same opinion. I think this 11th rule of Order XL. was framed for the express purpose that, if there was no dispute between the parties, if there was such an admission on the pleadings that it was plain that the plaintiff was entitled to a particular order, he should get that order at once on motion. The rule states no doubt that it is to be an admission of fact in the pleadings, but I think it must be such an admission of fact as leaves no doubt that the plaintiff is entitled to the order, because, if there was a serious question of law to be argued between the parties, I do not think it could have been intended that it should be decided on motion; but where there is such an admission on the pleadings that it is plain that a party is entitled to an order, although it may be an order in the nature of a decree or

judgment, the intention was that the party should have the order at once, and that he should not be obliged to wait until it came on in the regular list of causes. I see no reason why the present case does not come within that rule. There being an admission on the pleadings, and the pleadings comprehending all the facts that the court requires for the purpose of making the order, in my opinion any order that might be made if the case was heard as a short cause, or which might be made if it came on upon a regular hearing, may now be made at once.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me that this 11th rule of Order XL. was intended to apply, and can be most usefully applied to a case like the present, and I think that by proceeding under this rule in such cases there is a saving both of time and of expense.

After some discussion, the following minutes were arranged: Order that an inquiry be made who are the persons interested in or entitled to the freehold messuages, lands, and hereditaments described in the schedule to the chief clerk's certificate made in the cause of *Pitt v. Pitt*, and dated the 1st day of June 1874, and mentioned in the 42nd paragraph of the plaintiffs' statement of claim, and in what shares and proportions such persons are so interested or entitled, and whether such persons are parties to this action or have been served with notice of this order. The further consideration of this action is adjourned, and any of the parties are to be at liberty to apply that the hearing or further consideration be in Chambers, but it is ordered that the costs of all parties of this application, and of the said order (the Vice-Chancellor's order), dated the 23rd March 1876, be costs in the cause.

Solicitors for the appellants, *Milward and Whitehead*, agents for, *Ryland, Martineau, and Carslake*, Birmingham.

Solicitors for the respondents, *John Letts, jun.*, agent for *J. H. Baker*, Birmingham; *Robinson and Preston*, agents for *M. A. Filer*, Birmingham.

Thursday, June 1.

(Before JAMES, L.J., BAGGALLAY, J.A., and LUSH, J.)

SMITH v. WEBSTER.(a)

Vendor and purchaser — Statute of Frauds (29 Car. 3, c. 3, s. 4)—Memorandum signed by agent—Authority of agent—Verbal contract—Terms stated in letter by vendor's solicitor—Specific performance.

The plaintiff verbally agreed with the defendant to purchase a freehold house of his for the sum of 950l. On the next day the defendant instructed his solicitors to prepare a formal agreement. Thereupon the defendant's solicitors wrote to the plaintiff's solicitor as follows: "Mr. W. (the defendant) has been with us to-day, and stated that he had arranged with your client, Mr. A., for the sale to the latter of the Golden Lion for 950l. We therefore send herewith draft contract for your perusal and approval."

Held (reversing the decision of Malins, V.C.), that the letter of the defendant's solicitor was not a memorandum or note of the agreement within the 4th section of the Statute of Frauds, the solicitor

(a) Reported by H. FEAT, Esq., Barrister-at-Law.

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not being an agent "thereunto lawfully authorised" within the meaning of that section.

This was an appeal from a decision of Malins, V.C.

The hearing in the court below is reported in 34 L. T. Rep. N. S. 479, where the facts of the case are sufficiently stated.

The Vice-Chancellor having held that the defendant's solicitors had authority to communicate the terms of the verbal agreement to the plaintiff's agent, and that the defendant was bound by the letter, the defendant appealed.

Simmonds (with him *Glasse*, Q.C.) for the appellant.—There is no agreement in writing in this case to satisfy the Statute of Frauds. The letter written by our solicitor is not a memorandum signed by the appellant's agent "thereunto by him lawfully authorised" within the meaning of the 4th section of the statute, for the solicitor was merely instructed to prepare a formal agreement, and had no authority to sign on the appellant's behalf.

Robinson, Q.C. and *Smart*, for the respondent.—The appellant's solicitors being his agents to carry the contract into effect, they necessarily had authority to tell our agents what the terms of the contract were. Having such authority, their letter stating the terms of the contract is a note or memorandum in writing signed by a lawfully authorised agent within the meaning of the statute. They cited:

Jackson v. Love, 1 Bing. 9;

Chinnock v. Marchioness of Ely, 11 L. T. Rep. N. S. 536; 2 H. & M. 230; (a)

Jackson v. Oglander, 2 H. & M. 465; 13 L. T. Rep. N. S. 16.

Without calling for a reply, JAMES, L.J., said—I am of opinion that this really cannot be treated as a memorandum in writing within the Statute of Frauds. The Statute of Frauds requires that the memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person "thereunto by him lawfully authorised," that is to say, lawfully authorised to sign a contract, or to sign a memorandum or note of the contract. In this case there is no such contract signed by the defendant himself. He goes to his solicitor, and the only authority he gives his solicitor is to prepare a formal document. He gives him no authority to do anything more. If the solicitor's letter had stopped in this way, "Mr. So-and-so has been with us to-day, and has told us that he has sold the property to you for 950*l.*," it is quite clear that that would not have been a memorandum or note of an agreement within the meaning of the Statute of Frauds. If the letter had been a mere statement of a verbal communication of the arrangement, that certainly would not have amounted to a memorandum. It must be really signed by the person interested in the agreement or by someone expressly authorised to sign it. All that the solicitor says in his letter is that it was a verbal arrangement, and that he therefore sent a draft of the contract, which is a different contract, and is not the contract sought to be enforced. It is a contract which was never assented to by the parties, and they were never at one upon it. That being so, it appears to me impossible to make out anything from a solicitor merely giving a reason why he was sending something on to the other

party's solicitor. I do not think that can be considered to be, within the meaning of the Statute of Frauds, a memorandum signed by an agent lawfully authorised to sign it as binding the person interested. I am of opinion, therefore, that the Vice-Chancellor's doubts were well founded, and that this is not a memorandum in writing within the meaning of the Statute of Frauds.

BAGGALLAY, J.A.—From the evidence in this case it appears to me that the arrangement or agreement come to by Mr. Webster on the 3rd Dec. 1873 was to sell the Golden Lion for 950*l.*, but that that arrangement or agreement was conditional upon a formal contract being executed for the purpose. It appears to me also clear that the authority which was conferred upon the solicitor by Mr. Webster was not to convert that arrangement into an absolute agreement, but to prepare, and to procure the execution of, a proper contract which would express the general terms of the agreement; and that being the case, even if the letter of the 4th Dec. 1873 could be construed as in fact expressing an agreement absolutely to purchase the property for 950*l.*, I should be of opinion that he would have no authority to write such a letter, and that he was not a person lawfully authorised by his principal to sign a memorandum or note of the agreement. But when I look at the letter it appears to me to be clear what was the intention of the parties. The reference to the arrangement for the sale of the Golden Lion for 950*l.* is merely in the nature of a recital showing why Messrs. Marshall, the solicitors, addressed that letter to the plaintiff's solicitor. It says: "We therefore send herewith draft contract for your perusal and approval." The use of those words "perusal and approval" appears to me to indicate that the writer was not by the letter confirming or entering into an agreement, but that he was only forwarding the draft contract for approval. Therefore I think the decision of the Vice-Chancellor must be reversed.

LUSH, J.—I am of the same opinion. In order to constitute a note or memorandum in writing within the 4th section of the Statute of Frauds, it must be a thing which the principal has authorised the agent to sign. Now the authority to the solicitor here was, not to write a letter which should contain the terms of the contract, but merely to prepare a formal draft contract, to be sent to the other side for perusal and approval, and when perused and approved to be signed by the party himself. That is all the authority that the solicitor had. Stating what he did state as being the substance of the contract, was merely an accident, and introductory to the business which he was commissioned to transact. It was never intended by him to be a contract, and was never intended to be anything binding.

JAMES, L.J.—The Vice-Chancellor's order will be discharged, and the bill will be dismissed with costs, including the costs of the appeal.

Solicitor for the appellant, *Richard Smith*, agent for *Marshall, Sons, and Bescoby*, East Retford.

Solicitor for the respondent, *W. H. Tatnam* agent for *John Whall*, Worksop.

(a) Reversed on appeal by Westbury, L.C., 12 L. T. Rep. N. S. 251.

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RHODES AND ANOTHER v. AIREDALE DRAINAGE COMMISSIONERS.

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SITTINGS AT WESTMINSTER.

Tuesday, May 9.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J.,
and POLLOCK, B.)RHODES AND ANOTHER v. AIREDALE DRAINAGE
COMMISSIONERS. (a)*Arbitration—Lands Clauses Act 1845—Power of
umpire to state special case—Compensation—
—Evidence of damage—Common Law Procedure
Act 1854, s. 5.*

By the Common Law Procedure Act 1854, s. 5, an arbitrator upon any compulsory reference under the Act, or upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the Superior Courts of law or equity at Westminster, may state his award in the form of a special case for the opinion of the court. K. was appointed an umpire in an arbitration under the Lands Clauses Act 1845 (8 & 9 Vict. c. 18), by which it is provided (sect. 25) that the appointment of an arbitrator by each party respectively "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made," and that (sect. 36) "the submission to any such arbitration may be made a rule or order of any of the Superior Courts of law or equity at Westminster." Previous to K. being made an umpire, each party had appointed an arbitrator.

Held, reversing the decision of the court below (see 31 L. T. Rep. N. S. 59), that K. had power to state a special case for the opinion of a Superior Court, inasmuch as the arbitration was within the provisions of the Common Law Procedure Act 1854, s. 5, as to arbitrations by consent.

By the Airedale Drainage Act (24 & 25 Vict. c. 160) the defendants were authorised to execute certain drainage works, and it was provided that full compensation should from time to time after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works, by this Act authorised, be made by the defendants to the owners, lessees, and occupiers of certain land, &c., for the time being, sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of this Act, and that in case of dispute as to the amount of such compensation, the same should be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845.

The plaintiffs, who were occupiers of certain land, included in the provisions of the Airedale Drainage Act, claimed compensation for damage sustained by floods occasioned by the defendants' works. The matter was referred to K., as umpire, who found by his award that the defendants had altered certain tributaries of the river, had formed new cuts or channels, had removed shoals from the river formed therein by gravel soil and other materials, and also a weir, which latter, however, in no way affected the damage that was occasioned. K. also stated that there was no sufficient evidence before him to enable him to determine whether the works, exclusive of the removal of the shoals and weir, caused the lands to be more damaged than they otherwise would have been.

K. awarded to the plaintiffs 110*l.*, who brought an action to recover it.

Held (reversing the decision of the court below), that the action was not maintainable, inasmuch as the compensation was awarded for damage caused by the removal of shoals, which were merely casual obstructions, and did not come within the provisions of the Act.

The word "damage" in the local Act includes any such damage as would have been actionable but for the passing of the Act.

Semble, where shoals have in course of time become part of the natural bed of a river, any damage caused by their removal would be the subject of compensation, such damage being actionable damage.

THIS was an action upon the award of an umpire appointed under the Airedale Drainage Act 1861 (24 & 25 Vict. c. 160), which incorporated the provisions of the Lands Clauses Consolidation Acts 1845 and 1860. The umpire (Mr. Kemplay) awarded to the plaintiffs the sum of 110*l.*, to recover which the action was brought. The first plea denied the validity of the award under the Airedale Drainage Act. The second plea set out the award of the umpire as follows: "If I have no power to state my award in the form of a special case for the opinion of the Superior Court, of which the submission to arbitration of the matters so referred as aforesaid may be made a rule, then I award and judge that the claimants, as occupiers of Morley Hall Farm, have sustained damages, by reason of and consequential upon the exercise by the commissioners of the powers of the Drainage Act, to the amount of 110*l.*, and are entitled to be paid compensation for the same to that amount; but if I have power to state my award in the form of a special case for the opinion of such superior court as aforesaid, then I hereby state my award of and concerning the matters so referred as aforesaid in the form of a special case for the opinion of such Superior Court, as follows, that is to say: Morley Hall Farm is a farm of 150 acres, adjoining the river Aire, and situate about one mile and a half below the lowest of the works executed by the commissioners under the powers of the Drainage Act as hereinafter stated. The claimants were occupiers of the farm as tenants to William Ferrand, Esq., in and during the years 1866, 1867, 1868, and 1869, and as such occupiers sustained damages from certain specified floodings of the said farm, which occurred in these years in consequence of floods in the said river. The claim for compensation so referred to arbitration as aforesaid was in respect of the damages so sustained by the claimants as aforesaid. All the said floodings occurred after works authorised by the Drainage Act had been executed by the commissioners under the powers of that Act. All the said works were above the said farm, and were executed at different points of the said river within a district beginning at a point about one mile and a half above the said farm, and extending up the said river for a distance (reckoned along the whole course of the river) of nearly fourteen miles. For the purposes of this case the said works may be divided into four clauses, first, the division and alteration of tributaries of the said river whereby the said tributaries were made to flow into the said river differently from what they previously did and otherwise would have done; secondly, the formation of several cuts or channels for the said river at different points of the district last aforesaid, whereby the course of the said river was

(a) Reported by R. H. AMPELLETT, Esq., Barrister-at-Law.

shortened nearly a mile and three quarters; thirdly, the removal from the said river of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river and deposited in the said river near the confluences therewith of the said tributaries; and, fourthly, the removal of a weir, belonging to a mill about a mile and a half above the said farm, being the lowest work in the said river executed by the commissioners under the powers of the Drainage Act. None of the said works executed by the commissioners as aforesaid were executed by them in or upon land or other property of the said William Ferrand, Esq., or the claimants. All the said works had been executed and were in operation before and at the time of the occurrence of the said floodings of Morley Hall Farm, in respect of which the said claim for compensation arose, except the first of the said works, with the exception of one of the said cuts. Before the passing of the Drainage Act and the execution by the commissioners of any of the said works, Morley Hall Farm was more or less liable to be flooded by flood waters coming down the said river. The effect of making all the said cuts was to bring down the flood waters of the said river to Morley Hall Farm about twenty-six minutes earlier than they otherwise would have reached that farm, and the effect of making all the said cuts, except the said cut which was not in operation till after the first of the said floodings, was to bring down the flood waters of the said river to Morley Hall Farm about eleven minutes earlier than they otherwise would have reached that farm. From the evidence before me, I find that the claimants, as occupiers of the said farm, sustained damages on the occasion of the aforesaid floodings by reason of and consequential upon the execution by the commissioners of all the said works which were in operation at the respective times of the said floodings, to the amount of 110*l.* and that the damages so sustained by them would have been substantially the same if the said weir had not been removed. There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, exclusive of the removal of the said shoals and weir as aforesaid, caused the said farm on the occasions of the said floodings, to be flooded to greater extents or for longer periods of time, or to be more damaged than it otherwise would have been." (a)

Third plea. That the sum awarded by the umpire included damages in respect of matters beyond his jurisdiction.

Fourth plea. That the plaintiffs had not sustained any such damage by reason of or consequential upon the circumstances of any of the powers of the Act, as entitled the plaintiffs to any compensation under its provisions or otherwise.

* It is unnecessary for the purpose of this report to set out the remaining pleas.

At the trial before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term 1874, the plaintiffs simply put in the award of the umpire, and closed their case, and it was agreed that the umpire who was called should be taken

as representing in the witness box the statements made in the special case appended to the award. No further evidence of damage was given by the plaintiffs. At the trial the verdict was entered for the plaintiffs for the amount of the award, leave being reserved to the defendants to move to enter a nonsuit or verdict for the defendants on the following grounds: That the plaintiffs gave no evidence of any damage for which they were entitled to compensation; that the award proved in evidence was not final, or such an award as stated in the declaration; that the award given in evidence shows on its face that the umpire gave compensation for matters on which he had no jurisdiction; and that the third plea was proved. The court had power to draw inferences of fact. The Common Pleas Division (Lord Coleridge, C.J., Archibald, J., and Amphlett, B.) were divided on the question whether the word "damage" was confined to damage which would have been actionable but for the Act, but were unanimously of opinion that it sufficiently appeared from the statements of the umpire in the award that the damage was properly the subject of compensation. Accordingly they gave judgment in favour of the plaintiff.

From this judgment the defendant appealed, which also involved an appeal from the decision reported in 31 L. T. Rep. N. S. 59.

Herschell, Q.O. and *K. E. Digby* for the defendants.—The action fails on two grounds. First, the decision of the court below on the demurrer was wrong. The umpire has power to state a special case, and if that be so there is no such award as is alleged in the declaration. The Common Law Procedure Act 1854, sect. 5, provides "that it shall be lawful for the arbitrator upon any compulsory reference under this Act, and upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered, according to the opinion of the court." This is a "reference by consent" within the meaning of that enactment. Here an arbitrator was appointed on both sides, and the Lands Clauses Consolidation Act 1845 (8 & 9 Vict., c. 18, ss. 1, 25), expressly says that "every appointment of an arbitrator shall be deemed a submission to arbitration on the part of the party by whom the cause shall be made." And by sect. 36, "the submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties." Therefore by the effect of those actions this arbitration is a "reference by consent" of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster," within sect. 5 of the Common Law Procedure Act 1854. The authority on which this case was decided in the court below (See 31 L. T. Rep. N. S. 59) was that of *Re Newbold and the Metropolitan Railway Company* (14 C. B., N.S., 405), as appears from the judgment of Lord Coleridge (*sup.*). In that case it is true Willes, J., appears to have entertained the opinion that an umpire appointed under the Lands Clauses Consolidation Act 1845 had no

(a) This plea was demurred to on the ground that the umpire had no power to state a special case, and the demurrer was allowed: (See *Rhodes v. Airedale Drainage Commissioners*, 31 L. T. Rep. N. S. 59; L. Rep. 9 C.P. 508; 43 L. J. 323, C.P.)

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power to state a special case; but it was a mere *obiter dictum* on the part of that learned judge, and, indeed, the exact contrary has been decided by *Be Dare Valley Railway Company* (L. Rep. 4 Ch. 554), where the Lords Justices affirmed the judgment of James, V.C. This case was not brought to the notice of the Court of Common Pleas, or they would have doubtless acted upon it. In *Ex parte Harper* (L. Rep. 18 Eq. 589) Jessel, M. R., expressed a similar opinion; and, again, in *Re Harper* (L. Rep. 20 Eq. 39; 32 L. T. Rep. N. S. 214), after his attention had been called to *Newbold and The Metropolitan Railway Company* (*ubi sup.*), though the *Dare Valley Railway Company* case (*ubi sup.*) was not cited before him. Then, secondly, the action fails on the merits, because there is no such damage as will support the award. By the Airedale Drainage Act (24 & 25 Vict. c. 160, s. 25:

Full compensation shall from time to time, after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works by the Act authorised, be made by the commissioners out of the rates to be levied under this Act to the owners, lessees, and occupiers for the time being sustaining any damage by reason of or in any way consequential upon the exercise of any of the powers of this Act, of the lands and hereditaments of Wm. Ferrand, Esq., situate in the parish of Bingley, in the West Riding of the county of York, or any part or parts thereof respectively; and in case of dispute as to the amount of compensation, the same shall be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845.

The word "damage" must, as pointed out by Amphlett, B., in his judgment (a) be action-

(a) The following are the observations of Amphlett B., on the construction to be put on the word "damage," together with the cases cited, which are referred to by Jessel, M.R., in his judgment (*see post*). "The first question which I think it will be convenient to consider in this case is whether the damage for which compensation can be claimed under sect. 45 of the Drainage Act, is confined to what we may call actionable damage, that is to say, damage in respect of acts for which an action might have been brought if the Drainage Act had not been passed. Now it could not be, and was not, in fact, denied on the part of the plaintiffs, that by a long series of cases, of which I need only mention the *Caledonian Railway Company v. Ogilby* (3 Macq. 239), it is perfectly settled that the right to compensation under sect. 68 of the Lands Clauses Consolidation Act 1845, is limited to actionable damage. It is true that the language of the 68th section of the Lands Clauses Act, which speaks of lands 'being injuriously affected,' is slightly more favourable to the limited construction; but the courts have adopted the same construction in analogous cases, where the language used was practically identical with that of the clause we are considering. *New River Company v. Johnson* (2 E. & E. 455; 29 L. J. 73, M. C.) under the Waterworks Act (10 & 11 Vict. c. 13), where the words were 'that in the exercise of the powers conferred by the Act, the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them, through the exercise of such powers' (*Hall v. The Mayor, &c., of Bristol*, 15 L. T. Rep. N. S. 572; L. Rep. 2 C. P. 322), under the Public Health Act (11 & 12 Vict. c. 33), where the words were, 'that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act.' I cannot but think, under the circumstances, that it would be very undesirable on light grounds to disturb this unanimity of decision upon a point constantly arising in practice, and which, with the single example of *Lord Westbury*, in *Rickett v. The Metropolitan Railway Company* (12 L. T. Rep. N. S. 75; L. Rep. 2 H. L. 201; 36 L. J. 205, Q. B.), has been approved of on general grounds by almost all the judges who had taken part in

able damage to come within the statute; and, as regards this point, it is submitted that the learned Baron's observations on that part of the case are correct, and are supported by the authorities referred to in his judgment. There was here no evidence of any actionable damage. The court below has put an erroneous construction on the award. A riparian owner is entitled to remove shoals from a river, and there is nothing in the award to show that there has been any interference with the bed of the river.

Manisty, Q.C., and L. Cave, Q.C. (Bidder, Q.C., with them) for the plaintiffs.—No notice of appeal has been given on the first point, but it is admitted that *Be Dare Valley Railway Company* (*ubi sup.*), is an authority to show that the umpire had power to state a special case. The substantial question is as to the right of the plaintiff to recover damages. The award is *prima facie* evidence that the plaintiff has sustained damage that is actionable. [JESSEL, M. R.—The umpire's award is evidence of the amount of damage but not of the facts contained in the award.] The umpire has found that the damage was caused by the removal of shoals, by which he meant shoals which had formed a part of the natural bed of the river. Lastly, it is contended that actionable damage is not necessary under the special Act. They cited the *Caledonian Railway Company v. Ogilby* (2 Mac. Sc. Ap. 229), and the *Duke of Buccleuch v. The Metropolitan Board of Works* (L. Rep. 3 Ex., 306; 18 L. T. Rep. N. S. 906; 37 L. J. 177, Ex.)

JESSEL, M.R.—This is an appeal from the Com-

such decisions. But it was argued on the part of the plaintiff that the Legislature must have used the word 'damage' in a more extended sense in the 45th section, since otherwise that section would have given the owners and occupiers of the land mentioned therein no further protection than they would be entitled to under the Lands Clauses Acts. I think, however, there are two answers to that argument: first, having regard to the decision in *Rea v. The Directors of the Bristol Dock Company* (12 East, 439), and the language of *Lords Cranworth and St. Leonards in the Caledonian Railway Company v. Ogilby* (*ubi sup.*), I think it would be an arguable question (and that is sufficient for this purpose), whether persons who have rights in respect of a public road or a public river, the same in principle, but different in degree from other people, could claim compensation under the Lands Clauses Act for damage either to one or the other which was authorised by Act of Parliament; and, secondly, the compensation given by the 45th clause of the Drainage Act is quite different from that given by the Lands Clauses Act. In the latter case compensation is given once for all; whereas in the former case it is to be given 'from time to time;' the reason for which no doubt was, that as the only damage that could accrue to the lower lands from the improved drainage of the upper would be at flood times, it would be impossible, or at least difficult to estimate the damage except when the floods happened. These reasons appear to me satisfactorily to account for the introduction of the special claim, without supposing that the Legislature intended to enlarge the subject-matter of compensation. Indeed, looking at the object of the Act, which was for the more effectual drainage of a large tract of country, which is expressly stated to be, as it manifestly was, for the public benefit, it is difficult to suppose that the Legislature intended that the commissioners in the execution of their duties should be hampered by claims for compensation in respect of acts which the riparian proprietors had a common law right to do with impunity; and if the Legislature had any such intention it is strange that they should have used language which had already at that time acquired by judicial decision a more limited sense. In my judgment, therefore, the first point ought to be decided, if it should be necessary, in favour of the defendants."

mon Pleas Division involving not only the decision in this case, but also a decision of the Court of Common Pleas on demurrer some time ago. In accordance with the power conferred on us by the Judicature Acts, it will be better to decide the question raised by the demurrer as if it were now before us upon appeal; and it is the more desirable because the same question is raised by the demurrer as by this appeal, so that it is impossible to deal with the one without dealing also with the other. Now the question on demurrer was in substance this, whether under the powers of the Lands Clauses Consolidation Act 1845, an arbitrator has power to state a special case for the opinion of a superior court. The Court of Common Pleas held that he had not. It is said that no such power is conferred under the Common Law Procedure Act 1854. The present question doubtless turns first on the construction of the Act, and, secondly, what has been done with reference to the construction put on the Act. No doubt under the words of the Common Law Procedure Act 1854, sect. 5, by which, if at all, the power is given, there is some difficulty, as it refers apparently only to arbitrations by direction of a court or judge, or by consent. But on the other hand it certainly would be remarkable that a large class of arbitrations should have been omitted; and if we can consistently do so we ought, I think, to bring these submissions within the purview of the enactment. I have already given my views on the subject in *Harper's case* (*ubi sup.*), and will not again repeat them. It is much to be regretted that the Court of Common Pleas in deciding this case were unaware of the *Dare Valley case* (*ubi sup.*), where the Chancery Court of Appeal confirmed the decision of James, V.C., that an arbitration under the Lands Clauses Consolidation Act 1845, was within the provisions of the Common Law Procedure Act 1854, sect. 5, as to arbitrations by consent. Against that decision we have really nothing but the decision of the Court of Common Pleas; therefore, as an authority, we ought to decide against the latter court, and follow the judgment of a co-ordinate court given in the *Dare Valley case* (*ubi sup.*), which last decision I was in ignorance of when *Harper's case* (*ubi sup.*) was before me. I do not intend to say that we are always bound to follow the decision of a co-ordinate court; still there must be strong reasons for disregarding it, and no such reasons, so far as I can see, exist here. The next point is one of great importance, viz., whether, having regard to the terms of the local Act, the damage for which a plaintiff is entitled to recover is for actionable damage only, or includes all loss whether actionable or not. Now the words of this particular section are really undistinguishable from the words of other sections, the construction of which has been established by a long chain of decisions. When I come to look at clauses 44 and 45, I find that they are what are termed landowners' clauses, that is to say, clauses put in by opposing landowners for their protection; and if the landowners could have induced the Legislature to give larger powers of compensation they would naturally (knowing as they did, the decisions on the subject) have taken care to make the intention of clauses in their own favour clear. I will refer only to two of the decisions which are referred to by Amphlett, B., in the court below (*The New River Company v. Johnson*, 2 E. & E. 445; 29 L. J. 93, M. C.; and *Hall v. The Mayor*,

&c., of Bristol, 36 L. J. 110, C. P.; L. Rep. 2 C. P. 322; 15 L. T. Rep. N. S. 572). In *The New River Company v. Johnson* (*ubi sup.*), which arose under the Waterworks Clauses Act (10 & 11 Vict. c. 17) the words were "that in the exercise of the powers conferred by the Act the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." In *Hall v. The Mayor &c., of Bristol* (*ubi sup.*) which was decided under the Public Health Act, the words were: "that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." In both these cases it was definitely decided that the right to compensation was limited to actionable damage, and that being so the question has been fairly decided, and I should have no doubt at all on the subject were it not that two of the learned judges in the court below appear to have arrived at an opposite conclusion. It is said, why then are these words inserted at all? I think there are two answers, one that the time is enlarged, the other that too much effect must not be given to mere repetitions. Next if the damage must be actionable, is there any such damage? No dispute arises as to the law. Riparian proprietors are entitled to remove casual obstructions as distinguished from the natural bed of the river. The only dispute is as to the construction of the award, and as regards that, I differ from the construction put on the award by all the judges, and am of opinion that that for which the arbitrator intended to award compensation, was damage caused by the removal of shoals. Now is that actionable damage? It was not disputed that riparian proprietors not only may, but are under a liability to remove such shoals; if, therefore, I am right as to the construction of the award, there is no actionable damage. The judgment of the Common Pleas must therefore be reversed. As regards costs, the costs in the court below and in this court will follow the suit; but as to the demurrer we think there ought to be no costs.

KELLY, C.B.—I am of the same opinion. The case comes before us in rather a complicated form. The action is on an award under the Lands Clauses Consolidation Act 1845. The case proceeded to trial, and a verdict was eventually entered for the plaintiffs for 110*l.*, the amount of the award, but leave was reserved to the defendants to move to enter a nonsuit or verdict for them. The question whether the judgment was right depends on whether the award is valid. That throws us back to the question whether the arbitrator had jurisdiction to make the award, and that again throws us back on the decision of the Court of Common Pleas upon the demurrer to the second plea. No appeal has been brought from that decision, but we deem it expedient, under the powers which we possess under the Judicature Acts, to consider whether or not the demurrer should be allowed. That question turns upon sect. 5 of the Common Law Procedure Act 1854. I may observe that, apart from the decisions, the arbitration seems to me to be, by the effect of sect. 25 of the Lands Clauses Consolidation Act 1845, an arbitration by consent, the claimants and the commissioners having each appointed an arbitrator, instead of the commissioners having exposed themselves to an appointment by the claimant singly; and the

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[Ct. of App.]

appointment of an arbitrator being, by the terms of sect. 25, a submission to arbitration on the part of the party by whom the cause is made. I should say, therefore, apart from the decisions, the arbitration was within sect. 5 of the Common Law Procedure Act 1854, and this view is confirmed by *Re Dare Valley Railway* (*ubi sup.*) This at once disposes of the first decision of the court below, which we are compelled to overrule. The question is still left open whether the demurrer having been set aside and overruled, the Court of Common Pleas were right in the judgment given on the special case; and we think it right, in order to avoid future litigation, to give our decision upon the special case. The question raised by the special case renders it necessary for us to look at the language of the award, and to see whether the plaintiff is entitled to judgment for the sum of 110*l.* That depends entirely on the nature of the damage which the plaintiff has sustained. Now by a long series of decisions it has been clearly established that the claim must be limited to damage which, but for the power conferred by the Act of Parliament, would be actionable. Is the damage done here actionable? It appears from the special case that the damage may have arisen from four different causes. [His Lordship referred to the special case already set out.] If the finding of the arbitrator had been that the damage resulted from all three causes, then, inasmuch as two of them would be actionable, were it not for the Act, the claimant would be entitled to recover. But if, on the other hand, it turns out that the cause of injury is confined to one species of damage only, namely, the removal from the river of the shoals, then the question will arise whether damage so occasioned is actionable. All that the arbitrator says is that damage was caused "by the removal from the river of shoals formed therein by gravel, soil, and other materials, which from time to time had been brought down by tributaries of the said river, near the confluence therewith of the tributaries." We all agree that if the bed of the river had been disturbed, it would have been actionable; but does the finding of the umpire amount to such a statement? I am clearly of opinion that no conclusion of this kind can be drawn. If the arbitrator had meant us to infer that the bed of the river had been disturbed, or that the shoals had become part of the river itself, why did he not expressly say so? Instead of that he has made use of language which, to my mind, is quite unambiguous. Then, lastly, was the damage caused solely by the removal of the shoals, or partly by the removal of such shoals and partly by other causes? I leave the weir altogether out of consideration, because no damage was caused by its removal. Now, the language of the award is to my mind clear as to how the damage was occasioned. The umpire has found that there was no sufficient evidence before him to enable him to determine one way or the other whether the said works, exclusive of the removal of the shoals, caused the farm on the occasion of the floodings to be flooded to a greater extent or for a longer period of time, or to be more damaged than it otherwise would have been. What is the meaning of that? Why, that there is no sufficient evidence to enable him to determine whether the damage was occasioned otherwise than by the removal of the shoals; in other words, it amounts to an allegation that the removal of the shoals

alone caused the injury, and that there was no evidence to satisfy him that any other cause or causes contributed. It must, therefore, be taken that the damage was solely caused by the removal of the shoals; and the law is well established that a riparian owner may remove shoals from a navigable river, so long as he takes care not injuriously to affect the navigation, without being liable to an action. I therefore come to the conclusion that the plaintiffs are not entitled to the compensation which has been awarded to them by the umpire.

MELLISH, L.J.—I am of the same opinion. With reference to the question whether an arbitrator, under the Lands Clauses Consolidation Act 1845, has power to state a special case, I should, if there had been no decisions, have thought it open to some doubt, but considering the authorities, there can be no doubt at all on the subject. The point was first raised before James, L.J., when Vice-Chancellor; his decision was that the arbitrator had such a power, and was affirmed, on appeal, by the Lords Justices. We, therefore, should not be justified in overruling it now. Had the decision in *Re Dare Valley Company* (*ubi sup.*) been brought to the notice of the Court of Common Pleas, I feel no doubt their decision on the demurrer would have been different. The arbitrator, therefore, having power to state a special case, I agree with Mr. Herschell that the defendants are entitled to have a verdict entered for them on the plea of no such award. But Mr. Herschell and Mr. Manisty both thought it proper that we should go on to consider the merits under the powers conferred on us by the Judicature Acts. The first question that arises is, whether, according to the construction of sect. 45 of the Airedale Drainage Act, the plaintiff is entitled to compensation for acts done whether actionable or not. My opinion is, that he is only entitled for acts done by causes which are actionable. The argument for the plaintiffs was based upon the difference of sect. 45 from sect. 43. I therefore took the opportunity of reading sect. 44. I find that that is a clause relating to Riddlesdown landowners, and in the main agreeing with sect. 45, but limited to actionable damage, the words being, "whether the lands injuriously affected be within or without" a certain area, the words "injuriously affected" being the very words which in sect. 68 of the Lands Clauses Act have been considered decisive of the question whether damage without legal injury can be considered the subject of compensation. I think it clear therefore that the plaintiff can only recover for damage which but for the Act would have been actionable. Then comes the question raised by the award, whether the removal of shoals is actionable? With all deference to the court below I have no doubt it is not. In course of time shoals may no doubt become part of the bed of a river, in which case it would be actionable to remove them; but so long as they continue in the shape of shoals they may clearly be removed. Such removal, therefore, not being actionable, has there been any damage in respect of any other matters? The umpire says, as to that, that there is no sufficient evidence to find one way or the other. That being so the judgment of the Common Pleas Division must be reversed.

POLOCK, B.—As regards the first point, had the matter been *res nova*, I should have

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liked to have had it further argued; but the decision in *Re Dare Valley Railway Company*, (ubi sup.) is binding, and the convenience of that decision is shown by the case of the *Duke of Buccleuch v. Metropolitan Board of Works* (ubi sup.) As to the other point I agree with the rest of the court. *Judgment reversed.*

Solicitor for the plaintiffs, *Field, Roscoe, and Co.*, for *Jeffery, Taylor and Little, Bradford.*

Solicitors for the defendants, *Phelps and Sidgwick* for *Brown, Skipton.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON.)

Wednesday, May 24.

WEST v. ORR.(a)

Will—Construction—Gift substitutional or Original—Member of a class dead at the date of the will—Gift to the issue of.

A testator directed his trustee, after the death of his wife, to divide his residuary estate equally amongst "such of the children of my late sisters Margaret and Mary as shall survive my said wife. . . but in case any of such children shall be dead at my decease, leaving lawful issue, then I direct that such issue shall take the share of their deceased parent," and if more than one, in equal shares. The testator's sister Mary had two daughters; one survived the testator, the other was dead at the date of the will, but left issue, six of whom survived the testator.

Held, that the gift to the issue of the deceased children of the testator's sisters was not original, but substitutional; and that, therefore, the issue of the deceased daughter of Mary took no interest under the will.

Hunter v. Cheshire (L. Rep. 8 Ch. App. 751; 25 L. T. Rep. N. S. 283) followed.

ROBERT ORR died on the 5th Jan. 1874, having by his will dated the 9th Aug. 1873, devised and bequeathed all the residue of his real and personal estate unto and to the use of trustees, their heirs, executors, administrators and assigns, upon trust, to permit his wife Margaret Orr to occupy his then residence rent free, and either to allow his said real and personal estate to remain in the same state in which the same might be at his decease, or at their discretion, to sell the said real estate, and convert into money such part of his said personal estate as should not consist of money, as and when they might think fit; and the testator further directed that his said trustees should invest the proceeds of the sale of any real estate and conversion of personal estate in manner therein mentioned, and should pay the income arising from his said residuary real and personal estate, and the investments thereof (subject to certain annuities) to his wife Margaret Orr for life, and the will then proceeded in the words following:

"And after the decease of my said wife I direct my said trustees shall pay and divide the capital and income of my said residuary estate unto and equally amongst such of the children of my late sisters Margaret and Mary as shall survive my said wife, and being males shall attain the age of

twenty-one years, or being females shall attain that age or marry under that age. But in case any of such children shall be dead at my decease, leaving lawful issue, then I direct that such issue shall take (and if more than one in equal shares as tenants in common) the share of their deceased parent."

The testator's sister Margaret, in 1805, married one William Mirren, and died on the 23rd Aug. 1823, having had several children, of whom two only lived to attain the age of twenty-one years, namely, Isabella Mirren and Mary White Mirren.

On the 2nd Oct. 1845 Mary White Mirren intermarried with Thomas West and died on the 19th Jan. 1863, having had issue eight children, six of whom survived the testator and were still living, and two of whom, namely, Daniel Henry West and Frederick William West, were respectively infants.

Isabella Mirren intermarried with William Cummings, and was still living.

In Jan. 1876 an action was commenced on behalf of Frederick William West for the administration of the testator's estate, it being contended that the plaintiff and the other children of Mary White West who survived the testator were in the events which had happened absolutely entitled in equal shares to one moiety of the testator's residuary estate subject to the life interest of Margaret Orr therein.

The defendants, the trustees of the will, demurred, on the ground that the plaintiff had no interest in the estate of the testator.

Kay, Q.C. and Medd for the demurrer.—The gift to the issue of deceased children is not an original or additional but a substitutionary gift. It is not a gift to a class of children and the issue of any deceased child, but it is a gift to the issue of the share which the parent would have taken, and it is settled law that where there is a substitutionary gift to the children of a class, no child can take unless the parent was one of the original class. Further, the words "such children" can only refer to the class previously described. Here the plaintiff's mother was dead at the date of the will, and therefore could not be one of the original class, and therefore the plaintiff takes no interest under the will. They cited

Re Hotchkiss's Trusts, L. Rep. 8 Eq. 643;

Loring v. Thomas, 1 Dr. & Sm. 497;

Christopherson v. Naylor, 1 Mer. 320;

Butler v. Ommamney, 4 Russ. 70;

Habergham v. Ridehalgh, L. Rep. 9 Eq. 395; 23 L. T. Rep. N. S. 214;

Hunter v. Cheshire, L. Rep. 8 Ch. App. 751; 25 L. T. Rep. N. S. 283.

Sir H. Jackson and O. P. Hanson for the plaintiff.—The doctrine of *Christopherson v. Naylor* (sup.) has been doubted, and is, we submit, overruled so far as the words "shall happen to die in my lifetime" may be said to exclude the children of those dead at the date of the will. We rely on *Potter's Trusts* (L. Rep. 8 Eq. 92; 20 L. T. Rep. N. S. 649), which was followed in *Adams v. Adams* (L. Rep. 14 Ex. 246; 27 L. T. Rep. N. S. 515). Then the words "such children" do not mean such children of his sisters as should survive him (the testator) and his wife and attain twenty-one, but mean a second class, who should represent the issue of such children of his sister's as should die before him. It is, in fact, a gift to a second original class, which, with the first class, makes one compound class. They also referred to

(a) Reported by H. L. FRANKS, Esq., Barrister-at-Law.

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Parsons v. Gulliford, 10 Jar. N. S. 231;
Phillips v. Phillips, 10 Jar. N. S. 1173;
Re Chapman, 32 Beav. 383;
King v. Cleaveland, 26 Beav. 166; on App. 4 De G.
 & J. 477, 480;
Re Phillips's Will, L. Rep. 7 Eq. 151;
Ice v. King, 16 Beav. 53;
Bobb v. Beckwith, 2 Beav. 306;
Re Foulding's Trusts, 26 Beav. 263;
Giles v. Giles, 8 Sim. 360;
Tytherleigh v. Habin, 6 Sim. 329.

The VICE-CHANCELLOR.—If I could make a new will for the testator, I might be able to decide in favour of the plaintiff; but as the testator has expressed himself in language which is perfectly intelligible, I cannot take into account the ingenious suggestions that have been advanced on behalf of the plaintiff. I find that the testator made his will in Aug. 1873, and that the plaintiff claims under the will as being one of the issue of a daughter of the testator's sister, who died in 1868. I have heard many cases cited in the course of the argument, and I think it is to be regretted that there are so many decisions on the construction of wills, but the rules of law applicable to wills must not be perverted or infringed for any reason, and in dealing with each case the words of the will are the only guide to the judge. Now there is nothing more plain than that you cannot give a legacy to a dead man. The words of the testator are also clear. I find him not referring in any way to the death of Mary West, and I cannot impute to him the knowledge that she died in 1868. His intention is to give his property to a class which, in the events that have happened, comprises only one individual, and the plaintiff is not that individual. The gift is "to such of the children of my late sisters Margaret and Mary as shall survive my said wife, and being males, shall attain the age of twenty-one years, or, being females, attain that age, or marry under that age." And then he goes on to say, "but in case any of such children shall be dead at my decease leaving issue, then I direct that such issue shall take (and if more than one in equal shares as tenant in common) the share of their deceased parents"—so that the testator is speaking of persons whom he supposed to be then alive. That is the class from which the root of the plaintiff's title is derived; but if at the time that the will was made there was living only one child of testator's sister Mary, and the plaintiff's mother was not that child, how can I say that the plaintiff, and the persons whom he represents, can take the share to which their mother was not entitled? It is not necessary to consider again *Christopherson v. Naylor*, or the other cases which have been cited, except *Hunter v. Cheshire*, where the decision turned on the word "legatee"; but every child who takes under a gift to a class is a legatee. In that case it was decided that, under a gift to the children of any legatee who should die in the lifetime of the testatrix leaving children, the children of a child who was dead at the date of the will were not entitled. The gift in that case was very similar to the present. And here I am asked to hold that a gift to children who were supposed to be alive when the will was made, includes a person who cannot say that his mother, when living, was entitled to a share. The words are "to such of the children as shall survive my said wife," so that it is impossible to suppose that the testator intended to include children who were then dead; and the will goes on, in case "any

such children" shall be dead at my decease leaving issue—words which clearly refer to the class first mentioned—then the issue are to take the share which their parent would have taken. The gift to the issue, therefore, is plainly substitutional and not original. As I cannot find, therefore, that this plaintiff's mother took any share or interest under this will, I cannot hold that he is entitled to any. I decide solely upon the words of the will, and I think that none of the authorities which have been referred to, except *Hunter v. Cheshire*, are applicable to this case. I must, therefore, allow the demurrer, and with costs.

Solicitor for the plaintiff, *M. K. Braund*.

Solicitors for the defendants, *Maples, Teesdale, and Co.*

Friday, June 16.

HUBBARD v. ALEXANDER. (a)

Legacy to same person by different instruments—Duplicate codicils—Evidence—Admissibility of—Gift not cumulative.

*A testator executed his will in duplicate. One copy he deposited with his bankers, the other he retained in his own possession. Afterwards he gave a legacy of 2000*l.* to H., by two codicils, which were in exactly similar terms, but were executed at different times and attested by different witnesses. One codicil was attached to the copy of the will deposited with the bankers, the other to the copy of the will in his own possession.*

Held, that evidence was admissible to show that the testator intended the codicils to be duplicate instruments.

*Held, also, that H. was entitled to only one legacy of 2000*l.**

On the 11th Dec. 1863, John Richard Alexander duly executed his will in duplicate. One of such wills was retained by him in his own possession, and the other he deposited with his agents and bankers, Messrs. Mackrell and Company, in London.

In 1865 the testator informed his wife that he was desirous of leaving a legacy of 2000*l.* to his brother-in-law, and that in order to carry out his desire he intended to execute a codicil in duplicate in the same way as he had executed his will. Accordingly, he obtained from Messrs. Mackrell and Co. the will deposited with them, and added to the fourth sheet thereof a codicil in the following words:—"This is a codicil to the foregoing will of me, John Richard Alexander. I give and bequeath unto my brother-in-law, Captain Henry Stewart Beresford Hope, the sum of 2000*l.*, same to be paid, after the decease of myself and my said wife, to the said Captain Henry Stewart Beresford Hope, or to such person or persons as he may by deed or will appoint. In witness whereof I have hereunto set my hand, this 8th day of Nov. 1865." This codicil was duly executed, and was, together with the will, shortly afterwards returned by the testator to Messrs. Mackrell and Co.

Upon the death of the testator it appeared that the last sheet of the will retained by him, except a small portion of it on which was marked a cross, had been cut away, and on the back of the third sheet thereof was the following memorandum, in the handwriting of the testator:—"Notice. The

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

CHAN. DIV.]

Re EAST INDIA COTTON AGENCY (FURDOONJEE'S CASE).

[CHAN. DIV.]

half-sheet marked X I cut out, as I had made a mistake in copying the following codicil.—JOHN R. ALEXANDER." Immediately below such memorandum there was written, in the testator's handwriting, a codicil in precisely the same words and figures as the codicil above set out, except that it bore date the 11th Sept. 1867, instead of the 8th Nov. 1865, and was attested by different witnesses.

On the death of the testator Captain Hope claimed to be entitled to receive two legacies of 2000*l.* each on the death of the testator's widow, and thereupon this suit was instituted to administer the testator's estate.

With respect to the second codicil the following evidence was given by John Kendall, a solicitor, one of the attesting witnesses to it:

I was well acquainted with the testator. On the 11th Sept. 1867, he and I were fishing together in the west of Ireland. He asked me on that occasion to attest a codicil to his will, which he then produced, and I consented to do so. I did not act professionally on his behalf. I did not read the codicil, but he certainly did mention that it was a duplicate of one which he had executed in England, and that he wished to attach the same codicil to his own duplicate copy of the will. The date of execution was inserted by me or under my direction. I am positive that the testator intended the codicil to be merely a duplicate copy of the one which he had previously executed.

Both the duplicate will and the two codicils had been admitted to probate.

Eddie, Q.C. and Pemberton, for the plaintiffs, contended that the evidence of Kendal was admissible to show that the testator intended the second codicil to be merely a duplicate of the first, and that, therefore, the legatee was entitled to one legacy only.

Phear, for the legatee, argued *contra*, that the evidence was inadmissible. The court could only look at the documents, and, finding two codicils, with different dates and different attesting witnesses, must hold the legacies to be cumulative. The following authorities were referred to:

Wilson v. O'Leary, L. Rep. 7 Ch. App. 448; *Russell v. Dickson*, 4 H. of L. Cas. 293; *Whyte v. Whyte*, L. Rep. 17 Eq. 50; *Martin v. Drinkwater*, 2 Beav. 215; *Guy v. Sharp*, 1 My. & K. 569.

Sir H. Jackson and Macnaghten, and Grenside, who appeared for other parties interested under the will, and *Rigby* (for the Attorney-General), took no part in the arguments.

The VICE-CHANCELLOR.—Both the rules laid down in *Wilson v. O'Leary* (*sup.*) are very distinct, and the authorities which have been cited are merely illustrations of them. All I have to consider here is whether these two codicils are different instruments. Now, what are the facts? [His Lordship stated them.] The testator executed his will in duplicate, and we have it in evidence that at the time he executed the second codicil he stated to Mr. Kendall that he intended it to be a duplicate of the codicil he had previously executed in England, and to attach it to the duplicate copy of the will in his possession. This evidence has been objected to as inadmissible, but in my opinion it is properly receivable to ascertain whether the two codicils are different instruments, although it is not admissible for the purpose of construing the intention of the testator as expressed in the instruments. It is proved, therefore, that the testator intended the second codicil to be a duplicate of the first. I am of opinion,

therefore, that the two codicils are not separate and distinct instruments. There will, therefore, be a declaration that the legatee is entitled to only one legacy.

Solicitors for the plaintiffs, *Meynell and Pemberton*.

Solicitor for Mr. Hope, *T. Grahame*.

Thursday, July 6.

Re EAST INDIA COTTON AGENCY (FURDOONJEE'S CASE). (a)

English company—Foreign shareholder—Foreign bankruptcy—Liability for calls not provable as a debt—Winding-up order—Order of discharge—Contributory.

A foreign shareholder in an English company, who goes into liquidation before the commencement of the winding-up of the company and afterwards obtains his order of discharge, will nevertheless be placed on the list of contributories of the company if his liability in respect of calls on his shares was, at the time of his liquidation, a liability incapable of estimation for the purposes of proof.

MOTION.

The East India Cotton Agency Company was incorporated and registered in England in Nov. 1861, with a nominal capital of 500,000*l.*, divided into 50,000 shares of 10*l.* each. The object of the company was the carrying on a commission agency and general trading in Indian cotton produce to be procured as far as possible direct from the producers in the interior of India.

In or about the year 1863 one Ardaser Cursetjee Furdoonjee took 100 shares.

On the 12th Oct. 1866, resolutions were passed in Bombay under the Act XXVIII. of 1865 of India to wind-up Furdoonjee's affairs under management.

In Oct. 1868 Furdoonjee obtained his discharge under the 24th section of the Act XXVIII. 1865.

Between these dates, viz., in July 1867, the East India Cotton Agency Company was ordered to be wound up.

The official liquidator now moved that the name of Ardaser Cursetjee Furdoonjee might be placed on the B list of contributories for 100 shares.

Kay, Q.C. and Owen, for the motion.—As to the liability of the Indian shareholders in this company there can be no doubt, for the court has already decided upon the liability of the Indian shareholders to contribute: (*Re East India Cotton Agency Company* (*Sand's case*), 32 L. T. Rep. N. S., 299.) The proceedings in bankruptcy have not done anything to relieve the shareholders of this liability:

Financial Corporation v. Lawrence, L. Rep. 4 C. P. 731.

E. Cooper Willis, for Furdoonjee.—The only question is, whether the 24th section of XXVIII. Act 1865 of India does not relieve the shareholder from his liability. The decision of the Bombay High Court is clear that it does: (*Punnett v. Vinayak Pandurang* (9 Bombay High Court Rep. 27).) There, under exactly similar circumstances, it was held that an insolvent trader who has obtained his discharge under sect. 24 of Act XXVIII. of India 1865, was not liable for calls made after he had obtained his discharge in respect of shares held by him in a joint stock company when the

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order for the winding-up of such company had been made prior to the time of the insolvent debtor obtaining his discharge. This is the interpretation put upon the Indian Act by the High Court of Bombay. The Indian judges decided that there was, under similar circumstances to the present, a liability that would have been provable in bankruptcy, and, therefore, that the shareholder was released.

Kay, Q.C. in reply.

The VICE-CHANCELLOR said, that notwithstanding the decision of the Bombay High Court that had just been cited, he failed to see how, at the commencement of Furdoonjee's insolvency proceedings, Furdoonjee's liability to the company could have been proved for as a debt when at the time there could be no evidence that a call would ever be made; and that this being an English company, he felt bound to hold that the liquidator could not have gone in under the Indian bankruptcy and have proved for a liability which was at the time incapable of being estimated. Furdoonjee's name must, therefore, be placed on the list of contributories; but as it was, he was told, a representative case the costs of all parties must be allowed out of the estate of the company.

Solicitors for the liquidator, *Harper, Broad, and Battock.*

Solicitors for the respondent, *Chauntrell, Pollock, and Mason*, agents for *Prescot and Winter*, Bombay.

July 20, 21, and 25.

BROWN AND CO. v. BROWN; BROWN v. BROWN AND CO. (a)

Sale of ironworks to a company—Vendor's guarantee as to profits—Part of works discontinued by company—Guarantee discharged—Injunction.

In 1872 a company was formed to purchase and work (*inter alia*) a going concern, consisting of railway tyre and steam roller works, and the vendor accepted part of the purchase money in fully paid up shares, called "vendor's shares." The vendor guaranteed to the shareholders a dividend for the first five years upon the called up capital for the time being at the rate of ten per cent., and that if in any one of the five years the profits should not equal a dividend of ten per cent., he would pay the amount required to make the profits equal such dividend; and that, if he did not on demand pay such amount, the company might sell his "vendor's shares," and apply the proceeds in satisfaction of such amount. The business was carried on at a loss from the first, and in 1874 the directors, who had the widest powers of management, shut up the railway tyre department, which comprised four-fifths of the whole concern. In 1875 there were no profits at all, and the directors called upon the vendor under his guarantee to pay an amount sufficient to make up the dividend of ten per cent., and, on his refusal, commenced an action to enforce payment.

Held, that the guarantee was given upon the implied condition that the company should carry on the whole concern as it existed at the first, and that, the company having broken the contract on their part, the vendor was discharged from his guarantee.

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

Held, also, that the vendor was under the circumstances entitled to an injunction to restrain the company from selling his "vendor's shares."

IN and prior to the month of September 1872, George Brown carried on business as a railway tyre manufacturer and iron and steel roller at Rotherham, in Yorkshire, under the respective firms of "G. and J. Brown and Co.," and "G. and J. Brown."

By an agreement under seal dated the 25th Sept. 1872, and made between the said George Brown of the one part, and John Unwin Wing, it was provided (*inter alia*) that J. U. Wing should forthwith take the necessary steps for forming a joint-stock company with limited liability, under the provisions of the "Companies Acts 1862 and 1867," to be designated "G. and J. Brown and Co. (Limited)," having for its object (amongst others) the purchase of the Rotherham ironworks of George Brown, and all his stock in trade, loose plant, and machinery, and the goodwill of his said business, and the carrying on of the trades or businesses of iron manufacturers, railway tyre manufacturers, and iron and steel rollers, or any trades or businesses of a like nature, or connected therewith or incidental thereto; that the nominal capital of the company should be 125,000*l.*, divided into 1250 shares of 100*l.* each; that George Brown should be the chairman of the board of directors of the company until the 30th Sept. 1877, and that so long as he should continue such chairman no expenditure should be made in extending or adding to the works of the company without his consent; that the salary of George Brown whilst such chairman should be 1000*l.* a year; that the articles of association should be so framed as to give effect to the several provisions of the agreement, but might contain such extensions or modifications of such provisions as should be mutually agreed on; that the price to be paid by the company for all the property and effects agreed to be sold should be the value thereof on the 30th Sept. 1872, such value to be ascertained by valuation; that the company should immediately upon its incorporation issue to George Brown 250 shares in the company, all of which should be deemed and should be credited in the books of the company as fully paid up on the 30th Sept. 1872, and that he should accept the 250 shares so to be issued in payment of the purchase money to the extent of 25,000*l.*; that the 250 shares so to be issued to George Brown should bear the same dividends as the other shares for the time being in the company, and no dividends should be paid upon the amounts paid, or considered paid, on the vendor's shares in excess of the sums called up on the other shares of the company; "but the vendor guarantees to the whole of the proprietors of the shares for the time being in the company a dividend for five years, from the said 30th Sept. 1872, upon the capital from time to time called up, after the rate of ten per centum per annum; and whenever, at the end of any one of the said five years, the profits of the company shall prove to have been insufficient to pay to the said proprietors for such year such dividend as aforesaid, the vendor will forthwith pay to the company so much money as, with the said profits, will enable the company to pay to the said proprietors such dividend as aforesaid;" that the 250 shares so to be issued to George Brown should, until the objects for which the guarantee was given were fully answered, be

called "vendor's shares," and should not be transferable for a term of five years and three months from the 30th Sept. 1872, and the words "vendor's shares not transferable, and subject to vendor's guarantee" should be marked upon each scrip issued in respect thereof, and that all moneys payable by George Brown under the guarantee should be a charge upon such shares; that in case any of the moneys payable by G. Brown under his guarantee should not be paid on demand, the board of directors should have power at any time thereafter to sell as ordinary shares fully paid up, in any manner and upon any terms that might appear to them reasonable, all or any of the vendor's shares, and to apply the proceeds in satisfaction of the moneys for the time being payable to the company by G. Brown; that when the term of five years and three months from the 30th Sept. 1872, should have expired, and all moneys payable by G. Brown pursuant to the guarantee should have been satisfied, the scrip for the "vendor's shares" should be returned to the company, and thenceforth such shares should cease to be called "vendor's shares," and should cease to be under any special obligation, and scrip for the same shares, in the same form as the scrip issued for the ordinary shares of the company, should be given in exchange for such returned scrip; and that all questions and differences which should arise under the agreement should be referred to arbitration as therein provided.

On the 5th Oct. 1872, the company was duly incorporated and registered pursuant to the provisions of the agreement, which was itself embodied in the articles of association. The latter provided (Art. 118) that the business of the company should be managed by the board of directors "who may carry on the same in such manner as in their judgment they may consider expedient, and for this purpose they may exercise all powers and do all acts which are not by the statutes or these articles directed or required to be exercised or done by the company in general meeting;" and by Article 129 powers of management of the widest and most comprehensive character were conferred on the directors.

From the date of the incorporation of the company to the 30th Sept. 1874, 793 ordinary shares in the company were issued to divers persons, and the total calls made upon such shares up to the 30th Sept. 1875, amounted to 90*l.* per share.

The financial year of the company from the time of its formation was computed from the 30th Sept. in each year.

For the years ending the 30th Sept. 1873, and the 30th Sept. 1874, a dividend at the rate of ten per cent. was paid on the whole of the company's shares. There was a dispute whether these dividends were paid out of the capital of the company or out of moneys supplied for that purpose by George Brown under his guarantee.

The iron and steel rolling department of the company was always carried on at a profit, but at the beginning of the year 1875 a majority of the board of directors, notwithstanding the strong protests of G. Brown, determined to close and did close the railway tyre department. This department, which represented nearly four-fifths of the company's business, had been carried on at a loss from the first. This loss had originally been about 800*l.* per month, but in the month of Dec. 1874, it was only 19*l.* No profits whatever appli-

cable to a dividend were made during the year which expired on the 30th Sept. 1875, but on the contrary a large loss was sustained, and thereupon the company called upon G. Brown to pay the sum of 6198*l.* 19*s.* 6*d.* which was the amount required to make up a dividend of ten per cent. on the shares of the company for the year ending 30th Sept. 1875. Brown refused to pay, on the ground that his guarantee was operative only so long as the company carried on all the businesses sold to them by him.

On the 25th Nov., the company commenced an action against Brown to enforce payment of the 6198*l.* 19*s.* 6*d.*, with interest at five per cent.

Brown thereupon commenced a cross action against the company, alleging that the railway tyre department had been closed without taking any skilled advice or making any inquiries as to the advisability or prudence of such a course; that in Nov. 1872, a resolution was passed by the board authorising the sum of 7500*l.* to be laid out in alterations and improvements in the tyre department, but that no more than one-fourth of such sum had been expended in accordance with the said resolution; that if the railway tyre department had been continued and the suggested alterations and improvement carried out, the loss would soon have changed into a profit, and there would have been no necessity to resort to his guarantee; that while the tyre department was closed it was impossible that the business of the company should ever be carried on except at a loss; that under these circumstances he had refused to pay the amount demanded under his guarantee; and that the company had instructed their solicitors to sell his 250 vendor's shares, and he claimed a declaration that he was not liable to pay the 6189*l.* 19*s.* 6*d.* or any part thereof, and that the company might be restrained from selling his 250 shares.

Marten, Q.C., Gould, and Bush, for the company, contended that the guarantee was given without any qualification, that the entire management of the concern was vested in the directors, who were bound in the exercise of their discretion to close the tyre department to save the company from further loss, and that the question really related to the internal management of the company, with which the court in the absence of fraud would not interfere.

McDougall v. Gardiner, L. Rep. 10 Ch. App. 806.

Kay, Q.C. and Henderson, for Brown, argued, *contra*, that the guarantee was given as part of the agreement for the purchase on the implied understanding that the business was not to be altered, and that the company, having determined to close the tyre department, had so altered Brown's position that he could not be called upon to continue his guarantee. They cited

McIntyre v. Belcher, 10 C. B., N. S., 654;

Telegraph Despatch, &c. Co. v. McLean, L. Rep. 3 Ch. App. 656.

Marten, Q.C. in reply, referred to

Lytleton v. Blackburn, 33 L. T. Rep. N. S. 841.

The VICE-CHANCELLOR.—The only question which has to be decided in this matter arises upon the construction of the agreement, which is reasonably plain in its terms. The facts accompanying the agreement which have been referred to in the course of this discussion, and which are beyond dispute, are that Mr. Brown, having established a very extensive business of a somewhat special

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character, desired to dispose of his business to a joint-stock company. Now, stopping there for a minute, what does that mean? A man who has a business—a valuable business, as he thinks—believes that by the employment of a larger capital than he can command that business will be made still more lucrative. He, meaning to be a shareholder of the company himself, stipulates for his price, no matter what it is, and he is willing to become a shareholder himself to the extent of 250 shares. These are the circumstances existing when the agreement was entered into between him and the promoters of this intended company, and the contract is expressed in the agreement which is referred to in the pleadings and set out in the articles of association. The most important of the stipulations, at least the one first to be considered, in my opinion, is the first article in the agreement. "The promoters shall forthwith take the necessary steps for forming a joint stock company with limited liability having for its objects, or some or one of its objects, the purchase of the property and effects hereinafter agreed to be sold and purchased, and the carrying on of the trades and businesses of iron manufacturers, railway tyre manufacturers, and iron and steel rollers, or any trades or businesses of a like nature, or connected therewith, or incidental thereto." That is the purpose for which the company is to be formed according to the agreement. It is unnecessary that I should consider the more extensive objects which are mentioned in the memorandum of association or the articles, but that is the basis of the agreement, that Mr. Brown, who has hitherto carried on those businesses, shall transfer them to a company which shall be in his place and stead, and have, in addition to the moneys which he seems to have had, the capital which it is intended they should raise. The things sold are the offices (mentioned in paragraph 9 of the agreement), the Rotherham Iron Works, stock-in-trade, the loose plant; "and, fourthly, the goodwill of the vendor of the businesses as now carried on by him." Then the clause on which the question has mainly arisen is the 15th, which provides that the 250 shares, as in the previous part of the agreement provided, "so to be issued to the vendor shall bear the same dividends as the other shares for the time being in the company, and no dividends shall be paid upon the amount paid or considered paid upon the vendor's shares in excess of the sums called up on the other shares in the company, but the vendor guarantees to the whole of the proprietors of the shares for the time being in the company a dividend for five years from the said 30th Sept. 1872, upon the capital from time to time called up after the rate of ten per cent. per annum; and whenever at the end of any one of the said five years the profits of the company shall prove to have been insufficient to pay to the said proprietors for such year such dividend as aforesaid, the vendors will forthwith pay to the company so much money as with the said profits will enable the company to pay to the said proprietors such dividend as aforesaid." That is the stipulation which this bill seeks to enforce, but then it is accompanied by this proviso: "Whenever at the end of any one of the said five years the profits of the company shall prove to be more than sufficient to pay to the said proprietors a dividend for such year upon the capital from time to time called up

greater than ten per cent., then the company shall forthwith out of such excess of profits pay to the vendor such an amount or amounts as he may have previously paid to the company to make up any dividend or dividends to ten per cent. per annum as aforesaid, or such proportion of such amount or amounts as such excess will extend to pay, and the surplus (if any), or the whole (as the case may be), of such excess of dividend shall from time to time, until the expiration of the said five years, be carried forward from year to year, and if and whenever at the end of any future year of the said five years the profits of such year shall be insufficient to pay a dividend at the rate aforesaid, the said profits so carried forward shall from time to time, so far as shall be necessary, be applied in making up the deficiency, and if such last-mentioned profits shall be insufficient, then the vendor shall, from time to time, make up the deficiency." Now, then, "the profits" there assume a shape and a significance which it is impossible to misunderstand. They are the profits to be made by carrying on the trades and businesses of iron manufacturers and railway tyre makers, and so on, the stipulation being that the vendor, if he is called upon to pay in any one year, shall have the benefit of any excess that they may earn in future years, and that is to be measured by the amount of profits. Well, if the businesses or any of them are not carried on, there can be no profits; there is nothing by which the deficiency can be measured, no means by which it can be ascertained what the vendor shall be called upon to pay. However, that is the construction of this stipulation in the agreement, and that is an independent separate contract, which is wholly separate and distinct from anything else that may be contained in the agreement, and upon which alone the suit of the company is founded. The articles of association adopt the agreement, and declare that it "shall be read and construed with and as part of these presents;" but, as has been argued, I think in a manner that cannot be gainsaid, whatever may be contained in the articles cannot in any sense control or enlarge that contract or part of the agreement which I have just now read. Then the liability to Mr. Brown to perform that portion of the agreement is the matter to be considered. It has been said that because the words contain a contract that he shall pay to the proprietors a dividend, that is different from his having to pay it through the company or by the company, or different from that dividend which the company would declare. I cannot entertain that notion for a moment. It is a contract with an intended company, the purchasers are mentioned in it, but not as separate and distinct persons, not as drawing a line of distinction between the company, or the directors who may have the management of the company, and the proprietors who are to derive the benefit of the profit which may be made by carrying on the company. Well, then, unless you have some amount of profits arising from the business which the company, by that resolution which I have read last, by which they adopt the agreement, are to carry on, unless you can ascertain what business has been carried on by them, and first what profits have been derived, there is no possibility of arriving at the guarantee, the performance of which the vendor is to undertake by the stipulation I have just read. Then what takes place? The company, instituted

or formed in 1872, is carried on until 1875. It was carried on at a loss from the earliest moment of the operations of the company. The bargain, as it appears to me, that was agreed on, not only contemplated by Mr. Brown but agreed on by the directors, has been reasonably said to be this—it not only contemplated the introduction of capital, but it was agreed by the directors that it was necessary to expend money on the extension and alteration of the works, a thing which could not be done without his consent, which was readily given. The reason is explained by some of the witnesses. The works may be said to consist of three parts, in which the two end parts were devoted to the tyre business, the middle part being occupied by the rolling business, but it was found in practice that those two extreme parts should not be so severed as they were, and that if money was expended so as to counteract and overcome the difficulty arising from that circumstance a much larger output might be procured. Without any particular evidence on the subject that is a thing so evident that nobody would hesitate to adopt it, because the dead charges, the working charges being of a certain amount, would not necessarily be increased by the alteration which was to be made, and the profit would be greater, of course, if the output could be raised from about 80 tons to about 250 tons for the same period. So, a competent manager, as it was believed, being employed by the directors, a proposition is made to the directors, and accepted by them that 7500*l.* should be laid out in the improvement of works upon a plan which was then submitted and discussed and approved. So far, then, Mr. Brown's representations are adopted by the company; so far everything went on amicably. Then it appears that the manager so far failed to perform his duty as that, out of the 7500*l.* proposed only 1500*l.* was spent, and so things went on not prosperously, and considerable losses were incurred until at last at the end of Sept. 1874, it was considered by the directors, other than Mr. Brown, that inasmuch as the loss had been very large, and as there were debts owing to the bankers of the company and others, it would be better for them at once to suspend entirely the tyre making department and to confine themselves to the rolling business. In December of the following year the works were put an end to and shut up, and there was an end to all the tyre business. Now the directors institute this suit for the purpose of enforcing against Mr. Brown the stipulation by which he agreed to make up the dividends to ten per cent. per annum—in other words the directors or the company come into court for the purpose of enforcing the agreement against Mr. Brown. Well, then, is it a term of the agreement that they were at liberty at once to shut up their works, and call upon Mr. Brown under his guarantee? That they were at liberty to shut up their works nobody can dispute, but also that the guarantee is upon an implied engagement on their part that they will carry on these several businesses which are mentioned in terms in the agreement, and which agreement is adopted into the articles, seems to me too clear to admit of question. It is unnecessary for me to refer to cases in particular, because it may be considered that the principle is universal that a man who himself is under any obligation, if he comes to enforce the obligations of another, should be able to show that he has

failed in none of the obligations which are imperative upon himself to perform. Now what may have been Mr. Brown's motive in entering into this agreement is too plain to be questioned for a moment. Mr. Brown was a successful manufacturer of these iron articles with a very large, special, and lucrative business. He desired to have an extension of that business by means of further capital, and so confident was he in the success which he had hitherto met with in that business, so confident was he of the future prosperity of the concern, that he undertook to pay up the dividend to the amount of ten per cent. But upon what condition? Upon the condition that the company which was to be formed, which was formed, and which did adopt that stipulation which I have read from the articles, would continue to carry on that business. Can it be said that those who have ceased to carry on the business, who have extinguished all hope of profit from that branch of the business, can now ask Mr. Brown—the profits being calculated upon the entire concern as parted with by Mr. Brown, and they having made it impossible that there can be any profit—to pay the difference between the profits they have realized and the ten per cent.? In my opinion answer to that question is superfluous. I think the two cases which have been referred to have both of them direct application to the principle I have mentioned. The case of the surgeon's business (*McIntyre v. Belcher*) where the purchaser, after having agreed to pay a proportion of the profits to the vendor, sold the business and made it impossible to ascertain what was the amount of the profits, has a direct application to this case. Here the company have not sold the business, but they have so parted with it, including in it (which is worthy of notice) the goodwill, for that has been lost as the witnesses have proved, they have so dealt with this particular branch of the business, as that no profits can be derived from it. That brings me to the very condition which was mentioned in the case of the *Telegraph Despatch and Intelligence Company v. McLean* (*ubi sup.*) that the parties here are seeking to enforce an agreement when they themselves have most deliberately abandoned the agreement, and made the performance of it impossible. Upon that ground, in my opinion, Mr. Brown is perfectly justified in saying, "The contract which we entered into has been broken and wholly put an end to by the company, and I, therefore, am no longer bound to do that which, if they had not broken it, I should have been obliged to do." Now I regret very much that a great deal of time has been taken up in taking what is called evidence. [His Lordship, after referring to the fact that there was no material fact in dispute, and no negligence or impropriety imputed to Mr. Brown, continued.] The witnesses all of whom were competent men acquainted with the trade who had examined the works, knowing the capacity and nature of Brown's business, and its capability of extension, all prove that to suspend the business when the company did suspend it was as rash and ruinous a thing as could be. If the company were at liberty to do that they were also at liberty the day after the formation of the company to have sold and disposed (according to the stress of the argument on the part of the company) of every part which they had bought, putting the money into their own pockets, and

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to have said to Mr. Brown every half year, or whenever the dividend became payable, "Sir, there is no dividend, there are no profits out of which a dividend can be declared, and therefore you have to pay to the proprietors of shares in this company the ten per cent. guarantee." That is too monstrous to entertain, but, however monstrous it seems, that is substantially the nature of what the directors have thought fit to do. Whatever the directors have contracted to do, much or little, they have put an end to the possibility of any profits being derived from this by far the most lucrative branch of the undertaking—that undertaking which they were constituted and pledged to carry on; which, having adopted the terms of agreement in the articles of association, they did undertake to carry on; and by reason of their breach of which it has been impossible to ascertain whether Mr. Brown has incurred or would have incurred any liability under this contract. It is quite impossible now to measure by placing the profits against the ten per cent., how much or how little Mr. Brown ought to pay. To my mind it is quite clear that this was an ill-advised proceeding on the part of the company. I will refer now to the fifteenth paragraph of Mr. Brown's claim: "The result of the closing of the last mentioned department, which represented five-sixths of the company's business has been a disastrous one for the company. They have lost the whole of this connection in that class of business." The goodwill has been sold and surrendered by the covenant, that Mr. Brown would not engage in any such like business for the period of twenty years. They have had to pay considerable sums to persons engaged in that department to induce them to cancel their contracts. They have sold the loose stock at a great sacrifice in price. They have been compelled to call up no less than 25,000*l.* more capital for the purpose of paying off the liabilities on account of the closing of the iron and tyre department; and the building and machinery in that department have been depreciated fifty per cent. in value. It is impossible to read Mr. Brown's contract of guarantee without considering that it is made upon the condition that these things, which the company have done and neglected to do should have remained in the condition they were when he entered into the contract. They have broken the agreement in these several particulars, and are disqualified from seeking to enforce against him that contract which, but for their conduct, would have been enforceable against him. There must, therefore, be a declaration that Mr. Brown is not liable to pay the company the sum of 6198*l.* 19*s.* 6*d.*, or any part thereof, and that he has been since the 30th Sept. 1874, and henceforth is discharged from any liability to the company under his guarantee; and the company must be restrained from dealing with or disposing of the 250 vendors' shares. Mr. Brown is entitled to the costs of his action, but the cross action by the company must be dismissed with costs.

Order accordingly.

Solicitors for the company, *Torr and Co.*, agents for *Burdekin and Co.*, Sheffield.

Solicitors for Mr. Brown, *Learoyd and Learoyd*, agents for *Potter, Brown, and Co.*, Rotherham.

COMMON PLEAS DIVISION.

Monday, May 8.

HOWES AND ANOTHER (pets.) v. T. TURNER AND ANOTHER (resps.) (a)

Municipal Elections Act 1875 (38 & 39 Vict. c. 40, s. 1, sub-sect. 1)—Notice by town clerk—Time for delivery of nomination papers—Objection to nomination—Decision of mayor—Withdrawal of nomination paper—Jurisdiction of court to decide on petition.

An objection to the nomination of a candidate at a municipal election, on the ground that the notice, which by 38 & 39 Vict. c. 40, s. 1, sub-sect. 1, is to be given by the town clerk nine days at least before the election, is invalid, is not an objection to be decided by the mayor under sub-sect. 3, but may be taken by petition.

If the notice is such as to mislead a material part of the electors the election is void.

An objection that a nomination paper was delivered too late is not an objection to the nomination paper within the meaning of sub-sect. 3 so as to make the mayor's decision disallowing the objection final.

The town clerk gave notice of a municipal election in due time, but the notice directed candidates to deliver their nomination papers on a day which by sub-sect. 3 was too late. The petitioners and the respondent W. delivered their nomination papers in proper time. The respondent T. delivered his on the day named in the notice. Afterwards W. took away his paper to correct a supposed error, and re-delivered it after the proper time for delivery. The petitioners objected before the mayor to the nomination of the respondents. The mayor disallowed the objection, the election was held, and the respondents were elected.

Held, on a special case, that the mayor's decision was not final, and that the court had jurisdiction to decide the question raised by the petition.

Held, also, that W.'s taking away the nomination paper was not such a withdrawal as to avoid his nomination.

Held, also, that the notice was such as to mislead the electors, and therefore the election was void, and there must be a new election.

A PETITION had been presented by Richard Howes and William John Pierce against the return of Richard Turner and Thomas Wright as councillors for the East Ward of the borough of Northampton. By order of Denman J. the questions raised by the petition were stated in the form of a special case, which was as follows:

1. The borough of Northampton, in the county of Northampton, is a borough incorporated under the name of "The Mayor, Aldermen, and Burgesses of the Borough of Northampton," having a mayor, six aldermen, and eighteen councillors. The said borough is divided into three wards, one of which is called and known by the name of the East Ward. The East Ward is represented in the council of the said borough by six councillors, who are elected from the burgesses duly qualified in that behalf. Two of such councillors retire annually on the 1st Nov., when two fresh ones are elected or the same re-elected.

2. On the 19th Oct. 1875 Mr. Wm. Shoosmith, the town clerk for the said borough, published a

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

notice that the nomination papers of candidates at the forthcoming election of two councillors for the wards of the said borough were to be delivered to him at his office before 5 p.m. on Saturday the 23rd Oct. 1875, and that the mayor of the said borough, Mr. Wm. Adkins, would attend at the town hall on Monday the 25th Oct. 1875, from 2 to 4 in the afternoon to hear and decide objections to nomination papers.

3. The petitioners, being duly qualified burgesses, were nominated as candidates at the said election for the East Ward, and their respective nomination papers were duly signed by properly qualified persons, and were duly delivered to the town clerk before 5 p.m. on Friday the 22nd Oct. 1875, in accordance with the Municipal Elections Act 1875.

4. The respondent, Thomas Wright, being also a duly qualified Burgess, was nominated as a candidate at the said election for the East Ward, and his nomination paper in like manner signed in the manner hereinafter appearing was delivered to the town clerk before 5 p.m. on Friday the 22nd Oct. 1875, in accordance with the said Act, and was accepted and received by the said town clerk as a due and proper nomination of the said Thomas Wright, and the said town clerk placed the said nomination paper with the other papers relating to the said election. Afterwards on the same day the said Thomas Wright, without the sanction, authority, or knowledge of the town clerk obtained the said nomination paper from one of the town clerk's clerks (who had no authority to give up the same) for the purpose of getting one of the proposers who had signed one of his Christian names abbreviated to sign it in full, and the said Thomas Wright, having got the signature altered accordingly, delivered back the said nomination paper at the town clerk's office on the following day before 5 p.m.

5. The respondent, Richard Turner, being also a duly qualified Burgess, was nominated as a candidate at the said election for the East Ward, and his nomination paper, duly signed, was delivered to the town clerk before 5 p.m. on Saturday the 23rd Oct. 1875.

6. On the said 23rd Oct. 1875 the said mayor of the said borough did not attend at the town hall, but on Monday the 25th Oct. 1875, according to the above-mentioned notice of the town clerk, he attended at the town hall between the hours of 2 and 4 p.m., as mentioned in the said statute, to decide on the validity of objections made to nomination papers. An agent on behalf of the petitioner, William John Peirce, then appeared before the mayor, and contended that the nomination of the respondents was not legal, and ought not to be allowed. The mayor, having heard the said contention, disallowed the objection. No objection was made to the right or authority of the mayor then to hear such contention and to determine such objection.

7. On the said 25th Oct. 1875 the town clerk published the names of the petitioners and respondents as candidates for the office of councillors in the East Ward in the form required by the statute, and notice was given that the elections for the said ward would be proceeded with on the 1st Nov. 1875 according to notice.

8. On the 1st Nov. 1875 the poll was taken in the usual manner for all the four candidates aforesaid, when the returning officer declared the

respondents duly elected by a majority of votes to fill the two vacancies in the said East Ward.

9. On the 20th Nov. 1875 the said petition in this case was duly filed, but it was not served upon the returning officer, nor was any notice thereof given to him, and on the 11th Jan. 1876 the order of the honourable Mr. Justice Denman was made herein.

The questions for the opinion of the court are :

1. Whether the election of the respondents, under the circumstances, can be questioned by petition?

2. Whether the respondents were duly elected and returned, or whether the petitioners were elected and ought to have been so returned pursuant to the statute in that behalf, or whether there ought to be a fresh election?

By the Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1. "The following provisions shall be enacted and apply to nominations at all municipal elections of councillors, auditors, and assessors after the passing of this Act :

1. Nine days at least before any such election the town clerk shall prepare, sign, and publish a notice in the form No. 1 set forth in the first schedule to this Act, or to the like effect, by causing the same to be placed on the door of the town hall, and in some conspicuous parts of the borough or ward for which any such election is to be held.

2. At any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination.

3. Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself or his proposer and seconder to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered; the town clerk shall forthwith send notice of such nomination to each person nominated. The mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination paper, such objection to be made in writing. The candidate nominated by each nomination paper and one other person appointed by or on behalf of the candidate as hereinafter mentioned, and no person other than aforesaid, shall, except for the purpose of assisting the mayor, be entitled to attend such proceedings, and each candidate and the person appointed by him shall, during the time appointed for the attendance of the mayor for the purposes of this section have respectively power to object to the nomination paper of every person nominated at the same election. The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final, but if allowing the same shall be subject to reversal on petition questioning the election or return.

Sect. 11. In reckoning time for the purpose of this Act, Sunday, Christmas Day, Good Friday, and any day set apart for a public holiday, fast, or public thanksgiving, shall be excluded.

By sect. 1 of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60),

The election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the "court," on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes.

An election shall not, except in the manner provided by

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this Act, be questioned upon an information in the nature of a *quo warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act.

Cave, Q.C. (A. L. Smith with him), for the petitioners.—The petitioners are entitled to be declared duly elected, for they are the only candidates who have complied with the provisions of 38 & 39 Vict. c. 40, s. 1, subsect. 3 as to delivery of nomination papers. The delivery of the respondent Wright's nomination paper, though valid at first, was avoided by his taking it away, and the subsequent delivery was too late. If after he had taken away the nomination paper he had never returned it at all he would clearly have been disqualified, and his having redelivered the paper when it was too late cannot get rid of the disqualification. This was not an objection to a nomination paper, which the mayor could hear, and on which his decision, if he disallowed the objection, would be final. Here there was no nomination paper before the mayor; there had been no proper nomination. The objections as to which the mayor is to decide are objections such as those to the description of a candidate, which he would be peculiarly well qualified to decide; see the Ballot Act 1872 (35 & 36 Vict. c. 33) sched. 1 rules 6, 12, 13. The mayor's jurisdiction applies only to objections that can be decided on inspection of the nomination papers. Assuming that the mayor's decision is not final, this is a proper subject for petition, the petitioner could not have proceeded by information in the nature of a *quo warranto* (35 & 36 Vict. c. 60, s. 12). The respondents were not qualified, and therefore were not duly nominated; therefore the votes given for them were void, and the petitioners are elected. He also referred to

Reg. v. Ledgard, 8 A. & E. 535;

Reg. v. Parkinson, L. Rep. 3 Q. B. 11; 37 L. J. 52, Q. B.; 17 L. T. Rep. N. S. 169.

J. O. Griffiths, Q.C. (Ansie with him), for the respondents.—The giving of a proper notice of the election by the town clerk is not a condition precedent to the validity of the election; the clause is directory only. The defect, if there is one, is not such a defect as can be taken advantage of by petition, for the right to petition is given by 35 & 36 Vict. c. 60, s. 12, which does not extend to cases where the nomination is questioned. As to the nomination papers, the mayor has jurisdiction to see that they are in the proper form and are delivered in time. It was not intended that there should be any appeal from the decision of the mayor, except where a nomination paper was rejected; here there has been no such rejection, and therefore the mayor's decision is final. The respondent Wright's nomination paper having been delivered to and accepted by the town clerk, Wright had become duly nominated as a candidate, and his subsequent act in taking back the paper could not make him cease to be a candidate; it was not a withdrawal, for he could only withdraw by giving notice according to the terms of 38 & 39 Vict. c. 40, s. 7. Therefore Wright was duly elected. If the respondents' contention is wrong, and the election is invalid, the petitioners cannot be held to have been duly elected, but there must be a new election.

Cave, Q.C. in reply.

BRETT, J.—The material fact of this case is that the notice given by the town clerk under 38 & 39 Vict. c. 40, s. 1, was bad in this par-

ticular, that though it was issued in proper time, it gave notice that the nominations were to be given in on the 23rd Oct., whereas it should have been the 22nd. The petitioners were nominated, and their nominations were sent in insufficient time, as also was that of one of the respondents, but on the same day he takes it away, to correct it, as he thought. The nomination of the other respondent was sent in within the time named by the town clerk, but not in proper time. An objection was taken on this ground, but the mayor decided against it, and the election was held. The petitioners, relying on the validity of their objection, did not poll their voters, and the two respondents were elected. It has been suggested on behalf of the petitioners that the notice given by the town clerk was void because it has not followed the terms prescribed by the section of the Act, and the question is raised whether we can declare it to be void. It is said for the respondents that we have no jurisdiction, for we are not the election court, but that the only remedy is in the nature of a *quo warranto*; the other side says that we have jurisdiction. The question is, are we bound if there is a defect in the notice to say that the election is void, or are we at liberty to hold that some defects in the notice would have the effect of avoiding the election, but others would not, and then what is the effect of what has been done in this case? It is suggested that the mayor having decided as to the validity of the objection, his decision is final and we cannot review it. With regard to the decision of the mayor, the question seems to us not to be one, arising on the form of the nomination paper, but as to the time within which the nominations were to be sent in, and as to whether the nominations were void; it is not an objection to the paper, and both the grounds of objection might exist without there being any defect in the paper. By sect. 1 sub-sect. 3 it is enacted that the mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination paper. We think that the only office of the mayor is to decide as to objections arising on the nomination paper, and this was not a question for the mayor to decide, and therefore it is open to us. Then as to the delivering back of the nomination paper, the paper was sent in in proper time at first. The Christian name of the proposer was written with an abbreviation, but it was not such an abbreviation as would render the nomination invalid; therefore it was a good nomination paper. If the paper had been withdrawn, and the candidate in withdrawing it had intended that the nomination should be withdrawn, but he had afterwards changed his mind, this might have amounted to a withdrawal of the nomination. As at present advised I should say that in such a case as that the second delivery of the nomination paper would be equivalent to a first delivery, and would, therefore, be too late, and the same would be the case if at first there were a bad nomination owing to a defect in the paper, and it were taken away to be corrected, and when it was redelivered the time for delivery had elapsed. But where the nomination was in the first instance good, and the paper was withdrawn, not in order to withdraw the nomination, but for another purpose, and re-

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delivered after the time for delivery had expired, I do not think that this makes the nomination void. The two petitions were nominated in time, and one of the respondents was also nominated in time, but the nomination of the other respondent was too late, because he was misled by the notice of the town clerk, who made a mistake, which might very easily be made before the question had been decided. I am of opinion that the notice was wrong, but we have to decide whether this is the proper court to say whether it is wrong in such a manner as to avoid the election. We cannot decide more than the Election Court could decide under the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) ss. 12 to 15. Sect. 12, after enunciating certain other causes for which a municipal election may be questioned, says that it may be questioned on the ground that the person elected was at the time of the election disqualified for election to the office for which the election was held; it follows that the person elected may therefore be petitioned against, and the election may be declared void because the disqualification existed. It has been suggested that this provision refers only to personal disqualifications, and that if any other kind of disqualification is suggested the proper remedy would be by information in the nature of a *quo warranto*; but at the end of the same section there is a provision that an election shall not, except in manner provided by the Act, be questioned upon an information in the nature of a *pro warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of the Act. If the first part of the section applied merely to personal disqualifications, as there is nothing provided by the Act for the trial of questions relating to the validity of elections except a petition, it would appear that an election could not be questioned at all for any disqualification which was not a personal one. This seems to show that disqualification is not to be construed in such a confined sense as that contended for on behalf of the respondents. All inquiry under the Act is to be by petition, and by ss. 12—15 this court has the same power in municipal as it has in parliamentary election petitions. The Legislature intended all decisions of all questions by which a parliamentary election could have been avoided before this court had jurisdiction to be decided by this court, and also, by these sections to which I have referred, this court has the same jurisdiction in cases of municipal elections. I think, therefore, that we have jurisdiction to determine what was the effect of the notice of the town clerk. It is said that, although this notice was given in time, yet because it was wrong in its terms it was void; it is said that if there is any defect which causes the notice not to be like the form given in the schedule to the statute, then the notice is void necessarily, although no one may have been misled by it. I cannot think this is so; I think that even if the notice is only to the same effect as the form provided by the statute, but differs from that form in some particulars, it is not necessarily void. But I think if the defect is so great as to persuade the court that the electors, or a material part of them, were misled, so as to cause the election to be contrary to the real views of the constituency, and this result has fairly and reasonably been brought about by a defect in the notice, the court

has power to say that the notice is void, and if it is void it seems that every person nominated as a candidate for election would be disqualified, and the election would be void. Here it is clear that one candidate, the person who had a majority of votes at the election, was misled by the defect in the notice. We cannot say which of the two petitioners would be elected if we simply declared that the respondent Turner was not duly elected. The defect in the notice may have or might have misled others, and it seems to be such a defect as misled an important part of the constituency; and so the notice and nomination were bad, which made the whole election void, and all the petitioners and respondents were disqualified. I think the proper decision is that this election is void, and there must be a new election.

DENMAN, J.—I am of the same opinion. The first point is as to the power of the mayor, and as to that I agree with my brother Brett that 38 & 39 Vict. c. 40, s. 1, sub-sect. 3, was not intended to give the mayor so strong a power as to enable him to dispense with the necessity for delivering the nomination papers on the statutory day; the questions as to the day of delivering the nomination papers, and as to the effect of the notice were beyond the jurisdiction of the mayor. It follows, that if the mayor had no power, this court must decide the matter, for the question arises whether the candidates were disqualified, or whether those who were elected were not duly elected by a majority of lawful votes. Unless this is a *casus omisus*, I think it is a case within sect. 12 of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60). On the facts stated in the special case, it was directly in question whether certain persons were disqualified, and whether certain persons were duly elected by a majority of lawful votes. It is contended that this court has no power to avoid the election, but I think that would be an erroneous conclusion. By sect. 15 of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), this court has jurisdiction. That statute imposes on the court the duty of first seeing whether on the facts of the case, or according to law, the person declared elected was properly elected, or if any other persons were elected, and if the court cannot say either that the person declared elected was properly elected, or that some other person was, the court has power to declare the election void. Now in this case can the court do justice by declaring that any person is entitled to be considered duly elected, or are we driven to the alternative of declaring the election void? I think justice cannot be done except by adopting the latter course. We cannot say that any one or more of the candidates were properly rejected or elected. Consequently the election is void, and there must be a new one.

ARCHIBALD, J.—I am of the same opinion. Questions are raised as to the effect of the nomination papers, and as to the jurisdiction of the mayor. I agree with my brothers Brett and Denman as to the power of the mayor, that it only extends to deciding on objections arising on the face of the nomination paper, and that he cannot decide whether a candidate is qualified or not. I think that the respondent, Wright's nomination paper, if it was good, was never withdrawn with the intention of withdrawing the nomination, and, as to its validity, writing the proposer's

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Christian name "Fredk" is sufficient. If the paper was invalid, and were taken away and amended, I think it would be right to say that it would be invalid if it were redelivered after the proper day for delivery, but it is not necessary to decide that point, for our decision rests on the ground that the notice was invalid. The statute 38 & 39 Vict. c. 40, which repeals 22 Vict. c. 35, s. 5, provides by sect. 1, sub-sect. 1, that nine days at least before the election, the town clerk shall give a notice in the form in the schedule or to the like effect, and specifies how the notice is to be published, and by sub-sect. 3 every nomination paper is to be delivered seven days at least before the day of election. This was the ordinary annual election. The town clerk gave the notice wrong; two candidates, the petitioners, were in time in delivering their nomination papers, and the respondent Wright was also in time, but the respondent Turner was too late. Then was he misled? The only inference is that in consequence of having received insufficient notice he delivered his nomination paper on the 23rd. Without necessarily considering whether the provisions as to notice are directory or compulsory, it is enough to say that if they are directory, and the candidate is misled through their not having been followed, it is a bad notice. In this case the defect in the notice did mislead one of the candidates, and caused him to send in his nomination paper too late, and there has not been a proper election by the voice of the constituency. It is said then we have no jurisdiction to decide this case, but I think that the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) shows that the intention was to transfer all such trials to the Election Court created by that Act, with power to reserve questions of law for the Court of Common Pleas. Sect. 12 of that Act provides for questioning an election on the ground of disqualification in terms which on one reading may appear somewhat restricted, but I do not think that they need be so read, and sect. 15, sub-sect. 4, shows that the court is to decide whether the election is void absolutely, or whether it ought to be held invalid on the ground stated in sect. 12, that the candidate was disqualified. I think we must hold this election void, and order another to be held.

Judgment accordingly without costs.

Solicitors for the petitioners, *Elwes and Sharpe*, for *George Bands*, Northampton.

Solicitors for the respondents, *Vizard, Crowder*, and *Co.*

EXCHEQUER DIVISION.

Saturday, Jan. 29.

(Before *KELLY, C.B.* and *Pollock and Huddleston, BB.*)

FORDER v. HANDYSIDE AND Co. (LIMITED).(a)

Income tax—Traders—Return of profits—Deduction for depreciation of trade buildings and machinery, &c.—Addition to capital—5 & 6 Vict. c. 35, s. 100, schedule D, case 1, rule 3, and s. 159—Construction of.

A company carrying on business as ironfounders, in making a return of their annual profits and gains under schedule D for the purpose of assess-

ment to the income tax, are not entitled to claim a deduction in respect of a sum of money annually set apart by them out of their net profits, in accordance with their articles of association, for "depreciation of buildings, fixed plant, and machinery," the amount so set aside being net profits and an addition to capital, and not a sum expended in repairs, and the deduction, therefore, being contrary to 5 & 6 Vict. c. 35, s. 100, schedule D, case 1, rule 3.

So held by the Exchequer Division (Kelly, C.B. and Pollock and Huddleston, BB.), approving the case of Addie v. the Solicitor of Inland Revenue (in the Scotch Court), 12 Scotch Law Rep. 274.

THIS was a case stated for the opinion of the court pursuant to the provisions of 37 Vict. c. 16, ss. 8 and 9, in the matter of an appeal of Andrew Handyside and Company (Limited), against an assessment to income tax under schedule D, made upon them by the commissioners for the district of Morlestown and Litchurch, in the county of Derby.

CASE.

For the year 1874-1875, an assessment under schedule D was made by the commissioners for the district above named upon Andrew Handyside and Company (Limited), a company carrying on the business of iron founders in the parish of St. Alkmine, in Derby.

The assessment made upon the company was 8642*l.*, the amount taken from their own report, and therein specified as net profits; but in this amount a sum of 1509*l.* 7*s.* 6*d.* is shown as "amount written off for depreciation of buildings, fixed plant, and machinery."(a) The company (the now respondents) on their appeal to the commissioners on the 29th June 1875, produced a balance sheet for the year ended on the 29th June 1874, being their first year of trading, and objected to the charge in respect of the sum of 1509*l.* 7*s.* 6*d.*; and contended that, inasmuch as such sum had no real existence, but was written off in the accounts in accordance with the articles of association, as the works must of necessity depreciate from year to year, and as the sum expended in repairs could not entirely replace such depreciation, they were justified in writing off that amount as a deduction.(b).

The surveyor (the now appellant) objected that the sum appealed against was a deduction in re-

(a) In the course of the argument it was admitted that the company had, as they might properly do, written off a certain amount for repairs actually done.

(b) The 138th article of the company's articles of association on which they relied as above mentioned is as follows: "The directors may from time to time, before recommending any dividend, set aside out of the net profits of the company such sum as they think proper as a reserve fund, for the purpose of meeting contingencies, or of purchasing, improving, enlarging, rebuilding, restoring, reinstating, or maintaining the works, plant, and other premises or property of the company, or the erection or construction of new buildings, works, or plant, or for equalising dividends, or for any other purposes connected with the business of the company, or in furtherance of any of the objects of the company; and the same may be applied accordingly from time to time in such manner as the directors may determine. The reserve fund, or such part thereof for the time being as is not invested as hereinafter provided, may be used for the general purposes of the company. The interest of the reserve fund shall be treated as annual profits of the company."

(a) Reported by J. LION, Esq., Barrister-at-Law.

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spect of capital, and as such was contrary to the provisions of the 3rd rule of section 100 of the 5 & 6 Vict. c. 35, that no allowance for depreciation was provided for in the said Act, and that sect. 159 prohibited any deductions being made except those expressly enumerated in the Act.

The majority of the commissioners, however, being of opinion that persons in trade were equitably entitled to write off from their profits each year a sum for depreciation, and that the amount claimed was fair and reasonable, decided in favour of the company.

The surveyor being dissatisfied with such decision, requested that a case for the opinion of the court should be stated.

The opinion of the court is therefore desired as to whether the appellants (the now respondents, the company) are justified in making and should be allowed the deduction of 150*l.* 7*s.* 6*d.* claimed by them for depreciation.

The material parts of the Act of Parliament (5 & 6 Vict. c. 35) relied on by the Crown and referred to in the case and the judgment of the court, are the third rule to the first case in Schedule (D) sect. 100, of the Act, and sect. 159.

Rule 3 is as follows :

Third, in estimating the profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs, or alteration of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum annually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of any loss not connected with or arising out of such trade; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, &c.; nor for any capital employed in improvement of premises occupied for the purpose of such trade, &c.; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts except bad debts proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an indenture or contract of indemnity.

Sect. 159 enacts :

That in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any persons out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments; nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit on account of diminution of capital employed, or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation.

Pinder (with whom were the *Attorney-General* (Sir J. Holker, Q.C.) and the *Solicitor-General* (Sir H. S. Giffard, Q.C.), for the Crown, contended that the company were not entitled to the deduction which they claimed in respect of this sum of 150*l.* 7*s.* 6*d.*, set aside by them to meet the expected yearly depreciation in their machinery and

works. Admitting the company to be justified under their 138th article of association, in writing off this sum, the deduction is one which cannot possibly be allowed in law, being quite contrary to the express terms of the Act of Parliament: (see Rule 3, case 1, schd. D., sect. 100; and sect. 159 of the 5 & 6 Vict. c. 35). They have already claimed in their account and been allowed a sum for repairs; but this amount now claimed is no more or less than an addition to or an investment of capital. This precise point of depreciation was before the First Division of the Scottish Court in Feb. 1875, in the case of *Addie and Sons v. The Solicitor of Inland Revenue* (12 Scottish Law Rep. 274), and the short judgment of the Lord President (in which the three other Lords of Session concurred), is so completely in point, and so decisive of the present question, that I will read it as my argument on the part of the Crown on the present occasion. His Lordship said, "The appellants have been assessed under schedule D. in respect of profits from their business of ironmasters, and they claimed to have deducted from such profits two sums of 5525*l.* and 4435*l.*, as a percentage for pit sinking and depreciation of buildings and machinery, upon the ground that the sinking of new pits, though only an occasional thing, is still part of what may fairly be called the annual expenditure, necessarily incurred in realising the profits from their trade. There is, I think, only one point to be determined here, and not two, as represented, because the machinery and buildings connected with a pit appear to me to be just part of the pit itself. It is one compound structure necessary for the working of the mine, and the question is whether, under the special rules of the Income Tax Act, they are entitled to deduct something on account of the amount expended in making a new pit. Now I am quite clear that the making of a new pit in a trade of this kind is, in every sense of the term, just an expenditure of capital. It is an investment of money, of capital, and must be placed to capital account in every properly kept book applicable to such a concern. Now if that be so, it seems to me that the provision of the third rule under the first head of sect. 100 of the Property Tax Act, is conclusive upon the question before us, because it is there provided that in estimating the balance of profits and gains chargeable under schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against, or deducted from, or be allowed to be set against, or be deducted from, such profits or gains on account of any sum employed, or intended to be employed, as capital in such trade. It seems to me that it is quite unnecessary to go beyond that one part of the statute. No doubt some support may be had also from the 159th section, but I think this rule is in itself perfectly conclusive. As soon as you ascertain that this is an expenditure of capital, there is an end to any proposal to deduct anything in respect of it, and on that simple ground I think the judgment of the commissioners right."

Grantham, for the respondents, the company, *contra*, was called on by the court.—This point has never been discussed or decided by any court except in the Scotch case now cited on the part of the Crown, and which I submit does not apply. In the case, as that was, of a mine, and a pit, and machinery for bringing up coal, where a new shaft

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is sunk or opened, it is a new concern, and an investment of new capital. But here, in these heavy ironworks, the wear and tear is great, and the actual work causes a very large depreciation in the machinery and works, &c., every year, which cannot be met by mere repair. [KELLY, C.B.—Were it not for the words of the Act of Parliament I should be inclined to think that the view of the matter would be in your favour.] No doubt the words of the Act are strong, but I submit the present is a very different case from the Scotch mining case. That was, no doubt, a question of capital; but the present case does not come within the provision of the Act which was intended to apply to capital. The depreciation here cannot be met in any other way, and if this is not to be allowed, all the capital would in a few years be gone. No doubt—as my friend has argued—if the entire machinery is worn out in course of years, and is replaced by new, that would be charged to capital; but here it has to be reinstated every one or two years, piece by piece as it were; it is a depreciation going on constantly, and not occurring entirely at any one time, and a clean sweep made once for all. No average for three years can be arrived at. Now the company has only been at work some eighteen months, and they are entitled to make the deduction now claimed; and at the end of three years, when the average amount of the repairs can be correctly calculated, they can be surcharged for any that may have been wrongly deducted. The rule in the sixth case in Schedule (D) to section 100 is applicable to the present case, and the commissioners, who are well qualified to judge in the matter, have decided on a fair and equitable view of the matter, and that decision the court will uphold.

Pinder was not called upon to reply.

KELLY, C.B.—Whatever may be our opinion of the justice and fairness as regards commercial or manufacturing interests, of some parts of this Act of Parliament upon which there is no case now before the court, and upon which I do not feel myself at liberty at all to comment, it is perfectly clear that upon the 3rd rule in the first case in schedule D of the Act, the respondents, the traders, are not entitled to the deduction which has been claimed by them. It appears that in the 138th article of the company's articles of association there is a provision that a reserve fund is to be formed, and before recommending a dividend, and of course, therefore, before they pay any, the company, perhaps very prudently and properly, agree to set aside from their net profits a sum as a reserve fund for the purpose of meeting contingencies. But what are those contingencies? They are a variety of matters which the company have no more right to deduct from the net profits and say that the net profits are thereby diminished and that they have not really netted that amount of profit, than they would have a right to deduct a sum which they might spend upon the purchase of a house or a carriage. What they say is that it is "for the purpose of meeting contingencies, or of altering, improving, enlarging, rebuilding, restoring, reconstructing, or maintaining the works, plant, and other premises or property of the company. Now I leave out the word "repairing," because it is admitted that they are entitled to deduct, and they have deducted, a sum for repairs; and we must take it for granted,

as there is no appeal against that deduction on the one side or the other, that it is a proper deduction according to the Act of Parliament. The article then goes on to say, "or the erection or construction of new buildings, works, or plant, or for equalising dividends, or for any other purposes connected with the business of the company, or in furtherance of any of the objects of the company, and the same may be applied accordingly from time to time in such manner as the directors may determine." The question, then, is, are the company entitled to claim a deduction in respect of that portion of the reserve fund which they have set aside for the purpose of applying, or which they may have applied, to any of the purposes above mentioned besides repairs. No doubt they are empowered by their articles to set the amount aside and to apply it to any of the many purposes mentioned; but the case shows clearly that such sum is net profit, and in my opinion it is clearly contrary to the Act of Parliament that the deduction claimed should be allowed. The Act is quite explicit, and admits of no doubtful or difficult question of construction. It says that in estimating the balance of profits and gains chargeable under schedule D, or for the purpose "of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises, occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply of, repairs, or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes, according to an average of three years preceding the year in which such assessment shall be made." Now, just let us suppose that this business had been carried on for three or four years, and that the average sum actually expended for the necessary and usual repairs had been 500*l.* a year, the company, in that case, would be entitled to deduct from the amount of their net profits 500*l.* The average of the expenditure upon the repairs for the past three years would be about what they would expect to expend in repairs in the ensuing year, the year of charge in question, and that would be a fair and just deduction from their profit. But here it is said that the case is different, because the company have been in business only one year. But, there being no specific proviso in the statute applicable to that state of things, the result is that, if we are to take the average of three years to determine how much may be expected to be expended in repairs in the year to come, and if there are not three, nor even two years, but only one year, we must get the best information that we can, and must judge from what has been done during that one year what will be the probable amount expended in the ensuing year, and calculate the proper deduction on that footing. But the question here is, not what sum has been expended upon repairs, inasmuch as it is admitted that a sum has been set aside and allowed as a deduction from the net profits in respect of the repairs that have been effected, but it is, whether the respondents are entitled to deduct this entire sum of 1509*l.*, which may be applied anywhere, or at any time, and in any way they please, for a great variety of purposes, which are actually for-

bidden, directly as well as indirectly, by the provisions of the Act of Parliament? All that they are entitled to deduct they have already deducted, namely, the reasonably probable amount of repairs in the ensuing year, and no other deduction is allowed by the terms of the Act. Our judgment, therefore, in my opinion, should be for the Crown.

POLLOCK, B.—I am of the same opinion. The only question here is whether the amount, 1509l. 7s. 6d., written off for the depreciation of buildings fixed plant, and machinery, can be properly deducted in estimating the income tax payable by the company. Now, in my judgment, upon no construction of the Act of Parliament can that deduction be made. Strictly speaking, there is no difference between what is called an equitable construction of an Act of Parliament and any other construction. It appears to me that upon the most just and favourable construction of this Act of Parliament, as regards the respondents, they are not entitled to this deduction. There are three modes in which this fund to meet the depreciation of machinery may be dealt with. One is by adding to the company's original capital what is called a depreciation fund; the second is by laying aside out of the annual profits, which would be otherwise divisible among the shareholders, a certain sum to meet the estimated depreciation; and the third is by waiting until the depreciation occurs, and then either repairing or reinstating the machinery, so as to make it of equal value and efficiency to that which it was before. There are many ways in which expenses accrue by reason of depreciation. There are cases where there is a renewal of machinery from week to week, and sometimes from day to day; and there are cases in which the machinery, or certain parts of machines employed, may cost many hundred pounds, and the depreciation of which does not occur actually from day to day, or is not appreciable from day to day, but comes in the shape of breakage or other accidental or occasional occurrences, and as to which there may be a statement from year to year. Now, the way in which that would practically be met under this Act of Parliament is this: Whether the depreciation were small or great, and the consequent reinstatement small or great, it would all, in the long run, supposing the concern to be a going concern, be met justly and fairly under this Act, when the money was actually expended; because the words of the 3rd rule, under the 1st case of schedule D are, "Nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes." Therefore, where machines are employed which require new parts to be supplied every week, or every month, or at the end of a year, or when a breakage occurs and causes a large outlay to repair it, all that expense and outlay comes in in the average of three years, however large the amount may be. In that way perfect justice would be done between the parties, and the deductions which the company now claim would, in the long run, be allowed them. But it may be said that, supposing it is not a going concern, and there is a sale, then there would be a very great depreciation; but that depreciation does not affect any question arising under this Act of Parlia-

ment. A depreciation always takes place when a concern is sold, not as a going concern, but as one that has failed, or for some reason or other has stopped. The only question for our consideration is, whether this estimated amount, laid aside from year to year, or written off for the depreciation of buildings, fixed plant, and machinery, comes within the words of the section. I think it quite clear that it does not, and that therefore the commissioners in this case were wrong, and that consequently our judgment should be for the Crown.

HUDDESTON, B.—I am of the same opinion. It is quite clear on reading this case that this sum of 1509l. is a sum which any prudent person would no doubt put by or lay aside for the purpose of meeting what may be called the expenses of renewal. The articles of association clearly contemplate that it should be carried into the capital account, and that the company might make use of the money, but if they did so it would be in the capital account, appearing on one side as drawn or expended on the capital account; and it is quite clear that it would be treated for all purposes of bookkeeping, and for all usual purposes, as capital. The Scotch case, which has been referred to, clearly adopts that view, because, of the two sums, 5000l. was to have supplied the buildings necessary for the new pit, which would be capital, and 4000l. was there, as here, written off for the depreciation, and the Scotch court thought that that clearly would be capital. Then, if that be so, it clearly comes within the 3rd rule, and cannot be taken into account. And that 3rd rule is rendered still more imperative by the 159th section of the Act, which says that no deduction shall be made other than those expressly enumerated in the Act. This sum of 1509l. 7s. 6d., therefore, ought not to be allowed, and the company will have to pay income tax upon 5,151l. 7s. 6d., which is the sum which they enter as profits—namely, 8642l., plus the amount (1509l. 7s. 6d.) which they claim to deduct, and which they otherwise have deducted. I therefore think that the judgment of the commissioners cannot be upheld, and that our judgment must be for the Crown.

Pinder.—Will your Lordships in this case give some directions with regard to costs?

KELLY, C.B.—I think that we can say nothing about costs in a case of this kind.

Judgment for the Crown.

Solicitor for the Crown (appellants).—*The Solicitor for Inland Revenue.*

Solicitor for the company (respondents).—*F. Stanley.*

June 14 and 19.

GREAVES v. GREENWOOD AND OTHERS.(a)

Pedigree—Claim through female branch—Exhausting male branch—Presumption—3 & 4 Will. 4, c. 106, ss. 6, 7, 8.

It is sufficient for a plaintiff in ejectment claiming as heir-at-law of an intestate through a female branch to exhaust such branches of the direct male line as may reasonably be supposed to exist; and the fact of no one appearing within eight years in answer to advertisements inserted in several newspapers calling upon any person claiming as heir-at-law of the intestate to come forward and

(a) Reported by HENRY F. DICKENS, Esq., Barrister-at-Law.

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enforce their claim, is evidence upon which it may reasonably be presumed that no one claiming a nearer heirship than that which he has proved is in existence.

The plaintiff, claiming as heir-at-law of the paternal grandmother of an intestate, brought ejectment against the defendants in possession, who, though they admittedly had an inferior claim to that of the plaintiff, in that they claimed as co-heiresses of the intestate's mother, relied on their possession, and called on the plaintiff to prove his absolute title as heir-at-law. The plaintiff exhausted the male paternal branches of the intestate by proving that there were no male descendants of the intestate's grandfather alive, that no one had appeared in answer to advertisements within eight years, calling upon all persons claiming as heir-at-law to come forward and enforce their claims; and that no nearer heirs than himself were mentioned in any of several deeds and documents relating to the family.

Held, that the plaintiff had given all the evidence which he could reasonably be called upon to give to prove his title as heir-at-law, and that there was evidence on which the jury might find for the plaintiff.

EJECTMENT for certain property at Manchester. At the trial before Brett, J., at the Manchester Spring Assizes 1876, the following facts were proved:

In 1868 John Frederick Winterbottom died without issue, and, so far as the property which formed the subject of this action was concerned, intestate. After his death his widow caused advertisements to be published in the *Times* and in the Leeds and Huddersfield local papers, in which any person claiming to be heir-at-law of John Frederick Winterbottom were invited to come forward and prove their claims. The plaintiff was the only one who, in answer to these advertisements, appeared and took any steps to enforce his claim. A few others did, in fact, appear, but they took no further steps. The plaintiff claimed to be absolute heir-at-law of the deceased, and as such entered upon and took possession of other estates of the deceased in Yorkshire.

The property in question, however, was taken possession of by the defendants (the defendant Greenwood being the tenant of the other defendants), who claimed as granddaughters of Richard Townshend, whose sister, Anne, had married John Winterbottom, the father of the deceased, or rather, therefore, as co-heiresses of the mother of the deceased. The plaintiff consequently brought ejectment, in which he proved his title as follows: In 1751 Elizabeth Greaves, his grand aunt, married John Winterbottom, the grandfather of the intestate John Frederick Winterbottom. This John Winterbottom died in 1764, and the plaintiff proved that there were no male descendants of this John Winterbottom living, and consequently claimed the property as against the defendants as heir-at-law of Elizabeth Greaves, the paternal granddaughter of the deceased, by virtue of 3 & 4 Will. 4, c. 106, by which the lineage of the mother of the more remote ancestor is preferred to the less remote. The defendants contended, however, that, as they were in possession, the plaintiff, in order to oust them, must prove an absolute title as heir-at-law, which he had failed to do; that before he could claim through a female

branch he was bound to exhaust the male paternal branches of John Frederick Winterbottom, and that it was not sufficient for him to shew that there were no male descendants of the intestate's grandfather living; but that he must also exhaust the family of the deceased's great grandfather, and prove positively that there were no male descendants of the great grandfather living. The defendants moreover proved that 120 years ago there were male paternal ancestors living, who might have had issue, and they contended that it was for the plaintiff to show positively that no such issue did in fact exist. The plaintiff, however, contended that it was sufficient for him to exhaust the family of the grandfather, and that upon showing that there were no male descendants of him living, he was entitled as heir-at-law of Elizabeth Greaves, the paternal grandmother of the deceased John Frederick Winterbottom. But he further contended that even if it were necessary for him to exhaust the family of the great grandfather of the deceased, he had in fact done so, when he proved that no persons had appeared in answer to the advertisements, to enforce their claim, and when he further proved, which he did at the trial, by putting in several deeds and wills, none of which made any mention of any nearer heirs male, that no nearer heirs had in fact been heard of.

On these facts a verdict was entered for the plaintiff, with leave to the defendants to move to enter the verdict for them if the court should be of opinion that there was no evidence on which a jury could find for the plaintiff, the court to be at liberty to draw inferences of fact consistently with its being so left.

June 14 and 19.—*Herschell, Q.C., Gully, William Barber, and A. B. Dixon* now moved accordingly to enter the verdict for the defendants.—In order to recover against the defendants in this action the plaintiff must prove that he is absolute heir. To do this he must satisfy the requirements of 3 & 4 Will. 4, c. 106, ss. 6, 7, 8, which are as follows:

Sect. 6. And be it further enacted that every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer ancestor of his issue.

Sect. 7. And be it further enacted and declared that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed, and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

Sect. 8. And be it further enacted and declared that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of more remote male maternal ancestor shall be

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the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants.

He must prove affirmatively the exhaustion of the male paternal branches of John Frederick Winterbottom, and cannot assume it. Here he has failed to show that the male line is in fact exhausted. He has traced the male line as far as the grandfather of the intestate, and has then gone to a female branch, and thence deduced his title. But that is not sufficient. He is bound to trace the male line further, he must give evidence of the failure of descendants of more remote paternal ancestors. He must not assume that failure; and the mere publication of advertisements in newspapers is by no means sufficient to enable him to ensure the failure of nearer issue. The defendants proved affirmatively that 120 years ago there were living descendants who may have had issue. The burden is thus cast upon the plaintiff of proving affirmatively that these persons did in fact die without issue; and it cannot be presumed because no one has appeared to enforce their claim, in answer to the advertisements, that therefore no such issue exists. *Richards v. Richards* (15 East, 294) is in the defendants' favour. There it was held that the plaintiff in a case of this nature must remove every possibility of title in another before he can recover, and that no presumption can be admitted against the person in possession. The rule laid down in the case of *Doe v. Woolley* (8 B. & C. 22), which will probably be relied on by the other side, has been questioned in Taylor on Evidence, 6th edit., p. 199. They also cited:

Davies v. Lowndes, 5 Bing. N. S. 161;

Jeakes v. White, 6 Ex. 373;

David v. Frowd, 1 My. & K. 300.

Charles Russell, Q.C., Taylor, and Aspland for the plaintiff.—There was ample evidence here upon which the jury could find for the plaintiff. The plaintiff has proved all that he can reasonably be called upon to prove in order to show his title as heir-at-law. He has traced the ancestry of the deceased on the paternal side as far as the grandfather, and, having exhausted the male paternal branches to that extent, he is entitled to deduce his title from Elizabeth Greaves, the paternal grandmother of the deceased. He may assume that there is no higher ancestor on the paternal side in existence who could claim a nearer heirship than himself. He is certainly not called upon to prove affirmatively that no such persons do in fact exist. But even supposing he is called upon to exhaust still further the male paternal branches of the deceased, he has in fact done so here; for he has proved that advertisements were published in three newspapers calling upon any persons claiming as heir-at-law to come forward and enforce their claims, and he has proved that no one has, in fact, appeared who claims a nearer heirship. He has also proved, by putting in wills and other documents in which no mention is made of any such heirs, that no such heirs have in fact been heard of. These facts, therefore, raise the presumption that no nearer heirs exist, a presumption which it is for the defendant to rebut by positive proof of their existence. *Doe v. Woolley* (8 B. & C. 22) is absolutely in point. There it was held that after the lapse of a period of more than 100 years, in the absence of evidence to the contrary, the death of a person without issue might be presumed. The decision in *Richards v. Richards*

(15 East, 294) cannot be supported. They also cited

Davies v. Lowndes, 5 Bing. N. C. 161;

Roe v. Hasland, 1 Wm. Black. 404;

Hubback on Succession.

BRAMWELL, B.—I am of opinion that our judgment in this case should be for the plaintiff. The question is whether there was evidence to go to the jury upon which they might find for the plaintiff. I think there was. I think that some of the difficulties that arose in this case are attributable to the fact of not keeping in view the distinction between there being no evidence at all, and no evidence upon which the jury might act if they thought fit. What I mean is this: I asked Mr. Russell in the course of the argument whether he could have proved the heirship alone, and then have said, now let anybody show a better title. He gave the correct answer when he said that in that event there would have been a case for the jury, but it would have been a case in which they might have reasonably said, we are not satisfied. Here the plaintiff has shown that he is heir to the deceased man to this extent, that supposing it were shown that the great grandfather or some one of the male ancestry had been illegitimate, he would then have exhausted them, and no other upward ancestor could take. He would then have shown affirmatively that he is really the rightful heir, and that there was no one else who could be. Well, having proved that, what more is he bound to prove? Is he bound to prove that there are no persons who could claim a nearer heirship than that which he has proved. He proves a condition of things that would make him heir unless he is displaced by a nearer heir. Is he bound to prove more? I have great misgivings whether he is bound to. I doubt very much whether a person in a case of this description is bound to do so. I cannot help thinking that the expression that a man is bound to exhaust other heirs and give negative evidence, that no descendants prior in title to himself exist, simply means this, that if he does not give such negative evidence when he could do so, that the jury would be directed to say that they were not satisfied that he had made out the title. I think it comes to no more than that. Here, certainly, there is a doubt in saying that the plaintiff is the heir; but I think that if the Act is to be applied, it must be applied in a case where practically one is satisfied of this, that there is no one appearing who is a nearer heir. I doubt very much, therefore, whether there is any necessity for a plaintiff in such a case as this to do more than to trace his heirship, and exhaust in so doing those whose history he is reasonably bound to trace, and that when he gets to a remote date, having previously traced the histories of those of recent date, I doubt whether he is bound to do more. Here the plaintiff has fully traced the families of those who lived within a recent date, and who may reasonably be supposed to exist. No doubt it was proved that 120 years ago there were three or four persons in existence who may have married and have left descendants. Possibly, but the plaintiff may say it is a possibility, which I am not called upon to negative more than this: inquiries have been made, and these possible descendants have not been heard of. Advertisements were put in three different papers, and no claimant has, up to the present time, appeared to enforce his claim. Now, is not that negative evidence, or all the

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negative evidence that a person making this sort of claim can be reasonably expected to give? I think it is. I think, also, it is important to observe in this case that the defendant are not strangers, but that they are heirs, though confessedly more distant than the plaintiff. I doubt, therefore, very much whether the plaintiff is bound to give any evidence to negative a nearer heirship than that which he has proved; but if he is bound to do so, I think he has done so here. He has proved that some persons are not in existence, and has given negative evidence that possible descendants have not claimed, although advertised for in three different papers. In addition to this, it seems to me that the case of *Doe v. Woolley* (8 B. & C. 22), is in point, and I am unable to distinguish that case from the present. There it was held that after the lapse of a period of more than 100 years, in the absence of evidence to the contrary, the death of a party without issue might be presumed. Lord Tenterden, C. J., in the course of his judgment said, "It must at all events be admitted that the death of the grandfather's brothers might be presumed, and then in order to raise the objection two affirmatives must be presumed, viz., that they did marry and did leave issue. I think that would be very unreasonable." Now one word as to the case of *Richards v. Richards* (15 East 294 note (a)), in that case in ejectment the lessor of the plaintiff claimed as heir by descent, and showed the death of his elder brothers, but not that they died without issue, and the court held that this must likewise be proved, and that the plaintiff must remove every possibility of title in another person before he can recover; no presumption being to be admitted against the person in possession. I should say that the court were right in that case in holding that the plaintiff must show that the brothers died without issue, because it seems reasonable that, as it was well within the power of the plaintiff to do this in that the occurrence took place within living memory, he might well be called upon to do so. And that proposition is right in this sense, that he may be bound to do so if it were a matter within reach. But I cannot agree with the court that a plaintiff in such a case must remove every possibility of title in another person before he can recover. I should say, with all respect to their opinion, that the plaintiff in such a case can only be reasonably called upon to show that it is not likely that any one exists who has a better title than the heirship which he has proved; he is not called upon to show that such a thing is impossible, which the plaintiff here has proved. For these reasons I think that our judgment should be for the plaintiff.

AMPHLETT, B.—I am quite of the same opinion, and fully adopt all the reasons given by my brother Bramwell.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Torr, Janeway, and Co.*

Solicitors for the defendant, *Currie and Williams.*

COURT OF BANKRUPTCY.

Monday, Aug. 7.

(Before the CHIEF JUDGE.)

Ex parte STEPHENS; Re PEARSON. (a)

Voluntary settlement by non-trader—Subsequent trading—Bankruptcy—Statute of 13 Eliz. c. 5.

In 1858 A., a non-trader, and who was then perfectly solvent, made a voluntary settlement upon his wife and children of property which he had acquired under his father's will. In 1873 he went into business, and in 1875 became bankrupt. He had no assets except the property so settled.

Held, that the settlement was fraudulent within the meaning of 13 Eliz. c. 5.

THIS was an appeal from the decision of the registrar sitting as judge of the County Court of Kent, holden at Tunbridge Wells.

By an indenture of settlement dated the 6th Jan. 1858, and made between John Pearson of the one part and Edward Hodge and Henry Hodge of the other part, after reciting that John Pearson had recently come into possession under the will of his father of, amongst other things, the sum of one thousand pounds, and being free from debts and liabilities was desirous of settling the same for the benefit of himself and his wife and family in manner thereafter appearing, and had requested Edward Hodge and Henry Hodge to act as trustees thereof, which they had consented to do, and that the said John Pearson had accordingly previous to the execution thereof paid over the said sum of one thousand pounds to Edward Hodge and Henry Hodge, it was witnessed that in pursuance of the premises and in consideration of the natural love and affection which John Pearson bore towards his wife and children, it was thereby declared that Edward Hodge and Henry Hodge, their executors, administrators, and assigns should stand possessed of the said sum of one thousand pounds upon trust to invest and to pay the annual income of the trust premises unto or permit the same to be received by John Pearson until he should assign, charge, or otherwise dispose of the same annual income by way of anticipation or until he should be declared a bankrupt or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or until he should do any other act whereby the same annual income, if payable to himself, would become vested in some other persons or until his death, which should first happen. But if he should assign, charge, or otherwise dispose of the same annual income by way of anticipation, or should be declared bankrupt or become an insolvent debtor within the meaning of any Act of Parliament, or if he should do some other Act whereby the same annual income would become vested in some other persons, then upon trust to pay the same annual income unto Elizabeth the then wife of John Pearson for her life for her sole separate and inalienable use, and subject to the trusts aforesaid the whole of the trust premises should be in trust for the children of John Pearson by his wife Elizabeth, in such shares, &c., as John Pearson and Elizabeth, his wife, should by deed appoint, and in default of such appointment as the survivor of them should, by deed or will appoint, and in default of such last mentioned appointment, in

(a) Reported by A. A. DONIA, Esq., Barrister-at-Law.

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trust for all the children of John and Elizabeth Pearson at twenty-one or marriage. The settlement contained usual maintenance, advancement, and accumulation clauses, and a power to appoint new trustees.

There was issue of the marriage of John and Elizabeth Pearson four children, two of whom were still living.

Elizabeth Pearson died in or about the year 1871.

At the date of the settlement John Pearson was employed as a servant at an hotel, and continued in that or a similar employment, and without entering into business on his own account, until the beginning of 1873. In Feb. 1873 he entered into business as a publican, and took an inn at Tunbridge Wells called "The Chequers."

On the 13th Dec. 1875, a bankruptcy petition was presented by one Horatio Stephens against John Pearson, the act of bankruptcy being a declaration of insolvency filed the same day, and on the same day an immediate adjudication was made by consent. On the 31st the first meeting was held, when Mr. Stephens was appointed trustee. The statement of affairs filed by the bankrupt showed unsecured debts to the amount of 723*l.* 17*s.* 10*d.*, and assets nil. On the 10th Feb. 1875, the bankrupt passed his public examination.

In March last a notice of motion was given by H. Stephens to the trustees of the settlement to pay over the annual income of the trust property subject to the settlement from the time of the last payment up to the date of the bankruptcy. The application was dismissed, but on appeal to the Chief Judge the order of the court below was discharged.

On the 22nd July a further application by H. Stephens to the County Court, that the settlement might be set aside, as being fraudulent and void against the creditors of J. Pearson, under 13 Eliz. c. 5, was dismissed with costs. Against this order Stephens appealed.

A. A. Doria and E. Cooper Willis for the appellant, contended that the settlement was a conveyance of the whole of the debtor's property made with intent to defeat, defraud, and delay creditors within the meaning of the statute of 13 Eliz. c. 5. They cited

Lockyer v. Savage, 2 Str. 947;

Higginbotham v. Holmes, 19 Ves. 88;

Spiro v. Willows, 3 De G. J. & S. 293; 11 L. T. Rep. N. S. 614;

Es parte Mackay, L. Rep. 8 Ch. App. 643; 28 L. T. Rep. N. S. 823.

Finlay Knight and *E. Baldock Stone* for the respondent, argued *contra* that the settlement, having been made so long back as eighteen years, at a time when the settlor was perfectly solvent and not in trade, and with no intention of entering into trade, and being founded upon a good consideration, was perfectly valid and could not be impeached. At any rate it would not be set aside further than what would be sufficient to pay his creditors. They referred to

Fremant v. Pope, L. Rep. 5 Ch. App. 538; 23 L. T. Rep. N. S. 208;

Crossley v. Elworthy, L. Rep. 12 Eq. 158; 24 L. T. Rep. N. S. 607;

Mackay v. Douglas, L. Rep. 14 Eq. 108; 24 L. T. Rep. N. S. 737;

Knight v. Brown, 4 L. T. Rep. N. S. 206; 30 L. J. 649, Ch.

THE CHIEF JUDGE.—I think that the settlement Vol. XXXV., N. S. 879.

is plainly fraudulent, for the law says that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors. Here the settlor, in effect, settled his property in such a way that if by any accident his creditors should thereafter have any claim to it, it was to go to some one else, and in my opinion that is as plainly fraudulent as can be. The case of *Knight v. Brown* has no application, for it related to a marriage settlement, and the intended wife might well stipulate that, in the event of her intended husband's bankruptcy, she should not be deprived of the income of the settled property. I am of opinion, therefore, that this settlement must be declared void, but the costs of all parties must be paid out of the fund.

Solicitor for the appellant, J. Burton, Tonbridge.

Solicitors for the respondent, Collyer-Bristow, Withers, and Russell, agents for Stone and Simpson, Tonbridge.

House of Lords.

May 9 and 11.

(Before the Lord Chancellor (Cairns), Lords HATHERLEY and SELBORNE.)

LOWS v. TELFORD AND WESTRAY.(a)

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Malicious prosecution—Reasonable and probable cause—Forcible entry—Possession—Joint cause of action.

L., being entitled to the possession of certain premises, entered upon them, but was afterwards ejected by *T.* and *W.* He then indicted them for a forcible entry, but they were acquitted. They then brought an action against him for malicious prosecution, and obtained a verdict, which was afterwards set aside.

Held (reversing the judgment of the court below) that the action could not be maintained, as the facts showed that *L.* had a right to the possession, and had actually obtained possession, and there was therefore reasonable and probable cause for the indictment.

Semble (per Lord Cairns, *L.C.*), that the plaintiffs, *T.* and *W.*, had not a joint cause of action.

THIS was an action for malicious prosecution, brought by the respondents, as co-plaintiffs, against the appellant, who had preferred an indictment against them for a forcible entry, riot, and assault, at the Cumberland quarter sessions, upon which they were acquitted.

The cause was tried at the Manchester spring assizes in 1872, and a verdict was entered for the plaintiffs. This verdict was set aside by the Court of Exchequer, but their decision was reversed by the Exchequer Chamber, as reported in 31 L. T. Rep. N. S. 90.

Lows was mortgagee in fee of a house in Carlisle. The mortgagor had retained possession, and afterwards let the house to Telford as a warehouse. Some disputes having arisen, Lows, on the 14th July 1870, took possession, and endeavoured to keep Telford out, but he and Westray entered by a window and ejected Lows. The facts are fully set out in the report in the court below.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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C. Russell Q.C., Trevelyan, and Braunfeld appeared for the appellant, and argued that Lowes, as mortgagee, was entitled to the possession, the respondents being only his tenants at will, and the facts showed that he had actually obtained possession. They cited

Comyn's Digest, tit. "Estate," H. 6;

Coke Lit. 55, b;

Harvey v. Brydges, 14 M. & W. 437; 14 L. J. 272, Ex.;

Jones v. Chapman, 2 Ex. 803; 18 L. J. 456, Ex.;

Anon, 1 Salk. 246;

Butcher v. Butcher, 7 B. & C. 399.

[Lord SELBORNE referred to *Keech v. Hall* (1 Dougl. 21), and 2 Smith's L. C. 579, 7th edit.] At all events, the respondents were indictable under the stat. 5 Rich. 2, c. 7. As to the general question of reasonable and probable cause, see *Reynolds v. Kennedy* (1 Wils. 232); and the case of *Ireland v. Livingstone* (L. Rep. 5 H. L. 395; 27 L. T. Rep. N. S. 79) carries out the principle, though the analogy is remote, as to the ambiguity when there is a difference of judicial opinion. Further, there was no joint cause of action in the respondents. See *Pechell v. Watson* (8 M. & W. 691). *Barratt v. Collins* (10 Moo. 446), which will be cited on the other side, is a case of doubtful authority.

Herschell, Q.C. and *Kenelm Digby*, for the respondents, contended that Lowes had not actually obtained possession, but was only endeavouring to do so. The cases cited on the other side do not apply. See *Newton v. Harland* (1 M. & G. 664), *Mitchell v. Jenkins* (5 B. & Ad. 588). The question of possession has been much discussed in Roman law by Savigny in his *Treatise on Possession* (p. 169 of Sir Erskine Perry's translation), and Pothier in his edition of the *Pandects*, vol. XVII. p. 22. As to the joint cause of action, see 2 Williams' *Saunders*, 372, and *Weller v. Baker* (2 Wils. 414).

Trevelyan in reply, cited Comyn's Digest, tit. "Forcible Entry," A. 2.

The LORD CHANCELLOR (Cairns).—In the view which I take of the case now before your Lordships, there is little, if anything, to be determined in point of law, but the decision of the case appears to me to depend mainly, if not altogether, upon a just appreciation of the facts which appear upon the special case. [His Lordship then went through the facts and evidence, as set out in the court below, and continued:] Thereupon Lowes indicts Telford and Westray for a forcible entry. They are acquitted on the trial at quarter sessions, and they bring this action against Lowes for indicting them without any reasonable or probable cause, and with malice. At the trial of this action the damages were agreed upon, and a verdict was entered for the plaintiffs, with liberty to the defendant to move to enter a verdict for himself. The Court of Exchequer, before whom the case first came, were unanimously of opinion that there was reasonable and probable cause for the indictment, and that therefore the verdict should be entered for the defendant. But the Court of Exchequer Chamber were, also unanimously, of a different opinion, and held that there was no reasonable or probable cause for the indictment, and that therefore the verdict should stand for the plaintiffs. Now I am bound to say that in that state of things I am unable to arrive at any other conclusion than this, differing in opinion, with great respect, from the judges of the Court of

Exchequer Chamber, that there was reasonable and probable cause for this indictment. That there was the violence attending the transaction which would be necessary to bring it within the statute was not in any way denied, and the whole question turns upon this: at the time when that violence took place was Lowes in possession of these premises, or were they still in the possession of Westray and Telford? so that, in point of fact and truth, Westray and Telford, in place of entering upon the possession of others, were merely defending a possession which was their own. I repeat what I have already said, that as I view the facts, as I have already stated them, the possession which Telford and Westray were found to have had on the morning of the 14th of July, was put an end to by the proceedings of Lowes. Whether those proceedings were all we should have desired to see, whether they were courteous or discourteous, rough or the contrary, is immaterial; they were the proceedings of one who had a right to take possession, who took possession by the way that I have described, and who, it may be not for any great length of time, but for a definite and appreciable length of time, obtained and retained possession of the property. From that possession he was dislodged by the means I have stated. Those means appear to me to have amounted to a forcible entry, and I think, therefore, it would be impossible to hold that there was not a reasonable and probable cause for preferring the indictment that was preferred. I will only add to what I have already said, that if I look to the evidence of Westray himself, one of the plaintiffs, it is almost impossible not to see in every sentence of it that he states the case exactly in the way that I have stated it, namely, that Lowes had obtained possession, and that Westray and Telford were endeavouring to retake possession as against him. He says [his Lordship then went through the evidence of Westray as set out in the report below, and continued.] I turn now to the opinions of the learned judges of the Court of Exchequer Chamber. Passing over that of Blackburn, J., I take the expression of opinion of Keating, J., as showing the ground upon which the court proceeded. He says, "If in this case the facts had shown that the defendant, having the right which he unquestionably had of possession, had taken possession, and having taken possession the plaintiffs had entered upon that possession, why then I should have said there would be reasonable and probable cause for indicting the plaintiffs for forcible entry." I think that exactly describes the condition of the argument, but I venture to think that the conclusion at which he arrives is erroneous. I think it is exactly the case that the facts show that the defendant had the right of possession, and had taken possession, and, having taken possession, that the plaintiffs had entered on that possession. Further on he says, "That brings the question to a question of fact, had he taken possession? Now it seems to me that in order to constitute possession it must be complete possession, exclusive of the possession of any other person, and here, I think, the facts show that there was not such possession taken. All that occurred seems to have occurred in the nature of an act, and the transaction was this: The defendant was endeavouring to take possession and the plaintiffs were resisting him." I think

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that is a mistake. Lows had taken possession; there was no resistance whatever; there was nobody there to resist; he had taken possession, and that act was completed. Keating, J. continues, "That seems to me to furnish no foundation for an indictment for a forcible entry on the part of the plaintiffs, who were defending a possession which they partially had had, at all events for a considerable time." There, again, I think there is a misapprehension; they were not defending the possession; they had lost their possession and they were endeavouring, as Westray himself says, to retake that which they had lost. All that I have said is quite consistent with the verdict of the jury. The jury acquitted the defendants, the plaintiffs in the present action, and I am not in the least surprised that they did so. A jury do not always proceed upon strictly logical grounds, and I can readily imagine that, seeing the manner in which this transaction was accomplished, seeing the want of any notice given before Lows took possession, they would decline altogether to convict those who were indicted under these circumstances for a forcible entry. But the case before your Lordships is not whether the jury were right or whether they were wrong, or whether those defendants ought to have been convicted on the indictment. The question now is whether they can turn round and bring an action in which they must show affirmatively that there was no reasonable or probable cause for framing the indictment. That, I think, it is impossible they can do; therefore, in my opinion, the decision of the Court of Exchequer was right, and the verdict must be entered for the defendant. I will only add that it becomes unnecessary to decide the other question which has been raised—namely, whether these two plaintiffs could join in the action which they have brought for having been indicted without reasonable and probable cause. I wish merely to say that I am not at all satisfied that two plaintiffs under these circumstances could possibly have a joint cause of action, and could maintain the action as co-plaintiffs.

LORD HATHERLEY.—I entirely concur in the opinion which has been expressed by my noble and learned friend on the woolsack with regard to the main point in the case. We have only to look at the facts in the case, and it being almost conceded in argument, I think certainly it was conceded by the learned judges who took the opposite view, that the whole point in the case turns upon this, whether or not Lows had obtained the possession he was *de jure* entitled to, I cannot help thinking that he was in possession before Westray came up.

LORD SELBORNE.—The case of *Keech v. Hall* (*ubi sup.*) decided that a mortgagee may recover in ejectment without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. And the law was accurately stated at the Bar in the passage cited from Coke, and in the judgment of Maule, J., in *Jones v. Chapman* (*ubi sup.*), where he says, "If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of his right of possession, and one of them is actually in possession, and the other is not; if the question is which of those two is in actual possession, the answer is, that the person who has the title is in actual possession, and the

other person is a trespasser." In *Harvey v. Bridges* (*ubi sup.*), Parke, B., says, "I should have no difficulty in saying that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party." And the argument for the respondent is that in this case the appellant would have been himself liable in a criminal court for the course he took to obtain possession. But the applicability of these authorities entirely depends on the question, what is the actual state of the possession in each given case? Now, the fact here was, that previously to the appearance of the respondents upon the premises, the appellant had actually obtained possession in furtherance of his legal right. I think it unnecessary to say more than that I fully concur in the view of this case which has been presented to your Lordships by my noble and learned friend on the woolsack.

Judgment of the Exchequer Chamber reversed, and verdict entered for the defendant (appellant).

Solicitor for the appellant, G. M. Cooke.

Solicitors for the respondents, Phelps and Sidgwick.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Friday, March 31.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

SHARPLEY v. THE LOUTH AND EAST COAST RAILWAY COMPANY. (a)

Company—Construction of railway—Insufficient capital subscribed—Misrepresentation—Acquiescence.

A railway company, only one-fifth of whose share capital had been subscribed for, resolved to proceed with the construction of a part of the line. A shareholder, who had concurred in the proceedings at the meeting at which this course had been resolved upon, filed a bill to have his contract to take shares declared void on the ground of misrepresentation, alleging that he had applied for his shares on the faith of a representation that no part of the line would be proceeded with unless sufficient capital for making the whole line were subscribed.

Held (affirming the decision of Malins, V.C.), that the plaintiff had forfeited all title to relief by continuing to act as a shareholder for months after he had become aware of the facts on which he founded his claim to relief.

THIS was an appeal from a decision of Malins, V.C.

On the 18th July 1872, the defendant company obtained an Act of Parliament authorising them to construct a line of railway from Louth to Mapletorpe, and three short branch lines connecting Louth with different parts of the coast, the main

(a) Reported by H. FEAT, Esq., Barrister-at-Law.

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line and branches together extending to about eighteen miles. The capital was to be 96,000*l.*, in 9600 shares of 10*l.* each, and the Act provided that the company should not issue any share, nor should any share vest in the person accepting it, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof. And the company were authorised to borrow on mortgage any sum not exceeding in the whole 32,000*l.*, but no part thereof was to be borrowed until the whole capital of 96,000*l.* was subscribed for, issued, and accepted, and one-half thereof paid up.

In the year 1873, the plaintiff received a prospectus of the company, containing, amongst other things, a statement that if no allotment of shares was made the deposit of 1*l.* per share would be returned in full, and that a provisional contract had been entered into with a responsible contractor for the construction of the several lines authorised by the Act, by the 1st July 1875.

The plaintiff alleged that he was induced by a perusal of the prospectus to believe that it amounted to a representation that the company would not make any allotment of shares or commence business unless sufficient capital was subscribed, that is, unless at least two-thirds of the 9600 shares were issued or allotted, such being the proportion of shares required by the Stock Exchange to be issued or allotted before a setting day would be granted, and because the objects of the company could not be carried out without the subscription of at least two-thirds of the capital.

The plaintiff applied first for twenty shares, and subsequently for ten more, and the thirty shares were allotted to him on the 2nd May 1874, and he had paid 90*l.* in respect of these shares. On that day the total number of shares applied for did not exceed 1846, representing a subscribed capital of 18,460*l.* only, and the total amount actually paid, up to March 1874, was only 9619*l.*, of which 4664*l.* had been expended in preliminary expenses and bills of costs.

In Sept. 1874, a meeting of the company was held, when it was stated that another contractor had been found, who would execute the necessary works, and the shareholders were asked to sanction a proposed contract, and it was also stated at the meeting, by the chairman, that if the construction of the railway was not proceeded with, the money paid by the shareholders would be returned to them. A committee of the shareholders was appointed to advise as to the terms of the contract, and the contract was subsequently entered into, but the plaintiff alleged that its terms were not in conformity with the recommendations of the committee, which were that only part of the line should be at first undertaken, whereas the contract was for the whole line; and that other suggestions were also neglected, and the directors had commenced the undertaking with a totally insufficient capital.

The plaintiff accordingly filed his bill, praying that it might be declared that he had been induced to apply for thirty shares in the company under circumstances of deception and misrepresentation on the part of the company, and that the contract between the plaintiff and the defendant company for taking such shares was absolutely void; that the name of the plaintiff might be removed from the register

of shareholders, and that the company might be decreed to repay to the plaintiff the sum of 90*l.*, so paid by the plaintiff in respect of the said shares, and that the company might be restrained by injunction from further prosecuting an action which they had begun against the plaintiff to recover the sum of 61*l.* 10*s.* 10*d.*, being the amount of a call of 2*l.* on each of the thirty shares, and interest thereon.

The defence set up by the company's answer was that the plaintiff had taken a leading part in the projection of this railway; that he had attended meetings at which the affairs of the company and the amount of capital subscribed were fully disclosed; that he had actively canvassed for shareholders; that he was himself one of the committee to advise as to the terms of the covenant; that the directors had effected all the recommendations of the committee, with very few unimportant exceptions; that the plaintiff well knew the whole of the shares had not been taken up, and had afterwards applied for the additional ten shares held by him; and that he had attended meetings up to the 23rd March 1875, without opposing the directors, but that, on the contrary, he encouraged them to go on with the undertaking, and acquiesced in their proceedings, and did not file his bill till the 24th July 1875, and never till then made any objection or remonstrance against the conduct of the directors; and, further, that the company fully intended to carry out the construction of the line of railway; that their prospects as to raising money were greatly improved; and that the only shareholders who joined with the plaintiff in opposing the directors were interested in no more than twenty-seven shares.

The case came on for hearing before Malins, V.C. on the 26th Jan. last, and the hearing took up part of three days.

In delivering his judgment on the 1st Feb., the Vice-Chancellor said:—This is a very unfortunate suit, which I think has originated in an over-earnest feeling rather than from any real regard to the interests concerned. The inhabitants of Louth, as I gather, very generally concurred in applying to Parliament for leave to make a railway about seventeen miles long, with three branches, the main object being to communicate with different places on the east coast. I have no doubt it was a most desirable thing for the town of Louth, and I am satisfied it was an object in which Dr. Sharpley, the plaintiff, who was a medical practitioner in the town, entirely concurred. I must consider him as approving of the contents of the prospectus, and as concurring in this representation recited in the Act of Parliament: "Whereas the construction of the railways herein-after mentioned to connect the east coast of Lincolnshire with the Great Northern Railway, near Louth, would be attended with local and public advantage, and the persons hereinafter named, with others, are willing at their own expense to construct the said railways." The Act then provides that the amount of the capital shall be 96,000*l.*, in 9600 shares of 10*l.* each; that the company shall not issue any share created under the authority of the Act, nor shall any share vest in any person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof. Then there is a borrowing power authorising the company from time to time to borrow on mort-

gage any sum not exceeding in the whole 32,000*l.* but no part thereof to be borrowed until the whole capital of 96,000*l.* should be subscribed for, issued, and accepted, and one-half thereof should have been paid up. It is plain, therefore, that Parliament was satisfied that 96,000*l.* plus 32,000*l.*, or 128,000*l.*, was the proper capital for the construction of this line. The Act received the royal assent on the 18th July 1872, but there were considerable delays; the capital was not forthcoming, although the inhabitants of the district were desirous of having the railway made. Very few in point of capital came forward to supply the 128,000*l.*, or the 96,000*l.* which was wanted. No allotment was made till the 2nd May 1874, and then, instead of subscribing for the whole 9600, it appears by the bill that the applications were for 9619*l.*, or about one-tenth of the capital. The prospectus stated that "if no allotment be made the deposit will be returned in full." It also stated that a provisional contract had been entered into with a responsible contractor. The amount actually subscribed was totally and admittedly inadequate for the construction of the railway. Now we go on to the 2nd May 1874, when the applications for shares were so small that they did not provide more than one-fifth of the capital required. And it is plain to my mind that at that time the proper course would have been to have announced to the shareholders that the capital was wholly inadequate, that no allotment would be made, and that therefore, in pursuance of the statement in the prospectus, the deposit would be returned, and that there was an end of the matter, as the scheme had entirely failed. Amongst the persons who applied for shares was the plaintiff, who originally applied for twenty shares on the 1st of Sept. 1873. The plaintiff's course was a very plain one. If he did not concur in going on with this project, he should have at once remonstrated, and have required the prospectus to be acted upon. He was fully entitled to say: "You have not got a sufficient amount of capital, your borrowing powers will not arise, you can only get 15,000*l.* or 16,000*l.* out of the amount required. It is utterly absurd to go on with this project, and I require you, in pursuance of the stipulation entered into with me, to return my deposit." That is the course which in my opinion, common sense, common honesty, and common justice, would have entitled him to take; because nothing is more common, not only in the case of this company, but in that of other companies which come before me, than for directors to get into trouble, when, requiring a large amount of capital, they persist in going on with only a small portion of the capital which they require. If Dr. Sharpley had taken the course which I have suggested I should have granted him relief, and my own opinion is that the Court of Appeal would have supported me in that decision, and would have restrained the company from going on with their action for calls, and would have required them to give him back his deposit and take his name off the register of the company if he had applied in due time; but, as I collect, Dr. Sharpley was as much in earnest at this period as any other inhabitant of the town; and he was of opinion that, although this project had failed up to that time, nevertheless the thing should not be abandoned, for I find he was then attending meetings; he proposed resolutions, and was on the committee. And what does he

say? Not that the whole amount of capital should be subscribed before the thing is proceeded with, but that the railway should be proceeded with before the whole of the money was subscribed. The allotment day was the 2nd May 1874, but there was a meeting on the 12th Jan. 1874, at which Dr. Sharpley was in the chair, and at which meeting they knew very well that the capital had not been raised, and would not be raised. Then he proposes resolutions which are in effect that they should go on with the line. A further meeting took place on the 28th March 1874, and again, with the full knowledge that the capital had not been subscribed, and was not likely to be subscribed. On the 4th April 1874, Dr. Sharpley applies for ten additional shares, so that before the day of allotment arrived he had not only applied for twenty shares originally, but for ten additional shares. Then on the 2nd May the whole thirty were allotted to him. Now, the proper course for Dr. Sharpley under these circumstances to have taken was either to concur with his neighbours who had projected the railway, or if he did not wish to go on with it, he should have said: "I do not want to go on with it, give me back my money; I will withdraw." If he had done that, and persisted in it, I have no doubt he would have done great benefit not only to himself but to all his neighbours who are interested in this matter; because, after all, I cannot help thinking that the course adopted by these directors was a very unwise one. They can only make this railway with the assistance of a contractor; they have not sufficient capital to purchase the land; they have not the security of a substantial contractor to make the line, and I believe if they go on they will only get into further trouble. They would have taken a very wise course if they had adopted Dr. Sharpley's view, and abandoned the thing altogether; but that does not settle the matter between them and Dr. Sharpley. He has encouraged them in their course, which I say was a want of wisdom on his part; and if he has encouraged them, the rules of this court make it impossible for him to oppose them or to sanction a bill against them, and precludes him from asking for the relief which he seeks by his bill, because he himself has been a participator in the acts of the company. The question is whether he has or has not acquiesced in these acts. Mr. Higgins has cited several cases, and they all proceed on the same principle in effect—that although a man has a strict right to restrain the informal proceedings of a company if he does not acquiesce in them, yet if he acquiesces he cannot restrain them. All those cases proceed on the doctrine laid down in *Cohen v. Wilkinson* (12 Beav. 138; 1 Mac. & G. 481), which are, in my opinion, entirely applicable to this case. Mr. Cohen was a shareholder in the Portsmouth District Railway Company. He filed a bill against the company, which was formed to make a railway from Portsmouth to London, and made the line from Epsom to Leatherhead instead of from Epsom to Portsmouth. There it was decided by Lord Langdale in the first instance, and on appeal affirmed by Lord Cottenham, that each individual shareholder, inasmuch as he had subscribed his money to make the whole line, was not bound to allow his money to go to make part of the line only, because it did not follow that if the whole of the line could not be made, a part could

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be; and I apprehend it is equally clear that any landowner in this case might file a bill to prevent the company from taking his land for the purpose of making a part of the line, because he might say: "I thought this project was a good one; I understood it was intended that the whole of the line was to be made, and that is what I assented to, but I do not assent to part with my land on the railway company making a part of the line only." That being the decision of Lord Langdale, affirmed by Lord Cottenham, it appears that this question of acquiescence was suggested by Lord Cottenham then for the first time, because I find at the end of the report (1 Mac. & G. 487) that he concluded his judgment in this way: "His Lordship concluded by observing that the only part of the case about which he entertained any doubt was the allegation at the bar, though nowhere apparent in the bill, that the plaintiff had been aware of and had acquiesced in the substituted undertaking. The plaintiff's counsel then stated that this was the first time that such an allegation had been made, and that it was entirely unfounded. The Lord Chancellor, therefore, ordered the appeal motion to be dismissed with costs." I have a distinct recollection of those observations, because I was counsel in that case for the railway company, and I had no doubt that the plaintiff had acquiesced. But it is clear to my mind that, if Lord Cottenham had been satisfied that Mr. Cohen had assented to the making of part of the line instead of the whole, he would have dismissed the bill, instead of giving the relief he did. Now what has been the conduct of Dr. Sharpley? From the first time of the allotment being made in May 1874, he knew of the deficiency of the capital. Has he since that time been a concurring party to making part of the line instead of the whole? Has he been a concurring party in employing the contractor, with a knowledge that the contractor was to supply the means, without being a registered shareholder? Because if he has been a concurring party in that, it is impossible for him to sustain a bill in this court to restrain these proceedings in which he has participated, and which he has encouraged. There never has been a more remarkable instance of this than in a case which was before me last year, *Rooper v. The East Norfolk Tramways Company* (unreported), in which the capital of the company was to consist of 10,000 shares of 10*l.* each. It appeared that 204 shares only had been subscribed for, that is, 50 shares by Mr. Rooper and 154 by other persons, the whole of those shares, including Mr. Rooper's, producing 2000*l.* only; the tramroad had not been commenced; it was perfectly clear that there was no possibility of making the tramroad, no intention of making it, and it was perfectly plain to me (and, I believe, equally so to the Court of Appeal) that the only purpose to which they were going to apply Mr. Rooper's 500*l.*, which he was to pay up on the calls on his shares, was to pay their solicitor's bill and their secretary's bill. I thought then, and I think still, that it is a monstrous thing that a man who has subscribed 500*l.* towards a capital of 100,000*l.* to make a great public work, and after 2000*l.* in the whole only has been subscribed, and it is obvious that the plan cannot be carried into execution, should be obliged to pay 500*l.* for the solicitor's bill and the secretary's salary, which 500*l.* he subscribed to make a tramway. I therefore relieved

Mr. Rooper. It was urged upon me that he had acquiesced, and that he had received a dividend after he knew something of the wretched state of the company, because, in fact, they had paid dividends out of capital. I thought his knowledge was so imperfect at the time he acquiesced, that he was not bound by that acquiescence, and so I gave him relief; but, on going to the Court of Appeal, Lord Justice James and Lord Justice Mellish, adopting the view that he had acquiesced by accepting a dividend, which they thought was a very strong thing, considered he was bound by his acquiescence, and dismissed the bill, with costs, so that Mr. Rooper was bound to pay the 500*l.*, with no possibility of the tramway being made, simply for the purpose of paying the solicitor's costs and the secretary's salary. I think the doctrine of acquiescence cannot be carried further than that authority, which is the latest on the subject that has been cited. It is an authority by which I am bound, and which governs this case, if I come to the conclusion that Dr. Sharpley has acquiesced in part of the railway being made, and made by the aid of a contractor who has not sufficient capital, and if I am satisfied that he has concurred in the contract entered into with Mr. Jackson on the 3rd Oct. 1874, to make a part of the line, and has acquiesced in and approved of that contract. The additional contract of the 23rd April 1875 is, I think, only a variation of the original contract, and falls within that which is sanctioned by the meeting of the 28th March 1874; and although Dr. Sharpley did not attend that meeting, I must attribute to him a knowledge of what took place, particularly as he applied for shares after the meeting had taken place. The object of the meeting of the 28th March 1874 was obvious to all parties, and the statement in the answer is that it was to consider the then position of the company, and especially with reference to the contract for constructing the railway and works, which was then engaging the attention of the directors, and the amount of the capital of the company which had been subscribed for, and to discuss the prospects of the company. At that meeting the defendant James Wilson, informed the shareholders that 14,220*l.* had, up to that time been subscribed for in shares, and at such meeting a resolution was duly proposed, seconded, and carried. Now, here is the intimation that only 14,220*l.* out of 96,000*l.* had up to that time been subscribed for. There is evidence that Dr. Sharpley had a report of that meeting, and he must have known of it. Indeed, he does not pretend to say that he did not know it, and he is as much bound by the proceedings of that meeting, in my opinion, as if he had been personally present. Then this resolution was passed: "That this meeting expresses its entire confidence in the directors, and leaves all matters of detail in their hands." Therefore, here is Dr. Sharpley, with a knowledge that only one-seventh of the capital had been subscribed, acquiescing in, concurring in, and recommending the proceeding with the construction of the railway with one-seventh of the capital, and he now comes forward and says, that because the prospectus states, "If no allotment be made, the deposit will be returned in full," therefore he has now a right to have his money returned to him, and his name taken off the register of shareholders. That was a right which was vested in

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him on the 28th March 1874. On that day he might have said, "I am now informed that only one-seventh of the capital is subscribed for. You cannot, therefore, exercise your borrowing powers, and it is nothing less than madness to attempt to construct this railway. It is ridiculous to do so." That would have been a rational course for a man in his position to have taken at that time, and the whole thing would have been put an end to. However, the question I have to decide is, whether in this suit of Dr. Sharpley, I can grant an injunction against the company to prevent them from doing those very things which he has sanctioned their doing. Now, with regard to the contract of the 3rd Oct. 1874, with Mr. Jackson, Dr. Sharpley seems to have made no inquiry at that time, and by the evidence I must consider that he is bound by this contract; and although there is not the same evidence of his being personally bound by the second contract, yet there is a resolution passed by which he is duly informed that the details are left to the directors, in whom he and all the other shareholders had entire confidence. Therefore he has acquiesced in the making of the contract by the agreement of 1875, which is a sanction of what the directors have done, on the authority of *Rooper v. The East Norfolk Tramways Company*, and the other authorities cited by Mr. Higgins, namely, the cases of *Denton v. Macneil* (14 L. T. Rep. N.S. 721; L. Rep. 2 Eq. 352), *Hallows v. Fernie* (18 L. T. Rep. N.S. 340; L. Rep. 3 Ch. 467), *Kennedy v. The Panama, New Zealand, and Australian Mail Company* (17 L. T. Rep. N.S. 62; L. Rep. 2 Q. B. 580), *Ashley's case* (22 L. T. Rep. N.S. 83; L. Rep. 9 Eq. 263), and the case of *Scholey v. The Central Railway Company of Venezuela* (L. Rep. 9 Eq. 256 n.). In the last case, Lord Cairns lays down the rule that the plaintiff there had a perfectly clear and a good case if he had come in time, that is, if he had filed his bill as soon as he read the report; but as he delayed doing so for three months it was too late, and the bill was dismissed. Then, on the 23rd of March 1875, I find Dr. Sharpley attending a meeting, at which it is plain that the whole circumstances of the company were brought forward. There had been a report of the directors recommending that the railway should be proceeded with: "It having been moved, that the report of the directors be adopted, and a full discussion having taken place, an amendment was moved by Mr. J. G. Smith, and seconded by Mr. Sharpley, that the adoption of the report of the directors be adjourned, in order that the shareholders may have further details of expenditure." That is the view of Dr. Sharpley, that they must have further details of expenditure. What expenditure? An expenditure at a time when only one-fifth or one-sixth of the capital was subscribed, and he was therefore sanctioning that expenditure going on. "The amendment having been put to the meeting, it was declared not to have been carried, and the original proposition, having been then put, was declared to have been carried by a large majority. The meeting having proceeded to the election of the directors, it was moved that Mr. Frederick Heritage be a director of the company, and Mr. Heritage was declared to have been duly elected." Now it is perfectly clear that Mr. Heritage was the solicitor of Mr. Jackson, the contractor; and it is also clear that Mr. Heritage had no other claim to be a

director of this company than that of being Mr. Jackson's solicitor. To my mind it is plain that Mr. Jackson had made this stipulation: "I am to find the capital. I am to find the material with which to do the work for 98,000*l.*, and in order that my interests may be duly protected, I must have a director on the board." Whom does he select? His solicitor, Mr. Heritage. What could Dr. Sharpley suppose about this? Why does Dr. Sharpley concur in appointing Mr. Heritage a director? Only because he knew that Mr. Jackson had entered into this contract, and had stipulated that Mr. Heritage should be a director. Therefore, so late as March 1875, we find him concurring in the proceedings which he now seeks to stop. I agree very much with what Mr. Higgins has said, that such an amount of acquiescence has seldom been brought forward in any case as there is here against Dr. Sharpley. That brings us down to the 23rd March 1875, and from that time Dr. Sharpley appears to have been acquiescent. He does not appear to have taken any further part, but to have remained silent. Did he give any notice to his co-adventurers what his views were? Did he warn them not to go on? The bill has never been amended, and there is no contradiction to this statement in the answer: "The plaintiff never before the filing of the bill in this suit applied to the defendant company, or to the directors thereof, to remove, and the defendant company was not asked to remove, his name from the register of shareholders in the said company, or to repay the plaintiff the said sum of 90*l.* It is not known to the defendant company that they have any power to remove the plaintiff's name from the said register, or to repay him the said sum of 90*l.*, even if they were desirous to do so. Under the circumstances aforesaid, we respectfully cannot, as to our belief or otherwise, say whether the defendant company do or do not refuse to remove the plaintiff's name from the said register, or whether or not to repay him the said sum of 90*l.*" But the material statement is that, having acquiesced in the proceedings on the 23rd March 1875, with a view to carrying Mr. Jackson's contract into execution, he makes no further objection, but remains quiet and allows them to go on; and thereby again acquiesces in their proceedings. But when an action is brought against him for calls, then, in order to restrain that action, he files his bill. I have not heard any evidence that he ever protested against the calls. The persons connected with this company are, I believe, a most respectable body of gentlemen; and Mr. Wilson, who has been cross-examined, gave his evidence in a manner entirely satisfactory to my mind. A very intelligent statement has been made by him and by others. And although I quite agree with what has been said about this company going on without a sufficient capital, yet I am quite satisfied that everything they have done has been intended to be done honestly by them; and that they honestly believe that the railway will be beneficial, and that they hope to carry it out and construct it. But here you have Dr. Sharpley, after the meeting of the 23rd March, identifying himself with the proceedings, and lying by without saying a word, and without taking any steps, either by himself or by his solicitor, Mr. Mason, although Mr. Mason is a very zealous solicitor. Why did not Mr. Mason write a letter to the

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company, saying, "If any further attempt be made to press my client for calls he will resist it." Why did Dr. Sharpley lie by all this time, until an action was brought against him for calls? It is, then, for the first time you have a bill filed by him with this statement in it—that he was induced to take the shares by fraud. All that must be taken into account in considering his conduct. In my opinion he would have been entitled to succeed if it had not been for the acts of acquiescence; but in consequence of the acts of acquiescence I am of opinion he has entirely lost his right to succeed. I therefore think the bill has failed and has been a very great mistake. I think the acts of Dr. Sharpley, and the manner in which he has concurred in these proceedings for so long a time, beginning with the application for shares in Dec. 1873, and carried down to March 1875, and concurred with his neighbours, whom I will assume to be friends of his, in the town of Louth, have disintitiled him to any relief in this suit. Although I was at first impressed with the idea that there were a great many shareholders who concurred with him in the course he has taken, it now turns out, and it has not been contradicted, that there are only shareholders interested in twenty-seven shares—in other words, representing 270*l.*, who are now resisting the payment of calls. I am of opinion, on the whole, that the relief must be refused, that judgment must be entered for the defendants: that the bill ought not to have been filed, and that it must now be dismissed with costs.

From this decision the plaintiff appealed.

Glasse, Q.C. and *Nalder*, for the appellant.—The prospectus issued by the company distinctly stated that if no allotment was made the deposit would be returned in full, and the Act provided that the company should not issue any share, nor should any share vest in the person accepting the same unless and until a sum not being less than one-fifth of the amount of such share, should have been paid in respect thereof. That sum has not been paid by any shareholder, and on that ground and on the ground that we were induced by the misrepresentations contained in the prospectus, to apply for shares, we are entitled to have our name removed from the register of shareholders. The amount subscribed was avowedly quite insufficient to complete the railway, and *Cohen v. Wilkinson* (12 Beav. 128; 1 Mac. & G. 481), shows that in that state of things the company could not lawfully begin any part of it. Therefore, the money paid by us ought to be repaid, and we are entitled to an injunction to restrain the company from further prosecuting the action for calls. As to acquiescence, there was none on our part to the making of the whole railway, though we did concur as long as there was any hope of raising sufficient capital. We might be bound by acquiescence if the contract proposed by the committee had been carried out, but that proposal was widely departed from, and a contract was made for constructing the whole line, when the subscribed capital was not even sufficient to pay for the land required for the undertaking.

Higgins, Q.C. and *Onslow*, for the respondents, were not called upon.

JAMES, L.J.—Now that the nature of the bill has been made clear, and the facts admitted on both sides have been brought before us, there can be no doubt that the Vice-Chancellor's decision was

quite right. The case made by the bill is that the plaintiff was induced to apply for shares by misrepresentations contained in the prospectus and in a letter of the secretary. Thus the plaintiff's case is a case of misrepresentation. The Vice-Chancellor, assuming the case of misrepresentation alleged by the plaintiff to be true, held that it was impossible to give him relief, because, after he knew what the company had done, what it was doing, and what it was able to do, he acted as a shareholder, attending meetings of the committee, proposing resolutions, and acting as chairman at meetings; because he continued to act as a shareholder for months after he had full knowledge of all the circumstances entitling him, if ever he was so entitled, to be relieved from his shares. If a man wants to rescind his contract to take shares in a company on the ground that he has been induced by misrepresentation to apply for the shares, he must immediately rescind the contract as soon as he becomes acquainted with the circumstances giving him ground for doing so, or else he forfeits all claim to relief. It was said that the plaintiff ought not to remain liable to pay calls because the company are illegally applying the money called up in making a part of the line without any intention to make the rest. But that is not the case made by the bill. To obtain relief on that ground the bill ought to have been framed like that in *Cohen v. Wilkinson* (12 Beav. 128); but even on a bill so framed it would have been difficult for the plaintiff to obtain relief, after having been present at and concurred in the proceedings of meetings at which resolutions were passed in favour of proceeding with a part only of the line. The appeal must, therefore, be dismissed with costs.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—I am of the same opinion.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Collyer-Bristow, Withers*, and *Russell*.

Solicitor for the respondents, *R. Dickson*.

March 29 and 31.

(Before *JAMES* and *MELLISH*, L.J.J., and *BAGGALLAY*, J.A.)

ANDERSON v. BANK OF BRITISH COLUMBIA. (a)

Practice—Discovery—Privileged communication—Unprofessional agent—Production—Judicature Act 1875, Order XXXI., rule 11.

A suit had been instituted to set aside certain dealings by which it was alleged that funds in the custody of an American branch of a banking company had been improperly applied as against the plaintiffs. The claim was brought before the London manager in Nov. 1874, and two days afterwards, he, feeling that litigation was imminent, telegraphed to the manager of the American branch to send by letter fullest particulars of the whole transaction, but without stating for what purpose the particulars were required. Immediately after sending this telegram he for the first time consulted the solicitors of the bank on the matter. In answer to the telegram the London manager received a letter for which the defendants by their affidavit as to documents claimed privilege, and the present question was

(a) Reported by E. STEWART ROCHE, Esq., Barrister-at-Law.

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whether that letter was a privileged communication.

Held (affirming the decision of the Master of the Rolls) that the letter was not a privileged communication.

A letter by a mercantile agent to his principal, giving information respecting what the agent has actually done for, and on account of, the principal, is not privileged, although it is sent in compliance with the request of the principal, made after the principal has been threatened with litigation respecting the matter on which he requires information.

THIS was an appeal by the defendants from a decision of the Master of the Rolls, ordering the production of a letter addressed to the defendants by the manager of their branch at Portland, Oregon, in North America, in answer to a telegram from the manager of the London establishment requiring full particulars of the transactions in respect of which the present suit, which was at that time threatened, had been instituted.

The plaintiffs, Messrs. Anderson and Co., merchants in London, had been engaged in certain shipping transactions with Messrs. Laidlaw, Gate, and Co., commission merchants at Portland, Oregon, in respect of which a credit was granted, and bills had been drawn, and the proceeds lodged with the Bank of British Columbia. The proceeds were, it was alleged, appropriated by the bank in satisfaction of a balance claimed to be due to them from Laidlaw, Gate, and Co., and in Sept. 1874, a member of the firm of Anderson and Co. called at the London branch of the bank, and stated generally the nature of the claim to such money which was asserted by his firm. Mr. Ransom, the manager of the bank in London, at once wrote to the manager of the Oregon branch to make inquiries, and on the 7th Nov., in due course of post, received an answer, setting forth certain facts connected with the account. On the 11th Nov. matters assumed a more serious aspect, and the solicitors of Anderson and Co. wrote, making a formal application for the sum of 21,194 dols., and threatening litigation in default of compliance. Ransom, considering, from what passed at the interview, and the letter from the solicitors, that litigation was imminent, on the 14th Nov. 1874, sent to Russell, the manager of the branch at Portland, the following telegram: "Claim referred to by letter of 18th Sept. made for 25,000 dols. Send by letter fullest particulars whole transaction, especially cargo *Melancthon*, and copy of account." Mr. Ransom on the same day, wrote to the solicitors of the bank stating that the directors would be glad to confer with them at their next meeting, to be held on the following Tuesday, and on that occasion the plaintiff's claim and threat of litigation were laid before the solicitors of the bank. In answer to his telegram the English manager received a letter, for which the defendants, by their affidavit as to documents, claimed privilege, on the ground that it was a communication in reference to the subject-matter of the litigation, made by a third person to enable the defendants to prepare their defence to the litigation then in anticipation. The matter having been adjourned into court for argument, the Master of the Rolls held that the letter was not a privileged communication, and ordered it to be produced. The defendants appealed.

Chitty, Q.C. and Kekewich, in support of the

appeal, contended that communications with a professional, or even an unprofessional agent, were privileged if made in contemplation of litigation, and with a view to the prosecution of a claim, or to a defence against a claim. This case came within the principle that the client turned himself, for the nonce, into a clerk of the solicitor, for the purpose of ascertaining what the witness would say. There was no intention to deal with the information, except under legal advice. They referred to the following authorities:

Lafone v. Falkland Islands Company, 30 L. T. Rep. N. S. 129; 4 K. & J. 34;
Ross v. Gibbs, L. Rep. 8 Eq. 532; 39 L. J. 61, Ch.;
Hooper v. Gumm, 2 J. & H. 602;
The Chartered Bank of India v. Rich, 8 L. T. Rep. N. S. 454; 4 B. & S. 73;
Skinner v. The Great Northern Railway Company, L. Rep. 9 Ex. 298; 43 L. J. 150, Ex.;
Fenner v. The London and South-Eastern Railway Company, 26 L. T. Rep. N. S. 971; L. Rep. 7 Q. B. 787;
Reed v. Langlois, 1 Macn. & G. 627;
Bolton v. Corporation of Liverpool, 1 My. & K. 88;
Wooley v. North-London Railway Company, L. Rep. 4 C. P. 608;
Cossey v. London, Brighton and South Coast Railway Company, 22 L. T. Rep. N. S. 19; L. Rep. 5 C. P. 146;
English v. Tottis, 33 L. T. Rep. N. S. 724; L. Rep. 1 Q. B. Div. 141;
M'Corquodale v. Bell, 24 W. Rep. 399;
Brown v. Oakshott, 12 Beav. 252;
Greenough v. Gaskell, 1 My. & K. 98.

Graham Hastings, Q.C. and *Laing*, for the plaintiffs, were not called on.

JAMES, L.J.—Really, notwithstanding the length of the arguments addressed to us, and the number of cases cited, I think this is one of the clearest and plainest cases that have ever come before the court. According to all the practice laid down ever since I have known anything about the court, and everything I have read about the practice of the court, I think that this is a document which ought to be produced. The old rule was, that every document in the possession of a man must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. Then it was established that communications made by a man to his solicitor, or by the solicitor to the man, were privileged for certain reasons. Now, it is supposed that that rule was entirely altered by an expression of Vice-Chancellor Stuart in the case of *Ross v. Gibbs*. I am quite sure that the Vice-Chancellor did not intend, and it was not competent for him, by a mere casual and hasty generalisation, not called for at all by the facts of the case, to alter the whole tradition and course of this court with respect to the production of documents. If the rule had been, as it is supposed to be laid down in that case, all that had been previously said in text books by learned authors, with regard to the origin of the principle and the justification of the privilege, all that has been said about its being confined to lawyers and not extending to doctors and priests, all that has been said by learned judges in Chancery in the particular circumstances of the cases that have come before them to show how they might be brought within that general principle—the whole of that would be, to my mind, puerile nonsense if the law had been, as it is supposed to have been laid down by the Vice-Chancellor, that any communication made by a person with a view to litigation, whoever the person may be, was to be pro-

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tected. As to the cases at law, they seem to have been brought, now at least, very much into conformity with the principle of the cases in equity. I do not think it is necessary to review them to see whether, if the same state of circumstances came before this court, exactly the same decision would be arrived at; but looking at the dicta and the judgments cited, I think that they may possibly all be based upon this, which is an intelligible principle of production, namely, that you have no right to see your adversary's brief; and, as you have no right to see your adversary's brief, you have no right to see the materials, that which comes into existence simply as the materials, for your adversary's brief. But that seems to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information concerning the facts and circumstances of the very transaction which is the subject-matter of the litigation. If there is anything which ought to be produced, it seems to me it is that. And that is exactly this case. A man makes a claim against a bank in London; the bank in London, not having all the facts in their knowledge, send out a letter and send out a telegram to say to their agent who transacted the business: "Give us the fullest information that you have of all the facts and circumstances of the case—all about the shipping documents and everything of the kind connected with it." That was exactly what the agent ought to do. It was the duty of the man in the ordinary course of business to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is or ought to be the knowledge of the principal; and even if, after the bill had been filed, the defendant had said, when asked for discovery, "I do not know everything that is known by my agent in Oregon," this court would say, "That is no answer; it is your duty in making the discovery to use your best efforts *bona fide* to obtain all the information that your agent can give you, and whether it is before or after litigation it is your duty to write to him, if necessary, and get that information from him, and when you get it you must discover it so that we may know the exact facts and circumstances of the case." That being so, it is impossible to say that the discovery of this particular document is on any other footing than that. The agent, as we must assume, has sent to the principal the account or statement of what took place between him and the other party. The other party says: "You have got that statement of facts, produce it, it is the best evidence of the facts within your knowledge." I am of opinion, therefore, upon the plainest principles on which discovery is given by this court, that this letter ought to be produced, and the appeal dismissed with costs.

MELLISH, L.J.—I am of the same opinion. The question as to the right to discovery depends upon the 11th rule of the 31st Order. That is really copied from the provisions contained in the Chancery Amendment Act, and although it differs very little from a similar provision in the Common Law Procedure Act 1854, yet, having regard to the general rule that the practice in equity is to prevail, there can be no doubt that the rules

previously existing respecting discovery in the old Court of Chancery are now binding upon all the courts. With regard to the present case, I do not at all wish to go beyond what is necessary for the purpose of deciding the particular question involved. That question is, whether a letter by a mercantile agent to his principal, giving information respecting what the agent has actually done for and on account of the principal, is to be privileged because it is sent in compliance with the request of the principal after the principal has been threatened with litigation respecting the matter on which he requires information. I am clearly of opinion that such a communication is not privileged. To be privileged it must come within one of two classes of privilege, either, firstly, the privilege which protects a man from producing confidential communications made between him and his solicitor (sent directly by himself to his solicitor, or by himself to an agent who is to communicate them to the solicitor), or, secondly, the privilege which entitles him to refuse to communicate evidence which he has obtained for the purpose of litigation. Now, in declaring to what extent the latter privilege goes, some very nice questions may arise, particularly when the evidence is not obtained for the direct purpose of being given in the action, but is obtained before the action is commenced, or before the defence is relied on, in order that the party who seeks it may obtain information for the purpose of determining whether he will commence or defend an action. If the information is really and simply information obtained from a person who is to be a witness, I do not think it is necessary to give any opinion on the present occasion whether that would be privileged or not. Supposing a collision has taken place either at sea or on land, and a man before he determines whether he will bring an action or defend an action, writes to a person and says, "Get me an account from every one of the passengers and crew respecting this transaction; write it down as accurately as you can and send it up to me," it might be that that would be privileged, although he sent and asked for it before he determined whether he would bring an action or defend an action, just as much as it would be if it was sent after the action was commenced, and he wished to obtain information as to what evidence such persons would probably give. He may say that if the other person wants the information he may go to the same persons and ask them himself what evidence they will give, and if they will only inform one side what the evidence may be and not the other, that may be the misfortune of the other side. As a general rule, no doubt, a man is not bound to disclose such information. But I cannot think that that is the principle which ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which, in point of law, are the acts of the principal himself, matters as to which the knowledge of the agent is the knowledge of the principal. In point of law the principal knows the facts, or is to be deemed to know the facts, before he has himself personally got the information. I cannot but think that, as you are entitled to ask the principal, by an interrogatory, what he knows respecting those facts, you must necessarily be entitled to the information which

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his agent has sent respecting them. As I have observed during the course of the argument, I cannot conceive that there is any distinction between written and verbal communications by an agent to his principal. To say that the defendant in this case is not bound to produce this letter, would, as it seems to me, be the same as saying that if you asked the principal a question respecting anything which had happened in his own office concerning a matter of business not actually transacted by himself, he could reply, "I do not know personally how this was done, the only information which I have respecting it is the information I have obtained from my clerks and servants, and they gave me that information in consequence of a question which I put to them after I was threatened with an action." You cannot, for a moment, suppose that such an answer would excuse a man from giving the discovery sought for. It appears to me that, even if we had a discretion to say what was just and right, it would be a decision very detrimental to the ordinary purposes of justice to say that such communications as this are privileged. Practically, we should be depriving a man of the benefit of discovery in a very great number of cases. So far from the fact that the information comes from the other side of the world being a reason why it should be privileged, that is really a reason making it additionally important that it should be discovered. Anybody who is at all aware of the practice at common law in mercantile cases must know the extraordinary inconvenience, delay, and expense which results from commissions having to be sent abroad to prove facts, and obtain evidence respecting which there is no real doubt or dispute whatever; and the necessity for sending out such commissions would be enormously increased if we were to hold that principals are not to be bound to discover the information which they have received from their agents. If both parties are bound to discover information so received, then, in all probability, in a great many cases, the facts would be perfectly ascertained. The question before us is a strong instance of this. Here is a transaction which took place with the Bank of British Columbia, by their agent out at Oregon. Of course, the person, whoever he may be, who may be made a defendant for the purpose of discovery, will not know of his own knowledge what took place out in Oregon; and if it is necessary to wait until somebody goes and examines the books out at Oregon, nobody can tell what the expense and delay may be. If the matter had happened in London, or the man who actually knew the facts, and who was the person to actually give the discovery, was here, there would not be the slightest doubt but that he would be bound to make the discovery and produce the books. Why should there be a less right to discovery because this took place at Oregon, and because the information is contained in a letter sent by an agent in Oregon to his principal in this country? I am, therefore, clearly of opinion, in accordance with the practice that previously prevailed in courts of equity, and I should add in accordance with what I think is just, right and expedient, if we simply take the rule as we find it laid down in the order and interpret it, that this discovery ought to be made.

BAGGALLAY, J.A.—I am of the same opinion. The bill in this case asserts a claim based upon a

transfer by the defendants, the banking company, at their branch in Oregon, of a balance from one account to another. Whether that claim is well or ill-founded depends upon the particular circumstances of the case, all which circumstances are within the knowledge of the manager of the banking corporation in Oregon. Some ten months before the bill was filed, and at a time when it would appear from the affidavits that litigation was very probable in respect of this matter, a telegram was sent from the London bank to the Oregon manager requesting him to send the fullest particulars of the transaction. Now, if the defendants in this case, instead of being a banking company, had been an individual banker, whose business either in London or Oregon had been carried on under his own immediate direction, it could not have been for one moment contended that he would not be bound to give the fullest particulars as to the circumstances under which this transfer from one account to the other took place. It would be no answer for him to say, "I did not attend to this matter personally. I sat upstairs, and the business was carried on by my clerks here or by my clerks in Oregon." It would be no answer to say that. He would be bound, for the purpose of making the discovery, to ascertain from his clerks or manager, all the particulars of the case. Is there any difference between that case and this? You have the defendants who are a corporation instead of a defendant who is an individual. The banking corporation can only answer through their manager or through their official, and they are bound in some form or other, either by answer from their manager or by answer put in under their common seal, to give the fullest and most complete information as to the whole matter. I can understand no possible ground, consistent with the recognised principles on which discovery is given in suits of equity, upon which the information afforded by this letter can be withheld. It might be very different indeed if the letter had contained certain matters not within the knowledge of the party writing the letter, or not within his means of information in the ordinary discharge of his duties. It might possibly be that there might be some information contained in the letter which might be the subject of privilege. But that claim is not made here. There is no claim made of special privilege as regards the contents of the letter, but it is simply a claim of privilege on the ground that it was written in reply to a telegram asking for particulars.

Solicitors for the appellants, *Parker and Clarke*.

Solicitors for the respondents, *Freshfields and Williams*.

Wednesday, April 12.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

MERCIER v. COTTON (a).

Practice—Delivery of interrogatories before statement of defence—Order XXXI., rules 1 and 5.

A judge at chambers having ordered interrogatories to be struck out, on the ground that the delivery of interrogatories before a statement of defence was delivered, was premature and useless, the Queen's Bench Division discharged a rule to

(a) Reported by E. STEWART ROCHER, Esq., Barrister-at-Law.

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rescind the order for the purpose of enabling the plaintiff to appeal.

Held, that the judge in chambers was quite right in striking out the interrogatories. Where a plaintiff wanted information, interrogatories before the statement of defence would be allowed. But in the large majority of cases at common law the statement of defence would make most of the answers to interrogatories useless. This was an action for libel, and if the defendant admitted the publication, nearly all the interrogatories would be useless.

THIS was an appeal from a decision of a divisional court of the Queen's Bench Division, under the following circumstances:

On the 1st Feb. 1876 Captain Mercier sent a circular to various persons and heads of municipal corporations in the United Kingdom respecting a proposed national welcome to the Prince of Wales on his return home from India, and on the 8th Feb. the Lord Mayor caused to be published in the *Times* and other newspapers an advertisement stating that the use of his lordship's name in the concluding paragraph of the circular "was without his knowledge or consent, and was altogether unwarranted and indefensible." Captain Mercier complained of this statement as a libel, and commenced an action in the Queen's Bench Division against the Lord Mayor, claiming 1000*l.* damages. Immediately after delivering his statement of claim, the plaintiff delivered to the defendant interrogatories in writing for his examination. The defendant applied by summons in Chambers to have the interrogatories struck out, and Baron Pollock, without looking at them, ordered them to be struck out under the powers conferred by Order XXXI., rule 5, of the rules of the Supreme Court. The plaintiff appealed to a Divisional Court of the Queen's Bench Division. The appeal was heard by the Lord Chief Justice and Mr. Justice Archibald, who differed in opinion, and the appeal was dismissed. The plaintiff now appealed to the Court of Appeal. The question involved was with regard to the practice under the new rules of court. Order XXXI., rule 1 provides that—"The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, deliver interrogatories in writing for the examination of the defendant;" and by rule 5—"Any party called upon to answer interrogatories may, within four days after service of the interrogatories apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bonâ fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground; and the judge, if satisfied that any interrogatory is objectionable, may order it to be struck out." It had become the practice in the judge's chambers of the Common Law Divisions to strike out, as a matter of course, all interrogatories delivered by a plaintiff before the delivering of the defendant's statement of defence, unless the plaintiff made out some special case for their delivery at that stage of the proceedings. Mr. Justice Archibald thought that this practice was right, but the Lord Chief Justice, while admitting that it was very inconvenient that interrogatories should be delivered before the delivery of the defence, was of opinion that the plaintiff was entitled, as of right, to do this under

the rules. He concurred in affirming the order of Baron Pollock, with the express object of having the matter brought to the Court of Appeal so that the right practice might be settled. On the appeal,

Macrae Moir, for the plaintiff, contended that he was entitled as of right to deliver the interrogatories when he did, and that the order to strike them out, simply on the ground that the statement of defence had not been delivered, was in direct contravention of the provisions of the rules, which, indeed, formed part of the Act of Parliament.

A. L. Smith, for the defendant, said that when the question was before the judge in Chambers, it was stated that the defendant would probably admit the publication of the alleged libel, and would justify it, and he had, in fact, since done so, in his statement of defence. Under such circumstances the interrogatories would be wholly unnecessary. The meaning of the rules was that *primâ facie* the plaintiff was to be entitled to deliver the interrogatories, but this was subject to the power given to the judge by rule 5, to strike them out, and if an application was made to strike them out, the onus was on the plaintiff to show some good reason why they were material before the delivery of the defence. He submitted it would be an abuse of the practice if interrogatories were permitted as a matter of course in every case before the statement of defence was delivered. He referred to the following cases in the Weekly Notes for 1867:

Strong v. Tappin, p. 22;

Fenwick v. Johnston, p. 54;

Drake v. Whitely, p. 55;

Cotching v. Hancock, p. 55.

JAMES, L.J. was of opinion that the order of Baron Pollock was perfectly warranted by the rules. It was not intended by rule 1 that as a matter of course, interrogatories should be delivered by the plaintiff, whether they were really necessary or not. Rule 5 gave the widest power to a judge in Chambers to strike them out, though of course he must exercise a judicial discretion. In the present case he thought that Baron Pollock was entitled to ask the plaintiff what his object was in putting the interrogatories at that stage of the action, and, if satisfied that there was no reasonable object, he was entitled to say that they were not sufficiently material at that stage to be allowed. It was, of course, quite possible that the publication of the libel, and all the facts connected with it might be admitted by the defendant, indeed, it was stated to Baron Pollock that it was probable this would be done. It was clear, therefore, that the interrogatories could not have been *bonâ fide* administered for the purposes of the action. Of course, the judge in chambers could not, in the face of the rule, say that, as a matter of course, interrogatories should not be delivered before the delivery of the defence, but he was entitled to call on the plaintiff to show some reason why he wished to put them at that stage, and if the plaintiff could not do this, the judge was perfectly justified in concluding that it was not done really for the purpose of obtaining discovery, and in striking out the interrogatories. In so doing he would not be violating the rules, but would be properly exercising the power given him by rule 5. Probably, in nine-tenths of the cases which came before the judges in chambers, the

interrogatories were delivered only for the purpose of making costs.

MELLISH, L.J. was of the same opinion.—The question was to what extent rule 1 was modified by rule 5. No doubt, rule 1 was intended to alter the old practice at common law to this extent, that a plaintiff was to be entitled to deliver interrogatories as a matter of right without first obtaining the leave of the court. And it must be remembered that the judge, by saying that it was premature to deliver interrogatories with the statement of claim, did not deprive the plaintiff of the right to deliver them afterwards, as the right to do so continued up to the close of the pleadings. Then rule 5 said, in terms, that the interrogatories might be struck out on the ground that the matter inquired after was not sufficiently material at that stage of the action. What did that mean? Suppose the defendant said, "I am going to demur to the action." That would clearly be a good ground for not requiring the defendant to answer the interrogatories. That was an instance showing that interrogatories might be struck out because they were immaterial then, though they might become material afterwards. The provision as to materiality was originally, no doubt, intended with reference to a class of cases familiar in the courts of equity, where questions as to an account would not be material until the account came to be taken, but it was not confined to that. In ninety-nine out of one hundred common law actions it was impossible to say that interrogatories would be material until the defence was delivered, for you could not tell what the defendant would admit. The only cases where interrogatories were really material were those in which the plaintiff wanted an answer from the defendant to enable him to frame his own claim—cases which frequently occurred in the Court of Chancery, but very seldom in the common law courts. And certainly an action for libel was not a case of that kind, as the plaintiff could not bring it without having seen a copy of the alleged libel which was the foundation of his case. The plaintiff here could not possibly require interrogatories to enable him to frame his statement of claim, and it was clear that if the defendant should admit the publication, they would be wholly unnecessary; but, with regard to the general practice, his Lordship thought there was nothing wrong in the judges requiring, as a rule, that the plaintiff should state his reasons for delivering interrogatories before the delivery of the defence, and striking them out if this could not be done. He was, therefore, of opinion that the order of Baron Pollock should be affirmed.

BAGGALLAY, J.A. concurred.

Appeal dismissed with costs.

Solicitor for the plaintiff, F. A. Lawty.

Solicitors for the defendant, Yeo and Warner.

Wednesday, April 26.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Re DEIGHTON'S SETTLED ESTATES. (a)

Will—Gift to class—Vesting—Period for ascertaining class.

A testator bequeathed his real and residuary personal estate to trustees upon trust to pay the

income to his widow for life, and on her decease to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the shares which their parents would have taken if living) until his youngest surviving child attained twenty-one, and on that event occurring, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one several years before the death of the widow.

On the question as to who were entitled to the proceeds of part of the estate which had been sold during the widow's life, and the purchase-money paid into court:

Held (affirming the decision of the Master of the Rolls), that the class was to be ascertained at the widow's death, thus excluding the personal representatives of the children who had died without issue in her lifetime.

The court leans strongly in favour of the early vesting of interests in cases where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision; but where a testator provides for all his descendants living at the period of division, there is no reason to depart from the fair meaning of his words in order to make the shares vest at an earlier period.

THIS was an appeal from a decision of the Master of the Rolls.

The testator, W. S. Deighton, died on the 19th Oct. 1841, leaving a widow and nine children. The youngest child attained twenty-one on the 15th Feb. 1862. The widow died on the 11th Dec. 1874. In the meantime several of the children had died, some leaving issue and some without issue.

The testator by his will gave his real and residuary personal estate to trustees upon trust to convert so much as did not consist of ready money or of freehold or leasehold estate, and after payment of debts and of a legacy, to invest the residue of the proceeds in Consols; and he directed that all the said trust estates and premises should form an aggregate fund, and be held upon trust to pay the income to his wife during her life, if she so long continued his widow, but if she married again, then to pay her 50*l.* a year during the remainder of her life; "and on my said wife's death or marriage, to apply such income, or the residue thereof, in or towards the maintenance, education, bringing up, and supporting of such child or children of mine then living, and of the issue of my child or children then deceased (such issue taking the share of such income only as the parent or parents, if living, would have taken), until my youngest surviving child shall have attained the age of twenty-one years. And I direct my trustees, when my youngest surviving child shall have attained the age of twenty-one years, to sell all my said freehold and leasehold estates, and to stand possessed of the money arising therefrom and the residue of the trust premises in trust for my child or children then living, and the issue then living of my child or children dying before that period, such objects to take as tenants in common *per stirpes*, the shares of the children to be paid immediately, the shares of the other issue, being males, at the age of twenty-one years, or being females, at that age or marriage."

The opinions of two eminent counsel having

(a) Reported by E. STEWART BOCKE, Esq., Barrister-at-Law.

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been taken, the one in 1857 and the other in 1870, they both advised that the class of takers was to be ascertained when the youngest child attained twenty-one, and that their interests then vested. A third counsel in 1872 further advised that the property had become saleable when the youngest child attained twenty-one.

The trustees, after the death of the widow, paid away some portions of the residuary personal estate in accordance with such opinions.

The question having arisen as to who were entitled to the proceeds of part of the estate which had been sold during the life of the widow, under the Settled Estates Act, and the purchase-money paid into court, the Master of the Rolls held that the class was to be ascertained at the death of the widow, thus excluding the personal representatives of children who had died in her lifetime. The legal personal representative of one of the deceased children appealed.

Bristowe, Q.C. and Freeling, for the appellant.

Waller, Q.C., Kischer, Q.C., W. Barber, and Everitt, for the respondents, were not called upon.

JAMES, L.J.—I think the construction of this will reasonably clear. Putting aside the contingency of the wife's marrying again, which has not happened, the scheme of the will is this: The testator gives his property to his wife for life, and after her death he directs the income to be applied for the maintenance of his children and the issue of deceased children until the youngest child attains twenty-one, proceeding on the assumption that his children will not all have attained twenty-one at his wife's death. When the youngest child attains twenty-one he directs the property to be sold. He cannot have intended this sale to take place during the life of his wife. He never meant to take away the income in specie which he had given her. In saying that the sale is to take place when the youngest child attains twenty-one, he means that the sale is to take place when both events have happened—the death of the wife and the youngest child attaining twenty-one. In directing the proceeds to be held in trust for a class of persons "then" living, he means living at the time at which, according to the will, the sale was to take place. The court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period leaving a family, his children would take no benefit under the will; but there is no reason for departing from the fair meaning of the words of a testator in order to vest the shares of his children, when he has made a provision for all his descendants living when the fund becomes divisible.

MELLISH, L.J. and BAGGALLAY, J.A., concurred.

Solicitors: *Fidler and Sumner; Heather and Son.*

April 26 and 28, and May 6.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

MELUISE v. MILTON.(a)

Legacy—Assumed character—Bequest to a woman wrongly believed by testator to be his wife—Fraud—Jurisdiction.

Suit for a declaration that a devise and bequest of

(a) Reported by E. STEWART ROCKE, Esq., Barrister-at-Law.

H. Meluish's real and personal estate to Maria Milton might be declared void in equity, and that she might be declared a trustee of such estate for the plaintiff, the brother of the testator. By the will H. Meluish left all his real and personal property to "his dear wife, Maria Chapple Meluish," and appointed her his sole executrix. Her first and only real husband, J. Milton, was alive at this time. The plaintiff's case was that the devise and bequest to her in the will was obtained by the fraudulent assumption on her part of the character of the testator's wife. Mrs. Milton's case was that before she married the testator she had come to the conclusion that J. Milton, of whom she had not heard for seven years, was dead, and that the testator married her knowing that she had no evidence of J. Milton's death. Mrs. Milton had, after the death of the testator, been tried for bigamy in respect of her marriage with the testator, but she had been acquitted.

A preliminary objection was taken that, as the bill raised a case of fraud against the defendant in obtaining the will, the plaintiff's proper course was to apply to the Probate Division to recall the probate.

Held, upon the authority of Allen v. Macpherson (1 H. of L. Cas. 191) that the Court of Chancery had no jurisdiction to deal with fraud in obtaining a will of personal estate.

Appeal dismissed without any opinion being expressed on the merits of the case.

THIS was an appeal from a decision of Hall, V.C.

A bill was filed by William Meluish, the brother, sole next of kin, and heir-at-law of Henry Meluish, deceased, against John Milton and "Maria (otherwise called Maria Dunster, otherwise Maria Chapple) his wife," in order to obtain a declaration that a devise and bequest by Henry Meluish of his real and personal estate to Maria Milton might be declared void, and that she might be declared a trustee of such estate for the plaintiff. In the year 1850 Maria Milton, then Maria Chapple Dunster, spinster, married John Milton, who was a sergeant in the 1st Devon militia. Shortly after the marriage she left her husband, owing, as she alleged, to his ill usage, and being left to her own resources, and losing, as she said, sight of her husband, she, in the year 1854, went through the ceremony of marriage with Francis Evan Edwards. She lived with Edwards as his wife down to the year 1864, when he died.

On the 30th May 1870, she went through the ceremony of marriage, by the name of Maria Chapple Edwards, with the testator, Henry Meluish, and she lived with him as his wife down to the 4th June 1871, when he died.

Henry Meluish, by his will, dated the 23rd Aug. 1870, left all his real and personal property which amounted in value to between 700*l.* and 800*l.*, to Maria Milton, describing her in his will as his "dear wife, Maria Chapple Meluish," and appointed her sole executrix. The plaintiff's case was that Mrs. Milton had all along known that John Milton was alive, and that the devise and bequest to her by Henry Meluish was obtained by the fraudulent assumption on her part of the character of his wife.

Mrs. Milton's case was that before she married the testator she had come to the conclusion that John Milton, of whom she had not heard for seven years, was dead, that she told her history to the

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testator before she married him, and that he married her knowing that she had lived with Edwards, who was a friend of his, as his wife, and had had children by him, and knowing that she had no evidence of John Milton's death. Mrs. Milton was, in July 1874, tried for bigamy in respect of her marriage with the testator, but was acquitted. In the court below Mrs. Milton was cross-examined, and deposed that she had only seen John Milton on one occasion, and that was in the year 1862, when she asked him if he would consent to a divorce, though she appeared under the impression that this interview occurred after the death of Edwards, which did not happen till 1864, or less than seven years before she married Henry Meluish.

An objection was raised that the Court of Chancery had no jurisdiction in the case, but that the Court of Probate had sole jurisdiction in the matter.

The Vice-Chancellor, after stating the facts as alleged by the bill, said that the principles of law within which it was sought to bring this case were those laid down by Lord Alverley in *Kennell v. Abbott*, and referred to by Lord Cottenham in *Rishton v. Cobb*, that "wherever a legacy is given to a person in a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy. The court," said Lord Cottenham, "must be satisfied that the assumed character was the motive of the bounty." Were those principles applicable to the present case? The question whether Mrs. Milton was or was not a married woman was or was not a matter of discussion between her and Meluish previous to their marriage. There was no absolute proof of John Milton's death, and it did not appear that Meluish himself made any inquiry as to his existence. Mrs. Milton had been living for ten years as the wife of Edwards, who was a friend of Meluish, who had known her in that character. There was some inconsistency in Mrs. Milton's statement as to her interview with Milton; but whether she had told Meluish that she had not seen Milton since 1862, or not since Edwards's death in 1864, it was clear that the testator had chosen to marry a woman as to the non-existence of whose husband there was no certain proof. These were circumstances to which such cases as *Kennell v. Abbott* did not apply, and he could not, in such a state of things, safely hold that the character of wife was the only motive of the gift. A man running the chance of another husband turning up, might very well intend that his property should go to his supposed wife, whether she was really the wife of another or not. Mrs. Milton had no doubt qualified her statements, and the period of 1862, fixed by her as the date of the interview with Milton, was displaced by the evidence that it was in 1866; but it did not follow that no portion of her evidence was credible. There might be some confusion in her mind as to dates, but she said that the occasion of the interview was after Edwards's death, and that might be a period of time which would fix itself in her mind, and one at which she would naturally make inquiries, though the precise date she assigned was incorrect. Upon the whole, giving due weight to all the evidence, and to such conflict as there was in the statements on the subject, he came to

the conclusion that Meluish was informed that Milton had been seen after the death of Edwards; that no fraud on the part of Mrs. Milton had been established; that the case had not been brought within the authorities; consequently the plaintiff's case had failed, and his bill must be dismissed with costs.

Upon the appeal by the plaintiff, *Dickinson*, Q.C. and *B. B. Rogers* for the appellant.

Ince, Q.C. and *Alfred Whittaker*, for the respondent.

The question of jurisdiction, which was raised in the court below, having again been raised.

Ince, Q.C. and *Alfred Whittaker* in support of the preliminary objection, contended that in a case like the present, which was one of alleged fraud affecting the right of obtaining probate, the jurisdiction was to be exercised exclusively by the Probate Division. A will obtained by fraud was not the testamentary disposition of the testator, and yet the probate, so long as it was unrecalled, was proof that it was his testamentary disposition. They submitted that the Probate Division had every means of arriving at the truth in investigating cases of fraud which the Chancery Division had. They referred to

Allen v. Macpherson, 1 H. of L. Cas. 191.

Dickinson, Q.C. and *B. B. Rogers*, for the plaintiff, admitted that the will was actually the will of the testator, and that no undue influence was used. The alleged fraud was not in obtaining the will but in obtaining the status of a wife, and the will was only an indirect consequence of that. They contended the Chancery Division, therefore, had full jurisdiction in the matter. They referred to

Kennell v. Abbott, 4 Ves. 808;

Rishton v. Cobb, 4 M. & C. 150.

Counsel were not called upon to address the court upon the merits of the case.

JAMES, L.J. said that the defendant had taken a preliminary objection by way of demurrer that the Court of Chancery had no jurisdiction to entertain such a suit. Beyond all question up to the date of the decision of the House of Lords in the case of *Allen v. Macpherson* a great deal might have been said, and was said, and even decided, in favour of the existence of such a jurisdiction in the Court of Chancery. In that case two very eminent and learned judges of the Court of Chancery—Lord Cottenham and Lord Langdale—stoutly maintained the jurisdiction of the court, but their eloquence and learning did not prevail with the House of Lords, who, in opposition to their view, came to the conclusion that in such a case of fraud the jurisdiction was not to be exercised by the Court of Chancery, but was to be exercised exclusively by the Court of Probate. That case was in many respects similar to the present case, though there was a distinction which was by no means in favour of the latter. The instrument quarrelled with in the case of *Allen v. Macpherson* was one of several codicils to the will of a testator, by which he revoked some beneficial interest given by the will, but did not affect the legal title of his personal representatives. In the present case, the fraud which was alleged, affected every line of the will, the legal devise and the appointment of executrix, and, therefore, the right to obtain probate. In *Allen v. Macpherson* the House of Lords held that a demurrer to the bill on the ground of want of jurisdiction ought to have

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been allowed by the Court of Chancery, and that the case should have been remitted to the Court of Probate. The view taken by the House of Lords might be shortly summarised thus: A will obtained by fraud is not the testamentary disposition of the testator. The probate, so long as it is unrecalled, is proof that it is his testamentary disposition and is conclusive of that until it is recalled. That was the decision of the House of Lords, and this court was bound by it, and must give effect to it unreservedly. He was unable to see any distinction between that case and the present. There it was said that one codicil had been obtained by means of fraudulent representation; here, that the whole will had been so obtained. It was suggested with some ingenuity by the plaintiff's counsel that here the fraud alleged was not in obtaining the will but in obtaining the *status* of a wife, and that the will was only an indirect consequence of that. His Lordship thought that argument could not be sustained. Either the fraud was the *causa causans* of the will, or it was not. If it was, the will was obtained by fraud, and the case was within the jurisdiction of the Probate Division; if the fraud was not the *causa causans* of the will, then that court had no right to interfere at all. He thought that the case fell within *Allen v. Macpherson*, and that the Chancery Division had no jurisdiction; and this court ought, therefore, to express no opinion on the evidence or on the view taken of it by the Vice-Chancellor. Indeed, this court had only heard the evidence on one side. The bill must be dismissed, with a declaration of the opinion of the court that the matter was within the exclusive jurisdiction of the Probate Division, and without prejudice to any application to that division.

MELLISH, L.J. was of the same opinion.—The decision in *Allen v. Macpherson* was that the Ecclesiastical Court had exclusive jurisdiction to set aside a will of personal property, either in whole or in part, on the ground of fraud. Whatever might be the respect of this court for the learned lords who formed the minority in that case, it must look at the opinions of those lords who composed the majority. What Lord Campbell said in that case amounted to this—that if a suit could be sustained to have the defendant declared a trustee of the property, that would be done indirectly which the law had said could not be done by the Court of Chancery in the case of a will of personalty. The only real question, then, was whether the present suit was one to set aside the will on the ground that it had been obtained by fraud, and his Lordship could not see how it was possible to take any other view of it. There were two facts which the plaintiff must prove in order to succeed—first, that the lady, knowing that her husband was alive when she went through the ceremony of marriage with the testator, fraudulently concealed that fact from him; secondly, that the testator made his will in the faith that he was her real husband. If these facts were proved, then it was proved that the will was obtained by fraud; if they were not proved, there was no ground for setting aside the will. The only ground that could be suggested in favour of the jurisdiction would be that there was some distinction between that which the Court of Chancery, and that which the Court of Probate would hold to be the description of fraud upon which a will could

be set aside. In his Lordship's opinion it would be most mischievous to hold that there was any such distinction. It was said that the fraud upon which the Court of Probate would act, was a fraud committed for the express purpose of inducing the execution of the will, and here it was said that the fraud was not committed for that express purpose. The concealment which was alleged in this case was, however, one which in law was equivalent to a direct misrepresentation. When the lady went through the ceremony of marriage, she did in effect, represent to the testator that she could lawfully become his wife, and every day afterwards she was making a continuing representation to him that she was his lawful wife. If she knew that her real husband was alive, that was a fraudulent representation of which a court of law would take cognisance. And for what purpose must the representations have been made? For the purpose of obtaining all the advantages which she would naturally obtain as the testator's lawful wife, and one of those natural advantages was that of having a provision made by him for her by his will in case he should die before her. Even if there should be no evidence that this object had been actually present to her mind, still if it was in fact obtained that would be enough. It appeared, therefore, to his Lordship that this was a suit to set aside a will on the ground that it had been obtained by fraud, and that there was no difference between the views taken by the Court of Chancery and the Court of Probate with regard to the nature of the fraud. The court ought to decide the case on this question of jurisdiction, and not go into the facts, for if it expressed an opinion on the facts it would prejudice the case when it came before the court which alone had jurisdiction to decide it. Indeed, his Lordship now thought that this court ought, when the question of jurisdiction was raised, not to have heard the evidence at all before the question of jurisdiction was decided. Moreover, if the court were to decide upon the facts, it would be doing the very thing which the decision in *Allen v. Macpherson* said that it ought not to do, and it would be inducing other suitors to refrain from raising a defence of fraud in the Probate Division under the notion that they could still, after the granting of probate, bring their case forward in the Chancery Division. It might have been true that at the time when *Allen v. Macpherson* was decided the Court of Chancery had superior means of investigating cases of fraud; it was not true now, for the Probate Division had now every means of arriving at the truth which the Chancery Division had.

BAGGALLAY, J.A. concurred.

Solicitors: *Prior, Bigg, Church*, and *Adam*, agents for *T. Wilton*, Bath; *E. Doyle*, agent for *J. K. Bartrum*, Bath.

July 17 and 18.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

LEE v. CLUTTON. (a)

Equitable mortgage—Priority—Register county—Constructive notice.

The plaintiffs, a firm of solicitors, took an equitable charge, by a memorandum and deposit of title

(a) Reported by E. STEWART ROCHE, Esq., Barrister-at-Law.

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deeds, from their client A., upon certain premises in the county of Middlesex, which they omitted to register. A. subsequently sold the premises to the defendant, who duly registered the conveyance. The plaintiffs filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in the hands of the plaintiffs, and made no inquiry:

Held (affirming the decision of the Master of the Rolls) that the facts alleged amounted only to constructive notice, and that in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior charge.

This was an appeal by the plaintiffs from a decision of the Master of the Rolls. The facts and arguments are fully reported 33 L. T. Rep. N. S. 717.

The plaintiffs were solicitors who held an unregistered charge on deeds relating to land in a register county. Their client subsequently sold a part of the land to a purchaser, who registered his conveyance. The plaintiffs claimed a charge on the land in priority to the defendant. The Master of the Rolls having decided against their claim the plaintiffs appealed.

W. Pearson, Q.C. and Morshead, for the appellants.

Roxburgh, Q.C. and Maidlow, for the defendants, were not called upon.

The following cases were cited

Jones v. Smith, 1 Hare, 43;
Wyatt v. Barnwell, 19 Ves. 435;
Rolland v. Hart, L. Rep. 6 Ch. App. 678; 24 L. T. Rep. N. S. 250;
Masfield v. Burton, L. Rep. 17 Eq. 15; 29 L. T. Rep. N. S. 571;
Whitbread v. Jordan, 1 Y. & C. Ex. Ca. 303;
The Agra Bank v. Barry, L. Rep. 7 H. of L. 135, 149;
Worthington v. Morgan, 16 Sim. 547.

JAMES, L.J.—It appears to me that the law applicable to this case is very clearly summed up by Lord Selborne in the *Agra Bank v. Barry*, and that, having regard to the law as there laid down, it is impossible for us to come to any other decision than that arrived at by the Master of the Rolls. Lord Selborne there says: "I entirely agree with the opinion your Lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man, dealing *bonâ fide* in the proper and usual manner, for his own interest, ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these the existence of a public registry, in a county in which a register is established by statute, must necessarily be very

material. It would, I think, be quite inconsistent with the policy of the Registration Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent. The appeal must be dismissed with costs.

MELLISH, L.J. and BAGGALLAY, J.A. concurred.

Solicitors for the plaintiffs, *Lewin and Co.*

Solicitors for the defendants, *Clutton and Haines.*

Monday, July 24.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

WADE-GERY v. HANDLEY (a).

Will—Construction—Executory devise—Interim intestacy—Rents and profits of real estate—Heir-at-law.

A testator devised his real estate to trustees for twenty-one years upon trust to accumulate the surplus rents and profits of the same, after paying thereout certain annuities and other outgoings, and then upon trust for the first and every son of T. M. successively in tail male, remainder to the second and every other younger son of W. W. successively in tail male, remainder to the first and every other son of H. W. successively in tail male, remainder to the first son of W. W. in tail male, with divers remainders over. At the end of the twenty-one years T. M. was dead without issue, and both W. W. and H. W. had an infant son and several daughters. There not having been born a second son of W. W., the son of H. W. claimed the estates as tenant in tail in possession indefeasibly, or as tenant in tail in possession, subject to defeasance in the event of a second son of W. W. being born.

Held (affirming the decision of Vice-Chancellor Bacon) that from the expiration of the twenty-one years until a second son of W. W. was born, or until W. W. had died without having had a second son, there was an intestacy; and that the interim rents and profits went to the heir-at-law and next of kin.

Hodgson v. Earl of Bective (9 L. T. Rep. N. S. 18; 1 H. & M. 376) followed.

Sidney v. Wilmer (9 L. T. Rep. N. S. 717; 4 De G. J. & S. 84) dissented from.

This was an appeal by the plaintiff from a decision of Vice-Chancellor Bacon [reported 34 L. T. Rep. N. S. 233]. The testator C. G. Milnes devised all his real estates to trustees and their heirs. He directed that his mansion-house and furniture should not be let or occupied except by the persons put therein to keep the same in good order "until the end of twenty-one years after my death, or until my brother and three sisters (to whom he gave annuities) are all dead." He declared that his trustees should apply the rents

(a) Reported by E. STEWART ROCHE, Esq., Barrister-at-Law.

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of all his real estate in paying the annuities and keeping the mansion-house and furniture in repair, and should accumulate the surplus and lay out the accumulations in the purchase of real estates to be settled to the same uses. He declared that "no such accumulations shall under any circumstances exceed the term of twenty-one years" from his death. He further declared that "at the end of the said term of twenty-one years from the day of my death, or if my said brother and three sisters shall all die within that period, then on the death of the survivor of them, whichever event shall first happen," the trustees should stand possessed of the real estates, upon trust to pay the annuities, and subject thereto, in trust for the first son of his brother in tail male; and failing such issue, in trust for the second and every other younger son of testator's nephew W. H. Wade-Gery in tail male; and failing such issue, in trust for the first and every other son of testator's nephew H. Wade-Gery in tail male; and failing such issue, over; with an ultimate limitation, "failing such issue," upon trust to sell the estates for the benefit of the testator's next of kin. The testator's brother died without issue before the expiration of the twenty-one years' term. At the expiration of the term, two of the testator's sisters were still living. His nephews were living, each having one son only, and several daughters. There not having been born a second son of W. H. Wade-Gery, the son of H. Wade-Gery claimed the estates as tenant in tail in possession indefeasibly, or as tenant in tail in possession, subject to defeasance in the event of a second son of W. H. Wade-Gery being born. The Vice-Chancellor having held that, there was an intestacy and that the heir-at-law and next of kin were entitled to the rents and profits during the suspense period, the plaintiff appealed.

Sir H. Jackson, Q.C. and *Yate Lee* for the appellant.

Hemming, Q.C. and *Maidlow* for the heir-at-law and next of kin.

Kay, Q.C. and *Begg* for the trustees.

The following cases were cited:

Hodgson v. Earl of Bective, 9 L. T. Rep. N. S. 18; 1 H. & M. 376, 391; 32 L. J. 469, Ch.;

Genery v. Fitzgerald, Jac. 468;

Re Eddle's Trusts, 24 L. T. Rep. N. S. 223; L. Rep. 11 Eq. 559;

Hopkins v. Hopkins, cited in *Hodgson v. Earl of Bective*.

Re Mowlem, L. Rep. 18 Eq. 9;

Sidney v. Wilmer, 9 L. T. Rep. N. S. 18; 4 De G. J. & S. 84;

Acroyd v. Smithson, 1 Bro. C. C. 503;

Holmes v. Prescott, 11 L. T. Rep. N. S. 38;

Percival v. Percival, L. Rep. 9 Eq. 366.

JAMES, L.J.—It is utterly impossible to say that the case before Lord Westbury (*Sidney v. Wilmer*), which is so entirely different from all the other cases, would justify us in departing from the rule which was so well settled long before *Hodgson v. Lord Bective*, and so clearly established by that case as to the title of the heir-at-law and next of kin respectively. I think the Vice-Chancellor could not do otherwise than follow that decision.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—I am of the same opinion also.

Yate Lee.—I presume there will be no objection to the costs coming out of the estates having regard to these conflicting decisions. It is a family matter.

JAMES, L.J.—If nobody objects, that may be so.

Hemming, Q.C.—No, my lord, I do not object.

Solicitors for the plaintiff, A. F. and E. W. Tweedie, agents for *Day and Wade-Gery*, St. Neots.

Solicitors for the heir-at-law, J. E. Fox and Co.

Wednesday, Aug 2.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

WATSON v. RODWELL.(a)

Pleadings—Prolixity—Rules of court 1875—Order XXVII., rule 1—Order XIX., rules 4, 24, 25, 26, and 27.

In an action by a lady against her solicitor, charging him with misconduct and seeking to have accounts taken of moneys received by him on her behalf, the statement of claim comprised fifty-three paragraphs, and contained lengthy allegations of the facts and circumstances relied upon by the plaintiff.

The defendant moved under Order XXVII., rule 1, to strike out or amend the statement of claim, so as to raise the real question in controversy between the parties, on the ground that it was not a proper pleading, and that it was prolix and tended to prejudice and embarrass the fair trial of the action; or that eighteen specified paragraphs, and parts of certain others, should be struck out as being irrelevant, improperly pleaded, or scandalous respectively, and as tending to prejudice and embarrass the fair trial of the action.

Malins, V.C. had refused to make any order, except to strike out one paragraph, the striking out of which was not opposed by the plaintiff:

Held, that although the statement of claim was unnecessarily long, the Court of Appeal would not interfere with the decision of the judge of first instance on a matter which was left to his discretion, by Order XXVII., rule 1, of the Judicature Act 1875.

THIS was an appeal by the defendant from a decision of Malins, V.C., under the following circumstances:

An action was brought by the plaintiff against Mr. Rodwell, who had been her solicitor, to make him account for certain sums of money which the plaintiff alleged he had received on her behalf during the conduct of a suit for the administration of her deceased husband's estate, and for damages in respect of alleged wrongful conduct.

The statement of claim occupied eighteen printed pages, and was divided into fifty-three paragraphs.

The alleged wrongful conduct of the defendant, of which complaint was made, was set forth at great length in the statement. It was alleged that the defendant, having become aware of the suit through a nephew of the plaintiff, whose acquaintance the defendant had then recently made and was assiduously cultivating, induced the plaintiff to withdraw her business from her then solicitors and to place it in his hands, and that he subsequently compromised the said suit to her disadvantage, without explaining to her the terms of the compromise, and that through misrepresentation he led her into further litigation.

The material portion of paragraph 12 was as

(a) Reported by E. STEWART BOCKE, Esq., Barrister-at-Law.

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follows: "The information that the defendant gave the plaintiff was never precise, but merely of a general nature and to the effect that all was going on well, and plaintiff would shortly be in possession of the property, and that he would, if all were left to him, see plaintiff properly protected, and plaintiff was, the defendant well knew, entirely unacquainted with the nature of the proceedings proposed to be adopted by him, and relied entirely on his integrity, and left the conduct of such proceedings to him in the belief that the defendant was consulting plaintiff's interest alone, and so acting as to put her speedily in unfettered possession of the testator's property."

Paragraph 15 was as follows: "It has been the habit and practice of the defendant to impose upon the plaintiff's inexperience and credulity by an affectation or pretence of indignation when any inquiries were made or questions asked of him touching the affairs of the testator, and whenever any such inquiries were made the defendant has diverted the same by simulation of being offended at doubt of his honour, and by profuse assurances that if everything were left in his hands it would be perfectly right."

On the 28th May the defendant moved before the Vice-Chancellor to strike out or amend the whole statement of claim, on the ground that it was prolix, and tended to prejudice and embarrass the fair trial of the action, or that certain specified paragraphs might be struck out as being irrelevant, improperly pleaded, or scandalous. On that occasion his Lordship ordered the application to stand over until next motion day, to enable him to read carefully the whole of the statement; and on the 29th June, on the plaintiff consenting to strike out paragraph 51, the Vice-Chancellor refused the application, with costs, holding (as reported, *Week. Notes*, 1876, p. 214) that, "inasmuch as, with the exception of paragraph 51, the allegations were such as would not have been improper in the old pleading, the question of their propriety could be raised on taxing the costs."

On the appeal,

Glaspe, Q.C., and *Ranshaw* for the appellant.

J. N. Higgins, Q.C. and *Fooks*, for the plaintiff, submitted that the Vice-Chancellor had a discretion in the matter, and that therefore their Lordships would not interfere. They referred to: *Golding v. The Wharton Saltworks Company*, 34 L. T. Rep. N. S. 474; L. Rep. 1 Q. B. Div. 374.

JAMES, L.J., said there could be no doubt that it was very important to prevent pleadings under the new rules from becoming a source of oppression and expense, as they were formerly in Chancery, but at the same time it was very important not to encourage appeals on matters which were merely matters for the exercise of the discretion of the judge of first instance. The Vice-Chancellor having taken the pleadings home with him, and having taken pains to see whether or no the statement of claim was embarrassing, and having come to the conclusion that it was not, his decision ought not to be interfered with. His Lordship would suggest that the pleader should also take the pleadings home with him, and endeavour to make them more concise.

MELLISH, L.J., concurred. He said that it had been laid down in an appeal from the Queen's Bench Division that the amendment of pleadings was a matter for the discretion of the judge of first instance, and that the Court of Appeal would

not interfere with his decision except in very extreme cases, or where he was acting on a wrong principle. It could not properly be said that the Vice-Chancellor in this case was acting on a wrong principle. He certainly did not agree with what the Vice-Chancellor was reported to have said, viz., that whatever should have been allowed in an old bill in Chancery should be allowed now. He was of opinion that what were called the charging parts ought now to be omitted, they being, in fact, merely statements of the pleader's views of equity. In this statement much should be omitted. Allegations such as those in paragraph 12 ought not to be in at all; they really were not pleadings of any facts but of evidence, and there was much more of the same character in the statement.

BAGGALLAY, J.A., said that the Legislature had thought proper to give a judge the power to strike out or amend pleadings, and had placed reliance on his discretion. Now in this case it appeared that the Vice-Chancellor had actually taken the pleadings home with him and taken time to consider his decision, and had arrived at the conclusion that the matters contained in it were not scandalous, oppressive, or likely to prejudice a fair trial of the action. That being so, his Lordship, as a member of the Court of Appeal, would be unwilling to differ from him, although, if the report in the *Weekly Notes* (1876, p. 214) of what he said was correct, he differed from him in respect to the rules of pleading under the new system. There was certainly a good deal of this statement which might be left out with advantage, and if the pleader meant to adopt the suggestion of the Lord Justice, and the time for amending had expired, it should be extended, as well as the time for putting in a defence.

Solicitors: *Stevens and Co.*; *Morley Rodwell*.

SITTINGS AT WESTMINSTER.

Wednesday, Feb. 16.

(Before *JAMES* and *MELLISH*, L.J.J., *BAGGALLAY*, J.A., *MELLOR*, J., and *CLEASBY*, B.)

HUGHES v. METROPOLITAN RAILWAY COMPANY.(a)

Lease—Lessee's covenant to repair—Forfeiture for breach of—Suspension of notice to repair—Equitable relief where tenant has been misled by landlord's conduct.

The defendants were sub-lessees of premises, granted under a lease for ninety-nine years. The lease contained a covenant by the lessees to repair the premises within six months after notice in writing from the lessor, and also the usual proviso for re-entry on breach of covenant. The defendants sub-lease contained a similar covenant. The plaintiff, who was the reversioner, duly gave notice to the defendants on 22nd Oct. 1874, to repair.

The defendants replied, suggesting that the plaintiff should purchase their interest in the premises, and stating that they would defer commencing the repairs, until a reply was received, and correspondence passed and negotiations were carried on between the parties, in accordance with that suggestion. The premises in the meantime remained unrepaired; and on the 31st Dec. the plaintiff wrote to the defendants, objecting to the price required by them, and re-

(a) Reported by *W. AFFLETON*, Esq., Barrister-at-Law.

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questing them to reconsider it. No proposal to reduce the price was made by the defendants, and the plaintiff gave no warning to the defendants that he considered the negotiations at an end. On 13th April 1875, the plaintiff wrote to the defendants' lessor, reminding him that the six months' notice would expire on 21st April. The defendants thereupon repaired the premises, completing the repairs in June 1875. The plaintiff obtained judgment in an action of ejectment against the defendants.

Held (reversing the decision of the Common Pleas), that the plaintiff's conduct was such as to mislead the defendants into believing that the notice to repair was suspended during the negotiations for sale of the defendants' interest. That those negotiations were not finally broken off until after 31st Dec.; and that the defendants were consequently entitled in equity to relief against the forfeiture.

This was an appeal from a decision of the Common Pleas Division refusing an application on the part of the defendants in an action of ejectment to restrain the plaintiff from issuing execution.

The Metropolitan Railway Company were the underlessees of a house No. 216, Euston-road, which was, in 1787, leased by the then Lord Southampton to James Haygarth for 99 years. This lease became ultimately vested in Col. Penley, who underleased to the defendants.

The plaintiff was possessed of the reversion expectant upon the determination of the term.

The original lease contained covenants on the part of the lessee, his heirs, executors, administrators, and assigns, to repair as often as need should require, and also a proviso enabling the lessor, his executors, &c., to enter and view the premises, and "to give or leave notice in writing on the demised premises for the amendment of all defects and wants of reparation then and there found." There was a further covenant by the lessee that he would "within six months next after every such notice well and sufficiently repair, amend, and make good all such defects, or wants of reparation and amendment, and all other defects and wants of reparation whatsoever in the demised premises."

The lease also contained the usual proviso enabling the lessor, his heirs, &c., to re-enter for a breach of covenant by the lessee.

In the underlease, dated 1874, to the Metropolitan Railway Company, similar covenants and a similar proviso were contained.

On Oct. 22, 1874, the plaintiff caused the following notice to be left on the premises.

To James Haygarth, his executors, administrators, and assigns, and whomsoever it may concern. Take notice that you are required to do and perform the several works of repair as set forth in this schedule, in a proper and workmanlike manner, within the space of six calendar months from the date hereof, to comply with the covenants of the lease under which the said premises are held of the freeholder.

(Signed) THOMAS HUGHES.

A schedule of the repairs to be done accompanied this notice.

On 28th Nov. 1874, the defendants' solicitors wrote to the solicitors for the reversioner as follows:

We are directed by the Company to say that the notices of repair served upon the premises (describing them) have been received, and that the repairs required by the covenant of the lease shall be forthwith commenced. It occurs to us that the reversioner may be desirous of obtaining possession of the Company's interest, which,

as you know, is but short; and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest.

The reversioner's solicitors answered this letter on 1st Dec. 1874 as follows:

We duly received your letter of the 28th ult. suggesting that our client, the freeholder, should purchase the Company's short leasehold interest in these houses, and have since seen our client thereon. If the Company are the owners of 222, Euston-road and the rear thereof, and the whole of the premises in the rear of the other houses in Euston-road mentioned in your letter, and are willing to sell them all and give immediate possession, my client will, on hearing from you the price, consider whether it is worth while to acquire the Company's interest or not. In mentioning the price please to give us particulars of the tenancies and rents paid to the Company.

On 30th Dec., 1874, the company's solicitors wrote to the solicitors of the reversioner:

We send you herewith a statement of the company's receipts and payments in respect of the houses in Euston-road, as requested by you. The company will agree to surrender the whole of the leases, in consideration of a payment of 3000l. We shall be glad to hear from you at your early convenience. (Particulars were enclosed).

On 31st Dec. the following reply was sent:

We have duly received your letter of yesterday's date, inclosing a statement of the company's receipts and payments in respect of the houses in Euston-road, and at the same time intimating that the company will agree to surrender the whole of the leases in consideration of the payment of 3000l. Having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company are liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must, therefore, request you to reconsider the question of price, having regard to our previous observations, and to the fact that the company have already been served with notices to put the premises in repair; and we shall be glad to receive in due course a modified proposal from you.

On the 6th Jan. 1875, the reversioner's solicitors wrote to the secretary of the railway company as follows:

212, 214, 218, 222, 224, 226, and 228, Euston-road. Mr. Hughes, of 194, Euston-road, has requested us to collect the ground rents in respect of these houses. There was a half year due at Michaelmas last, amounting to 23l. 2s., for which we shall be glad to receive a cheque.

216, Euston-road. Can you tell us the address of Colonel Penley, to whom you pay a sum of 100l. a year in respect of this house?

On Jan. 7, 1875, the secretary replied as follows:

In reply to your favour of the 6th instant, I will obtain a cheque for the groundrents due to your client, Mr. Hughes, at our finance committee meeting in next week.

216, Euston-road.

The rent payable to Colonel Penley by the company is remitted to Messrs. Remnant and Penley, of 52, Lincoln's-inn-fields.

On April 13, 1875, the reversioner's solicitors wrote to Messrs. Remnant and Penley as follows:—

216, Euston-road.

We send herewith a letter from Mr. Birt, the solicitor of Lord Southampton, authorising your client, the owner of this house, to pay the groundrent of 10s. a year to our client, Mr. Thomas Hughes. We beg to inform you that in October last Mr. Hughes caused particulars of dilapidations in respect of this house to be served upon the tenants, and that the time for completing the repairs in accordance with such notice will expire on the 21st instant.

On the following day Messrs. Remnant and Penley replied as follows:—

216, Euston-road.

Your letter of yesterday's date is the first intimation we had as to who is the owner of this property. When we called last to pay the rents we were informed Lord

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Southampton had parted with his interest, but we could not learn to whom. We had no notice at all of any want of repair, nor did we know until your letter that any particulars had been served upon the tenants. The Metropolitan Railway Company are the under tenants, and we have forwarded a copy of your letter to them at once, so that it may be attended to without delay. Why was not a copy of the notice served upon us? We enclose ground-rent for one year, 10s., for which please send us a receipt.

On the 14th April the reversioner's solicitors wrote to Messrs. Remnant and Penley acknowledging the receipt of the 10s., and adding:

You will be good enough to consider the rent as received without prejudice to the notice to repair, and all our client's rights under the original lease. At the time the notice of repair was served upon the tenant, we did not know that your client was the owner of the lease, or we should have served you with a copy of the notice on his behalf.

On the 18th April 1875, Messrs. Remnant and Penley again wrote to the reversioner's solicitors as follows:

Had we known that the notice to repair had been served, we of course should at once have seen to it, and we think inquiries should have been made earlier, to enable you to communicate with us. We do not know what the notice is, or what we are required to do. Have you a copy? We have communicated with the Metropolitan Railway Company, but we have not heard from them.

To this letter the reversioner's solicitors, on the 16th, replied as follows:

When our client completed his purchase, Mr. Bird, or rather, his clerk, Mr. Vaughan, informed us that he did not know for certain who paid the ground-rent in respect of this house (216, Euston-road); but he thought the former name was Penley, and our Mr. Hooper then wrote upon Mr. Bird's letter the words, "late Penly." We subsequently ascertained from the secretary of the Metropolitan Railway Company that the rent was paid to you on account of Colonel Penley. We have no doubt the railway officials were made aware of the notice to repair served upon the tenant; and, if you have any cause of complaint at all in the matter, it is, we think, against the railway for not informing you of the notice. P.S.—We send you a copy of the notice to repair.

On the 17th April 1875, Messrs. Remnant and Penley wrote to the reversioner's solicitors, as follows:

We have seen Mr. Bell, the secretary of the Metropolitan Railway Company. He informs us that Mr. Hughes knows that arrangements have been made for complying with the notice. We have required that the repairs be at once proceeded with, and no doubt all will be done satisfactorily.

On the 19th the reversioner's solicitors replied as follows:

In reply to your letter of the 17th instant, we beg to observe that only last week Mr. Hughes told us nothing whatever had then been done towards complying with the notice to repair.

On the same day the secretary of the company wrote to the reversioner's solicitors as follows:

Euston-road Houses.

As the negotiations with your client have not resulted in a sale of the company's interest to him, and the weather is now favourable for a performance of the necessary works, our repairing staff will immediately take in hand the requisite repairs to the above premises.

The secretary also on the same day addressed the following letter to Messrs. Remnant and Penley:

216, Euston-road.

You may rely upon our at once commencing the necessary works in respect of the dilapidations accrued to the above premises.

We have been negotiating with Mr. Hughes for the sale of the company's interest to him in this and the adjoining premises; but the negotiations have fallen

through. The delay in replying to your letters has simply arisen from my desire to ascertain from the company's surveyor whether there was any chance of effecting a settlement with Mr. Hughes.

Messrs. Remnant and Penley having forwarded the last-mentioned letter to the solicitors for the reversioner, the latter replied as follows:

With reference to Mr. Bell's letter to you, we beg to say that the negotiations with Mr. Hughes were broken off in December last, and there has been ample time since then to have completed the repairs in accordance with the terms of the notice.

A writ of ejectment was issued at the suit of the reversioner on the 28th April 1875; and on the 29th the secretary of the railway company addressed the following letter to the plaintiff:

Nos. 212, 214, 216, 218, 220, 222, 224, 226, and 228, Euston-road.

I understand that you are serving writs upon the various tenants of these houses, or some of them. I refrain from comment upon this course of proceeding, and simply beg to inform you that instructions were given to our repair department on the 19th inst. to proceed with the needful repairs as quickly as possible. Any delay which has arisen has been simply attributable to the fact of our not having been advised that the negotiations for the sale to you of the company's interest had gone off.

To this letter the plaintiff's solicitors replied on the 30th, as follows:

Your letter of the 29th inst., addressed to Mr. Hughes, has been handed to us, the matter being in our hands. The usual notices to repair, pursuant to the terms of the lease, were duly served upwards of six months ago.

No steps having been taken to comply with these notices, it became necessary for us to take the proceedings which have commenced on behalf of Mr. Hughes, to whom no blame can be attributed in the matter. The negotiations mentioned in your letter were brought to a close so far back as December last, since which time an ample opportunity has been given for doing the necessary repairs.

Many letters passed between the parties' solicitors suggesting terms of compromise, but no compromise was effected. The repairs were completed by the company about the middle of June, but it did not precisely appear when they were commenced. The action of ejectment was tried on the 16th Nov., and a verdict was found for the plaintiff. On Dec. 20 the defendants' solicitors served the plaintiff with notice of motion, under Order 53 of the Judicature Act 1875, requiring the plaintiff to show cause why he should not be restrained from proceeding to execution. The affidavits filed in support set out, amongst other things, that the company presumed that the repairs need not be commenced until further notice from the plaintiff's solicitors, and that the six months within which the repairs were to be done would not include any time during which negotiations were pending, and that the plaintiff's solicitors had not required the repairs to be done during the winter months, as the weather was then unfavourable for executing the repairs.

Cause was shown on 23rd Nov. 1875.

The court (Lord Coleridge, C.J., and Brett and Lindley, JJ.) having taken time to consider their judgment, on 21st Dec. 1875, gave judgment for the plaintiff on the grounds that the effect of the letter of 31st Dec. 1874, from the plaintiff's solicitors to the solicitors of the company, was to terminate the negotiations for a sale of the company's interest to the plaintiff unless the company chose to re-open the negotiations by making a fresh offer, that the company were not led to assume

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what was stated in their affidavit by anything said or done by the plaintiff or his solicitors, that the effect of the correspondence was—first, to give the company a reasonable time to make a fresh offer; and, second, if the negotiations were not renewed to give the company a reasonable time (but not necessarily six months) from 31st Dec. to do the repairs; that the company, not having made any fresh offer, allowed more than a reasonable time to elapse before they took steps to repair; and that the company could not show any conduct on the part of the plaintiff disentitling him in equity from enforcing his legal rights.

From this judgment the defendants now appealed.

Kay, Q.C. and W. G. Harrison, for the defendants.—The letter of the plaintiff's solicitors of 31st Dec. was not a breaking off of the negotiations for purchase. It was a continuance of them. The defendants were misled into believing that the notice to repair was suspended, and suspension of notice means that we have had six months' time to do the repairs in after the suspension terminated. [JAMES, L.J.—If it is to be taken that after the negotiations ended you had a reasonable time in which to do the repairs, would not that reasonable time be the six months mentioned in the lease?] Yes; and the repairs were actually completed within six months from 31st Dec., so that if the letter of that date was a breaking off of the negotiations, the company were still within their time. Admitted that equity, as a general rule, will not relieve against a forfeiture for breach of covenant, yet it is well settled that in cases of mistake, accident, or surprise, equity will relieve, particularly where the landlord's conduct has led to the mistake. They cited:

Bargent v. Thompson, 4 Giff. 473;

Hill v. Barclay, 18 Vesey, 56;

Bamford v. Oresay, 3 Giff. 675;

Gregory v. Wilson, 9 Hare, 683.

Murphy, Q.C. and C. Bowen, for the plaintiff.—The lease contained the ordinary general covenant to repair as well as the covenant to repair within six months after notice. When the special notice to repair was not complied with, the landlord could fall back upon the general covenant. [MELLISH, L.J.—The notice under the special covenant is surely a waiver of the general covenant.] If there was any suspension of notice on the correspondence, the defendants, at any rate, were bound to repair within a reasonable time after the suspension terminated. The defendants could reasonably have done the repairs within two months. They were, in fact, completed within that time after they had once been commenced. The suspension cannot be an indefinite one. The defendants should have made a fresh offer after the letter of Dec. 31, and should have warned the plaintiff that they considered the notice suspended. If the position of the parties upon the correspondence entitled the defendants to any relief at law it should have been claimed at law. [MELLISH, L.J.—To amount to a waiver at law the plaintiff must have expressly assented to it. Equity goes further, and says, that if the landlord by his conduct, without express consent, leads the tenant to believe that the notice is not running, the tenant shall be relieved from forfeiture.] It is submitted that if the correspondence does not show a waiver, it does not show an equity to relief. There has been undue delay in coming to equity; the defend-

dants ought to have raised their defence at law. They cannot be allowed to persevere up to verdict at law, and then come here to enforce their equitable rights. They cited:

Doe v. Meus, 4 B. & C. 606;

Few v. Perkins, L. Rep. 2, Ex. 92; 16 L. T. Rep. N. S. 62.

JAMES, L.J.—I take this case to be before us in the same way as if a bill had been filed in equity under the old practice for relief against a forfeiture for breach of covenant after the plaintiff had had judgment at law. The facts are as follows: A house of considerable value, No. 216, Euston-road, was let on a repairing lease, at a ground rent of 10s. a year. This house was held at the time of commencing these proceedings by the defendants, the Metropolitan Railway Company, at a rent of 100l. a year. The lessees were a company of considerable means, and quite able to lay out what was wanted to keep the premises in proper repair. The premises were out of repair, and about 100l. would have been necessary to put them into repair again. That being so the lessor, or reversioner, gives notice of the dilapidations to the defendants, pointing out to them what he requires them to do. The company receive this notice and acknowledge it, at the same time asking the landlord whether it would not be worth his while to purchase their interest in the property from them, and they state that they intend to suspend the repairs while their offer is being considered. A letter is returned on behalf of the landlord, acknowledging the letter of the company, and saying that if the company are the owners of the particular house No. 216, Euston-road, "our client will, on hearing from you the price, consider whether it is worth his while to acquire the company's interest or not. In mentioning the price, please give us particulars of the tenancies and rents paid to the company." By this letter the lessor clearly assented to the company's former letter, stating that the company intended to defer commencing the repairs. On the 30th Dec. 1874, the particulars which the landlord asked the company to furnish were sent, and the terms for which the company were willing to sell their interest were stated at 3000l. On 31st Dec. the landlord's solicitors write that, "having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be necessary to put them into a proper condition, we think the price asked for is out of all reason. We must, therefore, request you to reconsider the question of price, having regard to our previous observation, and to the fact that the company have already been served with notices to put the premises in repair; and we shall be glad to receive in due course a modified proposal from you." Now this letter clearly proceeded upon the notion that up to that time all repairs had been suspended. At this time there was a clear acquiescence on the part of the landlord in the proposal of the company, that the repairs should be suspended while the proposal for the purchase of the defendants' interest was being considered. On the 6th Jan., no answer having been received from the company, the plaintiffs' solicitors wrote again: "Dear Sir—Mr. Hughes, of, &c., has requested us to collect the ground rents due in respect of these houses, &c. Can you tell us the address of Colonel Penley, to whom you pay a sum of 100l. a year in respect of this house,

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216, Enston-road?" Now, for what did they want the address of Colonel Penley, except for the purpose of communicating with him with regard to the purchase of the property? They received an answer from the company giving them the information they required. Mr. Hughes gave no further intimation to the company to go on with the repairs, but waited until the 13th April 1875, within a few days of the period upon which the six months' notice to repair would expire, and then wrote to Colonel Penley's solicitor: "We beg to inform you that in Oct. last Mr. Hughes caused particulars of dilapidations in respect of this house to be served upon the tenants, and that the time for completing the repairs in accordance with such notice will expire on the 21st inst." It has been put to us forcibly that we have nothing to do with the hardship of this case as it affects the defendants, but we have to do with the equity of the case, and I am of opinion, sitting as a judge of law and fact, that the plaintiff intentionally lulled the defendants to sleep by inducing them to believe that he was waiving the notice to repair until the six months were all but over, and it was then too late to do the repairs. It would be inequitable that the plaintiff should be able to enforce the forfeiture under these circumstances, and this court now has, as the court of equity always had, jurisdiction to relieve the defendants against it. I am of opinion that the judgment of the court below must be reversed.

MELLISH, L.J.—I am of the same opinion. This was an application to the Common Pleas Division for equitable relief, and at first I somewhat doubted whether the application was not too late, but as the defendants probably had no real opportunity of raising their case for equitable relief by pleading, I think in this instance they might properly raise it in the way they have done. The question we have to decide is whether the defendants are entitled to equitable relief. It has been argued that the real defence is that there was a waiver by the plaintiff of his notice to repair, and that that defence ought to have been set up on the trial at law. Now there is a clear distinction between a waiver and an equitable defence such as is now before us. To constitute a waiver at law there must have been an abandonment of the six months' notice, and I do not think there was such an abandonment in this case; but if there was enough to put the defendants off their guard, and to lead them to suppose that the plaintiff did not intend to insist upon his strict legal right with regard to the six months' notice, I think that is quite enough to enable the defendants to call upon the court to say to the plaintiff, "It is inequitable that you should insist upon your notice now, for you have misled the defendants, and have led them by your conduct to believe that you did not intend to insist upon your notice. On the construction to be put upon the correspondence, I agree with James, L.J., that the plaintiff did enter into negotiations to buy the defendant's interest, and that it was understood by both parties that the repairs were not to be done while the negotiations were being carried on. From the nature of the premises, which were old and dilapidated, it might have been a useless expense to repair them when the landlord's intention in purchasing them might be to pull the whole down and rebuild. I think that the letter of the 31st Dec. was certainly not a breaking off of the nego-

tiations. It is no more than an objection to the price required by the defendants, and it assumes that a new offer may be made. I think that the plaintiff should have warned the defendants that the notice to repair was still running, and that he meant to insist upon his rights with respect to it.

BAGGALLAY, J.A.—I am of the same opinion. It is a general rule that equity will not relieve against forfeiture for breach of a covenant to repair. That rule, however, is based upon general principles, and there are special exceptions to it. Now, amongst the cases which have from time to time come before courts of equity, and in which such relief has been granted, mistake, surprise, and inevitable accident have been the grounds most ordinarily brought before the courts. I think it fairly to be inferred, upon the correspondence and the facts, that the defendants were led to suppose that the notice to repair was suspended during the negotiations, and it seems to me that that brings the case within these grounds, which are the exceptions to the general rule which I have mentioned.

MELLOR, J.—I am of the same opinion. I will only add, that in my view the reasonable effect of the correspondence was to induce the defendants to stay their hands, and not to do the repairs while the negotiations were pending, and that it is immaterial whether the plaintiff intended that effect to be produced or not.

CLEASBY, B.—The only question is whether the conduct of the plaintiff has been such as to disentitle him to insist upon his notice to repair. I must dissent from the view, which I understood James, L.J., to express during the arguments as to the objectionable nature of forfeitures for breach of covenant under leases. It seems to me that a condition of re-entry on breach of covenant is a necessary protection to the landlord, and that no one would grant a lease unless he could assure himself of that protection. In order to decide this case we must determine what was the condition of things between the parties on the 31st Dec., and how long did that condition of things continue. The question of purchase as a substitute for repairs was pending, and, further, I think it was a substitute for repairs under the notice to repair given by the plaintiff. That substitution was continued after the 31st Dec. by the plaintiff's requesting the defendants to reconsider the price they had fixed for their interest in the premises, but for how long was it continued, since the defendants took no further step in the matter? When was the plaintiff entitled to consider the purchase "status" at an end, seeing that the defendants did nothing? I do not think that the six months' notice could only begin to run again after a second notice to the company had been given. It is very difficult to say when it did begin to run again. I do not feel justified in dissenting from the decision the rest of the court have come to, but it does appear to me to be very difficult to define accurately the rights of the parties and the precise time when the notice, suspended during the negotiations, began to run again.

Judgment for the defendants. Judgment below reversed.

Solicitors for the plaintiff, *Davies and Co.*

Solicitors for the defendants, *Burchell and Co.*

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GOSLING v. THE AGRICULTURAL HALL COMPANY.

[CT. OF APP.]

Wednesday, Feb. 16.

(Before JAMES and MELLISH, L.J.J., BAGGALLAY, J.A., MELLOR, J., and CLEASBY, B.)

GOSLING v. THE AGRICULTURAL HALL COMPANY. (a)
Master and servant—Bailment—Conversion—Liability for wrongful acts of others.

The defendants, who were the owners of the Agricultural Hall, entered into an agreement with the Smithfield Club, by which the club were to hold their annual show in the defendants' hall, and the defendants were to find all the labour necessary to carry out the show, and to take all the profits, paying the club 1000*l.* annually; all the servants to be provided by the defendants for the purposes of the show were, while the same was going on, to be under the exclusive direction and control of the Smithfield Club officers.

The plaintiff bought and paid for three sheep at the show, and he received a delivery order for them directed to John Sharman, a gatekeeper. This order was signed by the secretary of the Smithfield Club, and on the back of it was a condition exempting the club from liability in case of damage to or non-delivery of animals exhibited at the show.

Through Sharman's default, the sheep were misdelivered. Sharman had contracted with the defendants to find the servants required for receiving and delivering the stock exhibited, and he himself received his instructions as gatekeeper from the secretary of the Smithfield Club.

Held (affirming the judgment of the Common Pleas Division), that the defendants were not liable to the plaintiff in an action of trover to recover the value of the sheep, as there was no duty cast upon the defendants to deliver the sheep to the plaintiff, and they were not responsible for the default of the gatekeeper, who, for the purpose of delivering animals at the show, was not their servant.

THIS was an appeal from a decision of the Common Pleas Division, making absolute a rule obtained by the defendants.

The action was of trover, to recover the value of three sheep, alleged to have been converted by the defendants' servant.

At the trial before Lord Coleridge, C.J., at the London sittings after Michaelmas Term, 1874, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter it for them. A rule *nisi* was obtained by the defendants accordingly on the grounds: Firstly, that there was no evidence of conversion by a servant of the defendants; secondly, that the defendants were not liable for the acts of Sharman or those under him; thirdly, that Sharman was not the servant of the defendants, but of the Smithfield Club, if he was the servant of anyone, or if he was not a servant of the club he was a subcontractor; fourthly, that the defendants were protected by the rules of the Smithfield Club.

On cause being shown, the C. P. Division (Lord Coleridge, C.J., and Grove and Archibald, J.J.) made the rule absolute to enter a verdict for the defendants, and from this decision the plaintiff now appealed. The case in the court below is reported 34 L. T. Rep. 59, where the facts are fully set out. They sufficiently appear, however, in the head note to this report.

Herechell, Q.C. and Candy for the plaintiff.—Sharman was the servant of the Agricultural Hall

Company, who are responsible for his acts. They employed and paid him. [JAMES, L.J.—I cannot conceive how a man can be the servant of another from whom he does not receive his instructions, and whose orders he can refuse to obey.] The defendants could dismiss him, and that is the true test. There was a duty upon the Agricultural Hall Company to deliver the sheep to the right person by reason of their having received them into their building. [MELLISH, L.J.—There could be no duty apart from a contract, and here there was no contract to deliver between the Agricultural Hall Company and the plaintiff.] Sharman's regular course of employment was to redeliver the animals sent to the show to their owners. He was the permanent servant of the Agricultural Hall Company, and they are responsible for the non-delivery:

Dalyell v. Tyrer, 28 L. J. 52 Q.B.

Grantham and Wheeler (for the defendants) were not called upon.

JAMES, L.J.—I am of opinion that there is really no ground whatever for disturbing the decision of the Common Pleas Division. It is clear that there was no contract between the plaintiff and the Agricultural Hall Company. Whatever contract existed was between the plaintiff and the Smithfield Club. Now the action is in *trover*, for the wrongful conversion by the defendants of the plaintiff's sheep. It is not brought against Sharman, who was the gatekeeper, but against the Agricultural Hall Company, who provide Sharman, paying him a lump sum. It seems to me clear that there was no conversion at all on the part of the Agricultural Company, and that they are not responsible for what Sharman did.

MELLISH, L.J.—I am of the same opinion. The Smithfield Club wish to hold their annual cattle show in the premises of the Agricultural Hall Company, who are to furnish servants to be under the orders of the Smithfield Club. The Agricultural Hall Company contract with Sharman, and the Smithfield Club contract with the exhibitors of animals at the show, and out of their separate contracts the present action has arisen. Now, as far as there is any bailment upon which to found an action of trover, it must be with the Smithfield Club only, and they only are liable for the wrongful conversion of the subject matter of the bailment; but I think that independently of any contract whatever, Sharman is the servant of the Smithfield Club, because he is the person they *de facto* employed to deliver the cattle. In answer to this it is said that as a matter of fact Sharman, although he may be the servant of the Smithfield Club for other purposes, yet in respect of the redelivery of the cattle he has entered into a contract with the defendants, from whom he is to receive a lump sum for his services; but there is no contract between the Agricultural Hall Company and the exhibitors at all, and no duty cast upon the defendants to deliver the sheep to the plaintiff, and I think it is clear that no liability attaches to the defendants in respect of Sharman's default.

BAGGALLAY, J. A.—I am of the same opinion, on the ground last mentioned by Mellish, L.J.

MELLOR, J.—I am of the same opinion. The only reason why the Agricultural Hall Company are made defendants is because the Smithfield Club have contracted themselves out of their liability to the exhibitors. It is said that Sharman is a

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

servant of the Agricultural Hall Company. In a sense perhaps he is. He is a gatekeeper, but he is also a builder and contractor, and he has entered into a separate contract to provide all the servants and men necessary to carry out the objects of the society. He is, therefore, I think, not the servant of the Agricultural Hall Company, for that purpose, but a subcontractor. There seems to have been no ratification of his acts by the defendants, and I think they are entitled to our judgment.

CLEASBY, B.—There is nothing to show that the animals came into the possession of the Agricultural Hall Company as bailees. If a person who has taken possession of goods merely for the purpose of delivery, delivers to the wrong person, he is liable to the owner for such wrongful delivery, but to make the Agricultural Hall Company liable, we must be satisfied that Sharman was their servant for the purpose of delivering, which I do not think he was.

Judgment for defendants. Judgment below affirmed.

Solicitors for plaintiff, *Angell and Terry.*

Solicitors for defendants, *Kingsford, Dorman, and Kingsford.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

July 11 and 12.

AMBLER v. LINDSAY.(a)

Executor who has not proved—Executor de son tort—Demurrer.

An executor who has not proved his testator's will, but has received assets may be made a defendant to an action by a creditor to the extent of the assets he has received.

Where a person has intermeddled with the assets of a testator without authority, he may be sued by a creditor of the estate as executor de son tort, to the extent of the assets he has received; and it is not necessary, to support such an action, to charge him expressly with having acted as executor de son tort; it is sufficient to allege that he has intermeddled with the assets without authority.

DEMURRER.

This was a creditor's action to administer the personal estate of John Lovett (described as) late of Colville-square, in the county of Middlesex, and of Melbourne, in Australia.

The statement of claim (so far as material) was as follows:

1. The said John Lovett, being possessed of considerable personal estate in Melbourne aforesaid, made his will dated the 25th Nov. 1872, and, after giving certain legacies therein mentioned, he thereby appointed the defendants Samuel James Lindsay and Peter Facy, executors and trustees of his will. He died on the 28th May 1874.

3. The last-named defendants (as the plaintiff believes, without proving the said will) have by themselves or their agents taken possession of the said personal estate of the said John Lovett in Melbourne aforesaid.

4. The same defendants have, in like manner,

distributed or otherwise disposed of portions of the said personal estate in payment of some of the said legacies, and have not paid the funeral expenses or any of the debts of the said deceased.

5. The defendants Messrs. Hunters, Gwatkin, and Co. have got in or received in England, and have now in their possession and control a portion of the said estate considerably more than sufficient to pay the said funeral expenses and debts.

6. The last-named defendants threaten . . . to distribute or otherwise dispose of the portion of the said personal estate of the said deceased which has so come to their hands without regard to the said funeral expenses or debts.

7. The plaintiff is a creditor of the said John Lovett, deceased, for the sum of 453*l.* 11*s.*, due and owing to him for medical attendance and other services performed by him for the said deceased. . . .

8. There remains justly due and owing to the plaintiff the said sum of 453*l.* 11*s.*, which the defendants, although frequently requested so to do, have neglected and refused to pay.

The plaintiff then claimed administration of the personal estate of the said John Lovett, and for that purpose all proper directions and accounts; payment out of the said estate to the plaintiff and other the creditors of the said deceased of the debts due and owing to them respectively; and an injunction against the defendants Messrs. Hunters, Gwatkin, and Co., restraining them respectively from parting with the portion of the said estate come to their hands, except under the direction of the court.

The defendants Messrs. Hunters, Gwatkin, and Co., put in a general demurrer to the statement of claim, on the ground that the facts alleged therein did not show any cause of action to which effect could be given by the court as against them.

J. Pearson, Q.C. and Romer, for the demurrer.—Lindsay and Facy have never proved the will in this country, and are described in the writ as out of the jurisdiction. This is an action for the administration of the personal estate of a testator, and no decree can be made in such an action without a properly constituted personal representative: (*Rowell v. Morris*, 29 L. T. Rep. N. S. 446; L. Rep. 17 Eq. 20.) Assuming that such an action can be maintained, Messrs. Hunters and Co. are merely debtors to the estate. The estate is solvent; and there is no allegation of collusion between Messrs. Hunters and Co. and the executors: Messrs. Hunters and Co. are, therefore, improperly made defendants to this action: (*Alsager v. Rowley*, 6 Ves. 748, cited with approval in *Hilliard v. Eiffe*, L. Rep. 7 H. L. 39.)

Glasbe, Q.C. and Bond Cope, for the plaintiff.—An executor may be sued before probate, if he has acted; and here the statement of claim alleges that the executors in Australia have disposed of part of the personal estate in payment of legacies, without paying debts: (*Vickers v. Bell*, 4 D. J. & S. 274.) Messrs. Hunters and Co. admit that they have assets in their hands more than sufficient to pay debts; they are, therefore, properly sued as executors *de son tort*: (*Cottle v. Aldrich*, 4 M. & S. 175; *Coote v. Whittington*, 29 L. T. Rep. N. S. 206; L. Rep. 16 Eq. 534.) It is not necessary to allege collusion between an executor *de son tort* and the legal personal representative; a person who has possessed himself of assets, without

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

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authority, though acting *bonâ fide*, is liable to be sued as executor *de son tort*: (*Sharland v. Mildon*, 5 Hare 469). A bill will lie, at the suit of a creditor against the executor and his partners, claiming to retain in their hands certain assets of the testator in satisfaction of a past debt, although the bill does not, in express terms, charge that the executor is colluding with his partners: (*Gedge v. Traill*, 1 B. & M. 281 n.; *Bowsher v. Watkins*, 1 B. & M. 277.) The cases in which a debtor may be made a party are by no means restricted to collusion and insolvency only: (*Holland v. Prior*, 1 M. & K. 244). There must be "some special case;" and, under the special circumstances of this case, Messrs. Hunters and Co. were rightly made defendants. [The VICE-CHANCELLOR referred to *Webster v. Webster*, 10 Ves. 93.] That case shows that an executor who has acted may be sued before probate, as executor *de son tort*. Here Messrs. Hunters and Co. are seeking to retain assets, with the consent of the executors in Australia; and that amounts to collusion: (*Gedge v. Traill*.) They also referred to

The Rules of Court 1875, Order XVI., rules 3 and 4.

J. Pearson, Q.C. in reply.—In *Vickers v. Bell* (*nb. sup.*) two of the defendants were executors who had proved the will. In *Rayner v. Koehler* (27 L. T. Rep. N. S. 506; L. Rep. 14 Eq. 262) the executrix *de son tort* admitted that she had received all the assets, and so was equivalent to a properly constituted representative. *Gedge v. Traill* and *Bowsher v. Watkins* were cases of partnership. There is no allegation that Messrs. Hunters and Co. are executors *de son tort*; and they cannot be made defendants as executors *de son tort* without an express allegation to that effect.

The VICE-CHANCELLOR said.—This case raises points of considerable importance. [His Lordship, after reading paragraphs 1 and 3 of the claim, continued.] I am bound, on these allegations, to believe that the plaintiffs have not proved. The allegation is that the executors, without having proved, have taken possession of the personal estate. The paragraph 4 states that the executors have distributed portions of the personal estate in payment of legacies, and have not paid any of the debts. Now it is true that where the assets are sufficient, the executor may, on his own responsibility, pay the legacies and debts; but if he pays legacies before paying the debts, such payment is no defence to a demand for debts. The plaintiff says that he is a creditor for 453l. 11s., which sum "the defendants, although frequently requested so to do, have neglected and refused to pay." On this demurrer, therefore, the defendants admit that the executors have refused to pay, though requested so to do. The executors then being resident abroad, having assets, but refusing to pay, the plaintiff finds assets in this country. Paragraph 5 states that "the defendants Messrs. Hunters, Gwatkin, and Co. have got in or received in England, and have now in their possession and control, a portion of the said estate considerably more than sufficient to pay the said personal expenses and debts," and paragraph 6 states that they threaten to distribute the portion of the personal estate which has so come to their hands without regard to the said debts. The first two paragraphs of the prayer are against the executors only; the third is against Messrs. Hunters and Co. Now, considering that the allegations of

the statement of claim are admitted to be true for the purposes of this demurrer, and that there is an allegation that there are executors who can pay, but will not pay; surely there is nothing unreasonable in the plaintiff, finding there are assets in Lincoln's Inn more than sufficient to pay the debts, trying to maintain this action. Then, can a suit be maintained against executors who have not proved the will? To say that you cannot sue an executor who has intermeddled with assets, because he has not proved the will, would be to give sanction to various kinds of wrongdoing. I argued that point in 1864 before Vice-Chancellor Stuart, in *Vickers v. Bell*. He decided that you could sue an executor before probate, provided he has acted as executor, and his decision was affirmed on appeal. Lord Justice Turner said: "In point of pleading, I apprehend that an executor who has not proved the will may be made a party to a suit, provided he has acted as executor; and I do not think that, for the purpose of maintaining the bill against him, it is necessary to prove that he has actually received money in the character of executor." Therefore, acting, without receiving money, entitles a creditor to maintain a suit against him; *a fortiori*, if he has received money. Mr. Pearson said that, in that case, two of the executors had proved the will. That makes no difference. If an executor has meddled with the assets, you may sue him before probate. In this case I must assume that the executors have not proved the will, and that there are assets in this country. Messrs. Hunters and Co. will, I am sure, never part with the assets in their hands to executors who have not proved. The executors, in my opinion, are properly sued. Then comes the question, are Messrs. Hunters and Co. properly sued? Can they be sued as executors *de son tort*? The statement of claim does not charge them, as executors *de son tort* in so many words. That is not at all necessary, if it appears that they have meddled with the assets without any authority. Here, there is, in effect, an allegation that they have intermeddled with the assets without authority. I have thoroughly considered the point twice; the last occasion, on which I considered it was in the case of *Coote v. Whittington*. My decision (in that case) has been observed upon by the Master of the Rolls in *Rousell v. Morris*. In that case the Master of the Rolls, if I may say so, has expressed himself somewhat incautiously, because he says (in effect) that you cannot sue an executor *de son tort*. If you cannot sue an executor *de son tort*, where a man dies without leaving a legal personal representative, any one may enter his dwelling house, and take all his trinkets, and the person who takes upon himself to act without authority cannot (in the absence of a legal personal representative) be sued for so doing. The rule of the court on this subject has been settled now for several years, as I pointed out in *Coote v. Whittington*. I am very glad to have had the additional authorities cited before me to day, which bear out my own decision. They show that the rule in this court, and the rule in a court of law on this subject, are the same. In *Cottle v. Aldrich* Mr. Justice Le Blanc directed the jury to consider whether, after the death of J. A., the defendant voluntarily interfered as executor of C. A. without authority, or acted merely as an agent; and the jury found a verdict for the plaintiff. On motion for a new trial Lord Ellenborough,

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C.J. said: "Admitting that Denton was rightful executor, yet if the defendant interfered in an assumed character of executrix, and if, never being executrix, she acted as such, and made claim in that character, may she not be charged as executrix *de son tort*? It is truly said that she was not executrix of C. A., as being executrix of J. A., because there were other executors of C. A. surviving, but the question is, has she acted as such?" So that, in the opinion of the Court of Queen's Bench, all that it was necessary to show was, that the person sued had intermeddled without authority. Then, in *Sharland v. Mildon*, "the widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected, and paid over to the widow, believing"—and, therefore, acting in perfect good faith—"that she was the administratrix." The widow never administered, and it was held that A. was liable to be sued as executor *de son tort*. Sir James Wigram, a very experienced judge, in giving judgment, says "The widow of a deceased person, the testator in the cause, intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and, in the course of doing so, she employed the defendant Hewish to collect the debts owing to the testator. Hewish accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is that the widow might, without question, be sued as executrix *de son tort*." Therefore a widow acting without authority may be sued as executrix *de son tort*. "The case, in the present instance, is one of great hardship on Mr. Hewish, and I desired to look into the cases, to see if I could avoid treating him as executor *de son tort*. The fact that he would be liable if he had received the money, and had not paid it over, is admitted or well established; and if that be so, it seems to follow logically that the defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. Hewish might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly show that the doctrine that the possession of an agent is the possession of a principal has no application to the case of a wrong-doer." So that case is an authority to show that Messrs. Hunters and Co., having assets (as they admit) more than sufficient to pay the funeral expenses and debts, are liable to be sued as executors *de son tort*. Then there are the two cases of *Gedge v. Traill* and *Bowsher v. Watkins*. In *Gedge v. Traill* the partners of the executor were debtors to the estate. Here Messrs. Hunters and Co. are debtors to the estate; and they and the executors have refused to pay the debts, "although frequently requested so to do." Sir John Leach there said that "it was collusion on the part of the executor if a stranger retained assets with his consent and approbation; that this bill alleged that all the partners (of whom the executor was one) retained the sums remitted, and claimed to be entitled to retain them; that those circumstances amounted to collusion, and

brought the case within the exception to the general rule," which is, that you may sue, where there is collusion, or, as Lord Eldon laid it down in *Alsager v. Bowley*, where there is "collusion, insolvency, or some special case." *Bowsher v. Watkins* shows that a bill for an account will lie against the executor, and the surviving partner of the testator (who has received assets), although collusion between the executor and the surviving partner is neither charged nor proved. The last case cited was *Holland v. Prior*. That case decided that in a suit for an account of the assets of a deceased person, the personal representative of his former personal representative is properly joined as a co-defendant with his continuing or present personal representative. [His Lordship, after commenting on that case, continued]: These cases decide that a person, who interferes with the assets may be sued as an executor *de son tort*. I ought to mention the case of *Webster v. Webster*, which decides that the Statute of Limitations applies where a person has intermeddled with assets. In that case Lord Chancellor Eldon allowed the plea, because the defendant might have been sued as executor *de son tort*. His Lordship admitted "he might be charged as executor *de son tort*, if it was proved that he had done any act; and thought the plea good upon the circumstances stated in the bill; considering the allegation upon a fair construction to be, that the defendant had possessed himself of the estate and effects of this testator previously to 1792; and if so, an account might have been brought at the moment; and, consequently, not only a cause of action, but an opportunity of suing arose in 1792." On these grounds I think that the statement of claim has been properly delivered before probate. It may turn out that there is no debt due to the plaintiff; but Messrs. Hunters and Co. have thought fit to defend on technical grounds. Upon these allegations I think that the plaintiff, finding executors, who have not proved the will, and who, so far as they have got in the assets, have misapplied them, was perfectly justified in delivering this statement of claim to prevent assets in England being parted with without his consent. If Messrs. Hunters and Co. have no claim on the assets in their hands, it will be their duty to hand them over to the persons who properly represent the testator. It can do them no harm to order them to retain these assets until the debts are paid. The demurrer will, therefore, be overruled.

Solicitors: *Kynaston and Gasquet; Hunters, Gwatkin, and Co.*

COMMON PLEAS DIVISION.

Monday, July 17.

MONKS AND OTHERS v. JACKSON AND OTHERS.(a)

Municipal election—Delivery of nomination paper—38 & 39 Vict. c. 40 s. 1 sub-sect. 3, 4—22 Vict. c. 35 s. 8.

The provision in the Municipal Elections Act 1875 (38 & 39 Vict. c. 40 s. 1 sub-sect. 3), that nomination papers shall be delivered to the town clerk by the candidate himself, or his proposer or seconder, is imperative, not directory, and the paper must be delivered by the candidate, or proposer or seconder, personally.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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Therefore, where petitioner's nomination paper was delivered by an agent, Held, that an objection to the nomination paper was rightly allowed.

THE petitioners petitioned against the return of the respondents as councillors for the several wards of the borough of Wigan. By order of QUAIN, J., a special case was stated, which, so far as it is material to the point decided by the court, was as follows:

1. The municipal borough of Wigan, in the county of Lancaster, comprises wards as follows, that is to say, No. 1, or Scholes' Ward; No. 2, or St. George's Ward; No. 3, or Queen-street Ward; No. 4, or Swinley Ward; and No. 5, or All Saints' Ward. Each of the said wards is entitled at the ordinary municipal elections holden on the 1st Nov. in each year, to be represented by two councillors to be then elected by the duly qualified burgesses.

2. In 1875 the town clerk of the said borough, pursuant to the statute 38 & 39 Vict. c. 40, duly and in due time gave public notice that the last day for delivering nomination papers for the nomination of candidates at the then ensuing election of councillors, was Friday the 22nd Oct. 1875.

3. Upon the said 22nd of Oct. in due time nomination papers nominating the respective petitioners as candidates respectively for the respective wards in the said petition mentioned, were delivered to the said town clerk by one Thomas Scott, being then the agent of the said petitioners and their respective proposers and seconders, authorised by them in that behalf; but the said nomination papers were not otherwise delivered to the said clerk by the respective petitioners, or their proposers or seconders respectively.

4. The said town clerk forthwith, on the same day, sent notices to the petitioners that they had been nominated. . . .

7. The mayor of the said borough, under the said Act of Parliament in that behalf, appointed the 23rd day of Oct. aforesaid, between the hours of two and four of the clock in the afternoon, for the reception of any objections to nomination papers, and the said mayor attended . . . for the purpose of hearing and deciding upon any objections that might be made to any nomination paper. . . . The respondent, Peter Jackson, delivered to the said mayor an objection in writing to the nomination paper of the petitioner, Elisha Hodgkinson Monks. . . . The said mayor received the said objection, and proceeded to hear and adjudicate upon the same. . . .

8. Copies of the said objections in writing are annexed hereto, and are to be taken as part of this case. The numbers in the margin have been inserted for the purposes of this case.

9. The said mayor reduced to writing his decisions in the premises and copies of such written decisions are annexed hereto, and are to be taken as part of this case.

10. The said mayor afterwards duly, by public notice in that behalf, declared the respective respondents to have been respectively returned as councillors for the said borough, and the respondents have since acted, and claim to act, as such councillors. . . .

12. The court to have power to draw inferences of fact.

13. The petitioners are to be at liberty, on the argument of this case to contend that the mayor

had no power to decide upon or to allow the said grounds of objection numbered 5, and that the respondents cannot on these petitions raise the question whether such objections are good.

The questions for the opinion of the court (so far as material here) were as follows:— . . .

3. Whether the said decisions of the said mayor were erroneous and ought to be reversed.

4. Whether the respondents were respectively duly elected.

The court to make such order in the premises and in the matters of the said petition as to the court may seem right.

The objection of the respondent Peter Jackson to the nomination paper of the petitioner, Elisha Hodgkinson Monks, was made on several grounds, of which the following alone is here material:

5. That such paper writing was not delivered by the said Elisha Hodgkinson Monks himself, or his proposer or seconder, to the town clerk of the said borough seven days at least before the said day of election, excluding Sundays, and before five o'clock in the afternoon of Friday, the 22nd Oct. 1875, such last-mentioned day being the last day upon, and five o'clock in the afternoon of the same day being the time or hour before which, by law, such paper writing ought to have been delivered to the said town clerk at or for the said election."

The decision of the Mayor on this objection was as follows:

"I, the undersigned mayor of this borough, do hereby allow the objection of Mr. Peter Jackson to the nomination paper of Mr. Elisha Hodgkinson Monks for No. 1 or Scholes' Ward.

JAMES BURROWS, Mayor."

The following are the clauses on which the decision turned:

38 & 39 Vict. c. 40 (Municipal Elections Act 1875), s. 1, sub-sect. 8, "Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself, or his proposer, or seconder, to the town clerk seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered."

Sub-sect. 4: Sect. 8 of the Act 23 Vict. c. 35, "so far as the same is now in force shall apply to nominations of councillors, auditors, and assessors duly made and allowed under this Act."

22 Vict. c. 35, s. 8: "At any election of councillors to be held for any borough or ward: (1) If the number of persons so nominated shall exceed the number to be elected, the councillors to be elected shall be elected from the persons so nominated, and from them only."

M'Intyre, Q.U. (Bigham and W. Hardy with him), for the petitioners.—It must be conceded that if the fifth objection to the nomination paper of the petitioner Monks can be sustained the petitioners cannot succeed. But it is not really an objection to a nomination paper, and therefore ought not to have come before the mayor, and cannot be entertained by the court on appeal from the mayor's decision. [Lord COLERIDGE, C.J., referred to *Northcote v. Pulsford* (L. Rep. 10, C. P. 476; 44 L. J. 217, C. P.; 32 L. T. Rep. N. S. 602).] The first clause of 38 & 39 Vict. c. 40, s. 1, sub-sect. 3, is directory only, not imperative. [Lord COLERIDGE, C.J.—*Howes v. Turner* (ante, p. 58), shows that it is imperative.] The words, "shall be delivered by the candidate himself," &c., only means that the candidate or his proposer or seconder shall see that the paper is delivered, but they need not do so with their own hands; delivery by an authorised agent is sufficient. 35 & 36 Vict. c. 60, s. 15, sub-sect. 9, which allows the re-

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spondent to give evidence that the petitioner was not duly elected, only applies where the office is claimed by the petition, which is not the case here.

Herschell Q. C. (Ohandos Leigh and Geary with him), for the respondents.—By 38 & 39 Vict. c. 40 s. 1, sub-s. 4, 22 Vict. c. 35 s. 8, applies to these elections, and the words “so nominated,” in that section, must mean nominated in the manner directed by 38 & 39 Vict. c. 40, s. 1, sub-s. 3. [He was stopped by the court.]

Lord COLERIDGE, C. J.—I am of opinion that our judgment ought to be for the respondents. Mr. McIntyre has very fairly admitted that if one point is decided against him it becomes useless to discuss the others, because in that case the election of the respondents cannot be questioned. 38 & 39 Vict. c. 40, s. 1, sub-s. 3, directs that every nomination paper shall be delivered by the candidate himself or his proposer or seconder to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered. The petitioners were persons who complained of the way in which the election was conducted, because they were nominated as candidates, and yet they were prevented from going to the poll. It is true that they were not prevented by any objection to the delivery of a nomination paper; but still they have questioned the election, and we have to determine if the respondents are duly elected. Paragraph 3 of the case states that “upon the said 22nd day of Oct. in due time nomination papers nominating the respective petitioners as candidates respectively for the respective wards in the said petitions mentioned were delivered to the said town clerk by one Thomas Scott, being then the agent of the said petitioners and their respective proposers and seconders, authorised by them in that behalf, but the said nomination papers were not otherwise delivered to the said clerk by the respective petitioners or their proposers or seconders respectively.” The case, therefore, shows that the petitioners were not duly nominated, and had no right to go to the poll, and if they had been elected their election must have been set aside. I am clearly of opinion that the first part of sub-sect. 3 of 38 & 39 Vict. c. 40, s. 1, is imperative, and not merely directory; and there is also the section to which Mr. Herschell very properly called attention, 22 Vict. c. 35, s. 8, incorporated by 38 & 39 Vict. c. 40, s. 1, sub-s. 4, by which, if the number of persons nominated exceed the number to be elected, the councillors shall be elected from the persons so nominated, and from them only. Therefore, if these petitioners were not duly nominated it was the duty of the mayor to declare that they were not entitled to go to the poll. It appears on the face of the case that the petitioners were not duly nominated, and therefore there is no ground to question the election of the respondents, and our judgment must be for them.

ARCHIBALD, J.—I am thoroughly of the same opinion. The facts show that the petitioners were not entitled to go to the poll. 38 & 39 Vict. c. 40, s. 1, sub-s. 3, provides that “Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself, or his proposer or seconder, to the town clerk,” &c. How the statute could more clearly indicate that the candidate himself,

or his proposer or seconder, must deliver the nomination paper I cannot conceive. It is clear that it was not intended that the paper should be delivered by an agent or any other person. This being so the petitioners were not qualified, and on this short ground I am of opinion that judgment should be for the respondents.

Judgment for the respondents.

Solicitors for the petitioners, *Chaster, Urquhart, Mayhew, and Holden*, for *Darlington and Sons*, Wigan.

Solicitors for the respondents, *Morris, Allen, and Carter*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 13 and 15, 1876.

(Before the Right Hon. Sir R. PHILLIMORE.)

CARGO *ex* SCHILLER.(a)

Life salvage—Cargo—Separately salvaged—Liability to pay life salvage—Merchant Shipping Act 1854, sect. 458.

Where life salvage is performed, cargo, subsequently salvaged and by persons wholly distinct from the life salvors, is liable to contribute towards the payment of the reward due to the life salvors under the provisions of the Merchant Shipping Act 1854, sect. 458.

THIS was an action *in rem* instituted on behalf of the owners, masters, and crews of the pilot cutter *Rapid* and the boats *O. and M.*, *Guinevre*, and *Swift*, against the cargo of the late German steamship *Schiller*, to recover salvage reward for services rendered to the lives of the passengers of that vessel.

The *Rapid* was a pilot cutter belonging to the Island of Bryher, one of the Scilly Islands, was of the value of 500*l.*, and at the time of the services was manned by a crew of eight hands. The *O. and M.* was a six-oared gig belonging to the Island of St. Agnes, one of the Scilly Islands, and at the time of the services was manned by a crew of six hands, including a licensed Trinity pilot. The *Guinevre* was also a six-oared gig belonging to the Island of St. Agnes, and was manned by a crew of seven hands. The *Swift* was a boat also belonging to the Island of St. Agnes, and was manned by a crew of four hands.

The *Schiller* went ashore on the Retarrier reef, which is about three miles and a quarter west of the Island of St. Agnes, and about two miles and three-quarters west and by south of the Island of Annett. The services were rendered during the morning of the 8th May 1876, and during a dense fog. The *Swift* picked up one passenger from the *Schiller's* lifeboat, which was discovered full of water in Smith's Sound; the *Rapid* picked up two men between the rocks of Minalto and Mincarlo; the *O. and M.* discovered the *Schiller* herself, and picked up from spars and wreckage five men; the *Guinevre* also got to the *Schiller* and picked up two men from among the wreckage; all these men were got ashore and saved. The *O. and M.*, after taking the men she picked up ashore, got a steamboat that was going to Penzance to go to the wreck. The steamboat took the lifeboat and the *O. and M.* in tow, and proceeded to the *Schiller*, the Trinity pilot from the *O. and M.* being on board the steam-

(a) Reported by JAMES P. ASPINALL, Esq., Barrister-at-Law.

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boat. The *O. and M.* was damaged before getting to the *Schiller* the second time, and had to put back, but the steamboat and lifeboat went on and saved more lives. The *Guinevere* also sent some fishing boats to the *Schiller*, and these saved more lives. All the persons saved were taken ashore by the persons who picked them up, and were landed either in the Island of St. Agnes or St. Mary's. The plaintiffs alleged that during the services the weather was very bad, the sea running very high, and that the services were rendered at great risk to the plaintiffs. A small portion only of the stores and hull of the *Schiller* were saved, but large portions of her cargo, mainly specie, to the value of 40,000*l.*, were saved. The above facts and others appearing in the judgment were fully set out in the statement of claim in twenty-two paragraphs.

The cargo proceeded against was not nor was any part of it saved by the plaintiffs, nor was it saved for a considerable time after the services rendered by the plaintiffs. The defendants' (the owners of the specie saved) statement was as follows:

1. The defendants admit the statements of fact in Articles 1 to 22, inclusive of the statement of claim.
2. The services of the plaintiffs to the passengers of the *Schiller* were rendered at some risk to themselves, but not at great risk, as alleged.
3. The said passengers were not the owners of the cargo proceeded against in this action, and the plaintiffs rendered no services to and did not attempt to save the said cargo or the owners thereof. Such cargo was saved under the circumstances in the next article mentioned.
4. Some time after the wreck of the *Schiller*, and after the vessel was partially broken up, and with her cargo had sunk in deep water, and had been abandoned by all concerned, the defendants determined to endeavour to raise six barrels of specie belonging to them, and which were known to be in the vessel's hold. The defendants thereupon engaged a staff of divers and workmen, and worked for many weeks at great expense, and with great uncertainty as to the success of their operations. During this time, and so long as it remained doubtful whether the operations would not be altogether unprofitable, the plaintiffs did not profess to be interested, or to have a claim against the cargo in respect of which the operations were proceeding.
5. After many weeks of unsuccessful and unremunerative operations, the defendants succeeded in raising four of the barrels of specie and a portion of the contents of another barrel, of the total value of 40,000*l.*, and the specie so saved was conveyed to Penzance. This specie is the cargo proceeded against in this action.
6. After the arrival of the specie at Penzance, the plaintiffs were induced by persons who had taken no part in the salvage services to put forward the claim made in this action, and they consented to do so upon being indemnified against liability for costs, and this action is being prosecuted in the plaintiffs' name under such indemnity.
7. Upon the arrival of the specie at Penzance, it was arrested in two distinct actions by or in the names of certain of the plaintiffs in the present consolidated actions, and a third action was afterwards instituted against it on behalf of the said plaintiffs. The said actions were all commenced by the instructions of the same person acting or professing to act as agent for the plaintiffs, and through the same solicitor, and the claim of the plaintiffs might or ought to have been put forward, if at all, in one action.
8. Numerous portions of the *Schiller*, and of her tackle, apparel, and furniture had been saved and recovered by persons other than the defendants prior to the commencement of these actions, but the plaintiffs made no attempt to enforce a claim against such property.
9. The plaintiffs respectively have received or are entitled to receive, and can upon application receive, from the passengers to whom they rendered the said services, and from the owners of the *Schiller*, and from the German Government, ample remuneration for their said services.
10. The *Schiller* at the time of her loss was a German

ship, sailing under the German flag, and by the law of Germany the ship and the owners thereof, and the passengers themselves, are liable for the remuneration of the services in the statement of claim mentioned, and the defendants as owners of the cargo on board the ship are not in the circumstances aforesaid liable for such remuneration.

The plaintiffs' reply was, so far as material, as follows:

1. It is not true, as stated in the fourth paragraph of the statement of defence, that during the time therein mentioned the plaintiffs did not profess to be interested in, or to have a claim against, the cargo therein mentioned.
 2. The several allegations in the sixth paragraph are untrue. It is further untrue, as stated in the seventh paragraph, that the actions therein mentioned were all commenced by the instructions of the same person, or that the claim of the plaintiffs might or ought to have been put forward in one action. The costs of the separate institutions of the two suits and action are trifling. The several allegations in paragraphs 6 and 7 are immaterial.
 3. It is not true that any portions of the *Schiller*, or of her tackle, apparel, or furniture, which were or are of any appreciable value, had or have been saved or recovered.
 4. It is true, as stated in paragraph 10, that the *Schiller* was at the time of her loss a German ship, sailing under the German flag, but with this exception, the several allegations in paragraphs 9 and 10 are untrue.
 5. At the time of the rendering of the services stated in the statement of claim, the *Schiller* was a ship stranded or in distress on the shore of a sea or tidal water situate within the limits of the United Kingdom, and the services so stated were rendered wholly or in part in British waters.
- From an affidavit filed by the plaintiffs in answer to interrogatories administered to them on behalf of the defendants, it appeared that the crew of the *O. and M.* received 75*l.* from three out of the five persons saved by that boat; that none of the other persons saved paid the plaintiffs anything; no claim other than these actions had been made upon the persons saved or the owners of the *Schiller*; that the crews of *O. and M.* and *Guinevere* sent in a statement by way of petition to the German Government and also to the Board of Trade, but no reply thereto was received before the institution of these actions; that the crew of the *Swift* accepted as a present from the German Government the sum of 1*l.* per head without prejudice to their present claim; and that, save as aforesaid, no other sums had been received by the plaintiffs for the services proceeded for in these actions.

March 13, 1876.—The Admiralty Advocate (Dr. Deane, Q.C.) and W. G. F. Phillimore, for the plaintiff.—The facts are admitted, and the only question is the case is whether the plaintiffs can by law recover reward for salvage of life. The right arises under the Merchant Shipping Acts. Even if the *Schiller* can be said to have been wrecked outside of British waters, the plaintiffs performed part of their service within British waters by taking the persons rescued to and landing them on the islands of St. Agnes and St. Mary. The first case on the point is *The Johannes* (Lush. 182; 3 L. T. Rep. N. S. 757; 1 Mar. Law Cas. O. S. 24), where it was held in 1860 that the Court of Admiralty had an original jurisdiction over life salvage, and that the Merchant Shipping Act 1854, s. 458 only gave jurisdiction over life salvage rendered within the limits of the United Kingdom. In the following year the Admiralty Court Act (24 Vict. c. 10) s. 9, extended the provisions of the Merchant Shipping Act "to the salvage of life from any

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British ship or boat, whosoever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered wholly or in part in British waters." Hence there is clearly jurisdiction. In *The Fusilier* (Bro. & Lush. 341; 10 L. T. Rep. N. S. 699; 2 Mar. Law Cas. O. S. 39, 177) it was held that passengers must be taken as "belonging to such ship" within the 458th section of the Merchant Shipping Act 1854. In *The Willem III.* (L. Rep. 3 Adm. & Ecc. 487; 25 L. T. Rep. N. S. 386; 1 Asp. Mar. Law Cas. 129) the services were rendered wholly outside British waters, and it was held that the plaintiffs could not recover for life salvage against the ship and cargo.

Butt, Q.C. and Lodge, for the defendants.—It is an admitted fact that the plaintiffs made no attempt to save the vessel or cargo. In *The Fusilier* (*ubi sup.*) there was a joint salvage of ship, cargo, and lives of crew and passengers by the same salvors. Here the services rendered were wholly separate from those subsequently rendered to ship and cargo. The cargo now proceeded against was got up some time afterwards by a wholly distinct set of persons. [Sir R. PHILLIMORE.—By the Merchant Shipping Act 1854, s. 458, salvage is payable for "assisting such ship or boat;" for "saving the lives of the persons belonging to such ship or boat;" and for "saving the cargo or apparel of such ship or boat, or any portion thereof," and is made payable "by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services or any of them are rendered." Dr. Lushington, in *The Fusilier* (*ubi sup.*), says: "That section begins by defining what constitutes a salvage service; it states three special heads. . . . The section then goes on to declare, that payment shall be made by the owner of the ship or cargo of a reasonable amount of life salvage. If the statute ended there, I should say the effect of it was simply to constitute the saving of life to be *per se* a salvage service, and to leave the mode of payment to be according to former practice; for I cannot find any words in this section adequate to effect so serious a change in the law, as to introduce a new system of payment, in substitution of the ancient rule which, where life was saved together with ship and cargo by a single set of salvors, threw upon the cargo a part of the proportionate increase of the salvage reward. The existing grievance was not the mode of payment—charging the cargo in part—but the absence, in some cases, of all payment for life salvage." Does not that passage show that the Merchant Shipping Act makes life salvage chargeable upon the cargo, whether saved with the lives or not? We submit that if such was the effect of the decision it must have been given without consideration of the 459th section which, provides that "salvage in respect of the preservation of life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of such ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may, in its discretion, award to the salvors of such life or lives out of the Mercantile Marine Fund, such sum or sums as it deems fit." This clearly shows that the intention of the Act was

that life salvage should only be payable where the persons saved are identified with the owners of the property saved. That is to say, that if the whole service to ship, cargo, and life is effected at once, the whole fund should contribute, but if only the lives are saved and no salvage to ship or cargo rendered until a later period, the ship only should be liable to pay the reward for the salvage of life. The cargo here was got up not by salvors, but by the owners of the cargo itself, and cannot be identified in any way with the salvage to life or the persons saved. If the ship was not sufficient, the plaintiffs should have obtained reward from the Board of Trade. The plaintiffs have accepted reward in respect of the services rendered.

The *Admiralty Advocate* in reply.—In *The Cairo* (L. Rep. 4 Adm. & Ecc. 58; 2 Asp. Mar. Law Cas. 257) reward for salvage to life was given, although no services were rendered to ship and cargo at the time of the life salvage.

Our adv. vult.

March 15, 1876.—Sir ROBERT PHILLIMORE.—It appears that on the 7th May last year, shortly before midnight, the plaintiffs heard the whistle of a steamer and the report of a gun, at the Island of St. Agnes. At that time there was a very dense fog over the whole of the Scilly Islands. It appears that, nevertheless, suspecting some vessel might be in danger, the crew of the *O. and M.* started from the Island of St. Agnes towards the Western Rocks. The weather continued densely thick, with fog, the wind was from the S.W., and a heavy sea was running through the rocks and breaking over the sunken ledges, between which the boats had to pass before they could get outside, to such an extent as to greatly imperil the lives of those on board them. The facts, I should have said, are all admitted, except that the great danger to the lives of the salvors is not admitted; as to this, the admission is qualified, for it is said that at this time there was not great danger. At the same time, it is a fact that the fog had shut out all landmarks, and, although some of the plaintiffs were Trinity pilots, they found great difficulty in making their way. One of the men on the Island of Bryher saw three spars wash on shore where he then was, and about six a.m. he saw some broken deck planks floating in the water. He immediately summoned the crew of the *Rapid*, who got her under weigh and passed down the channel between the islands of Sampson and Bryher. The statement of claim goes on to state that the coxswain of the *Swift*, being on the look out above Smith's Sound, on the Island of St. Agnes, saw a broken ship's lifeboat drifting to the southward, through the Sound, with something dark in it, which he could not distinguish for the fog. He immediately, with the crew of the *Swift*, launched that boat, and proceeded as fast as possible in the direction where he had seen the lifeboat. They saw her close to Buccaba, and rowing up to her, found she belonged to the *Schiller*, and that there was lying in her a passenger from the *Schiller*, groaning, benumbed with cold, and in a very weak state. The lifeboat was very much damaged, one half of her port side being clean gone. She was floating on a level with the water, and the passenger was immersed in water, except his head and shoulders, and he had lost all power of speech. Having got him on board the *Swift*, they took every measure to restore him to animation. In the meanwhile, the other boats, *Rapid*,

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O. and M., and *Guinevre*, were making the best of their way to the wreck of the *Schiller*. They first went to the Reef of Meledgen, thence to Gorregan, Rosevean, Rosevere, and Crebawithen, at none of which reefs could they discover anything. Shortly before seven a.m. the crew of the *Rapid*, which was then reaching in towards Minalto, heard cries, but could see no one, owing to the fog. Their statement goes on to show that they went in the direction of the cries, between the rock of Mincarlo and Minalto, which is a dangerous channel, and there they saw a man floating in the water, whom they rescued, and, going on, they saw another man, whom they took on board. It appears that the *Rapid* made several tacks in order to see if there were more men in the water, and not seeing any, and finding the men they had got out required care, they rowed to St. Mary's for medical assistance, and whilst so proceeding, they passed quantities of boxes, clothes, and trunks, which they did not stop to pick up, being anxious to obtain assistance for the two men. I mention these facts because it is not disputed that the account of the men is accurate. On the whole, the plaintiffs saved ten lives, and must be considered as having indirectly saved more, because the *O. and M.* obtained a steamer which was going to Penzance, and the *Guinevre* sent word of the distress and danger that the *Schiller* was in, and some of the passengers were saved and got on board the steamer and some fishing smacks. Now, a question of law has been raised with respect to these services; and it has been said, first of all, that the cargo is not liable to pay any, salvage remuneration for saving the lives of these persons. It is admitted that no part of the cargo or ship was saved; but the claim was rested exclusively and entirely upon the preservation of human life. The question was, it was admitted, discussed in *The Fusilier* (*ubi sup.*); both in the High Court of Admiralty and in the Privy Council, and a conclusion favourable to the plaintiff was arrived at in both courts. The case is reported in 3 Moore's P. C. C., N. S. 55, where Dr. Lushington is reported to have said: "Several questions of law have arisen respecting what is called life salvage, and to these questions I will address my attention before considering the particular facts of the case. First, then, as to the old law respecting salvage of property—the law before any statute was passed on the subject. There is, I apprehend, no doubt that the law was, that where no ship or cargo had been saved, no property rescued from destruction, but life had been saved from the ship, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. It is true that sometimes an anomalous case did arise, where one set of salvors exclusively saved life, and another, wholly distinct, saved the ship and cargo; but, even in these circumstances, the salvors of life alone could not render the property amenable to their claim. Then, as to the case where life and property had both been saved by one set of salvors, it was the practice of the court to increase the amount of salvage which would have been given if property only had been saved, and such doctrine does, I think, rest on too high authority to be doubted. The practice,

too, was that all the property saved should pay in such increased rate of salvage—the ship, the freight, and the cargo, each in proportion to its value. Such being the state of the law and the practice of the court, a question arises—what was the grievance which required the interposition of the Legislature? That grievance clearly was, that persons who had risked their own lives, perhaps, and saved life only, or with so little property as not to afford the payment of an adequate reward, could not be justly compensated. That was the grievance intended to be remedied. No doubt the leading motive for the legislative enactment to remedy this grievance was to encourage the saving of life; but there was a subsidiary ground—the encouragement of salvors generally, for the reward of life salvage operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose, *a priori*, that the remedy given by the Legislature would be commensurate to the evil, and effect no further change." Then the learned judge enters into a consideration of provisions in the Merchant Shipping Act (17 & 18 Vict. c. 104), ss. 458 and 459, and he comes to a conclusion that the cargo was clearly liable to pay the life salvage. The matter was argued on the pleadings before the Privy Council, and I had the honour to appear for the appellants, and Dr. Deane for the respondents. The question was very fully gone into and considered in the Privy Council, and Lord Chelmsford delivered the judgment and said: "The general rule as to the parties liable to pay salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives either of the crew or of the passengers of a vessel in distress would be any benefit either to the vessel or to the cargo. The Legislature, therefore, could not have intended to enact that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is, that there should be included in the entire sum payable for the salvage of ship and cargo a distinct award for the preservation of human life." Then he goes into the question of the 458th section of the Merchant Shipping Act, much discussed before me, and then says: "The Legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach, without any distinction, upon all the owners of property exposed to the common danger." And then, entering into a consideration of the 468th and 469th sections of the statute, which removed any doubt which the previous sections created upon this point, his Lordship concluded the judgment by saying: "The object of the Legislature in the different sections referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril more than on another." Now, it has been contended, as

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I have already observed, that these judgments are erroneous, and should be reconsidered, and would, perhaps, be reversed before another tribunal. I am not of that opinion myself, but I am clearly of the opinion that if I was, it would be improper in me to give a judgment in any way at variance with the decision of my predecessor and the Privy Council, and I decline to do so. It has been contended that there is a distinction between this case and *The Fusilier*—that in this case the cargo was saved afterwards by the owners, and no cargo at the time by the salvors, when the lives of these passengers were saved. Now, I am unable to follow any distinction in principle between the two cases. *The Fusilier* I have before me, and the argument there, that it was not a salvage service, appears to me to be wholly untenable. The property here saved amounted to 40,000*l.* in specie. I think that the cargo so saved was liable under the statute to which I have referred, in accordance with the judgment to which I have adverted, and was liable to pay salvage remuneration to those who saved the lives, by whomsoever it was saved. I am of opinion, therefore, that the judgment in *The Fusilier* supports the present case. It remains only to say what shall be the remuneration the court ought to award. The property is very large—40,000*l.*; and the services, though very effective, were not long or attended with much danger to the parties concerned. They lasted between three and four hours, and there is no doubt whatever that the lives of these persons would have been irrecoverably lost but for the exertions of these men. I have already spoken of the praise which they deserve in their hastening to save human life, and, therefore, I need not refer to that again. It has been said that they have received 75*l.* But, on looking at the affidavit, it appears it must be really considered as not paid so as to cover the amount payable as its proportion by the cargo, but as paid by the passengers themselves, from their natural desire to give some reward out of their own pocket to those who saved their lives. Now, there are four boats, and I think I shall make a fair award if I allow 500*l.* to all the boats, and that is the judgment which I deliver.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Waltons, Bubb, and Walton.*

House of Lords.

Tuesday, Feb. 29.

(Before the LORD CHANCELLOR (Cairns), Lords CHELMSFORD, HATHERLEY, and O'HAGAN.)

SYERS v. SYERS. (a)

ON APPEAL FROM THE COURT OF CHANCERY IN ENGLAND.

Construction of agreement—Partnership—Limited Partnership Act (Stat. 28 & 29 Vict. c. 86)—Determination of partnership at will.

A borrowed money from B. in order to establish a place of public entertainment, giving as security a document in these words: "In consideration of the sum of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the O.

Music Hall, to be drawn up under the Limited Partnership Act (23 & 29 Vict. c. 86), called an Act to amend the law of partnership." No such deed of co-partnership was ever executed. In a suit brought by B. against A. on the agreement, Held (reversing the judgment of the court below), that the agreement constituted a partnership at will as between the parties themselves, but that it was determined by the filing of the answer; so that B. was entitled to one-eighth of the profits up to that time, and of the value of the hall if sold as a going concern.

THE appellant in this case, M. R. Syers, was the proprietor of the "Oxford" Music Hall and Tavern, a place of public entertainment in Oxford-street, London. In order to start the place he had borrowed money from the respondent, D. B. Syers, who was his brother, and had given him a memorandum dated 8th June 1869 in these words: "In consideration of the sum of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act (28 & 29 Vict. c. 86), called an Act to amend the law of partnership." No such deed as that mentioned in the agreement was ever, in fact, executed.

The speculation succeeded, and disputes having arisen between the parties as to their rights under the agreement, the present respondent, D. B. Syers, filed a bill against the appellant, M. R. Syers, contending that under the agreement he was a partner in the concern to the extent of one-eighth share, for as long a time as it might be carried on at all. The defendant, on the contrary, maintained that the 250*l.* was merely a loan, upon which the plaintiff was entitled to one-eighth share of profits by way of interest during its continuance, but that it might be paid off at any time.

Bacon, V.C. held that a partnership was created, but his decree was varied by the Lords Justices.

M. R. Syers, the defendant, then brought this appeal to the House of Lords.

Southgate, Q.C., W. Pearson, Q.C., and Phear, appeared for the appellant:

Cotton, Q.C. and T. A. Roberts, for the respondent.

The course of the argument appears sufficiently in the judgments of their Lordships.

THE LORD CHANCELLOR (Cairns).—My Lords, there is no question that the dealing between the two litigants here, two brothers, has been of a character which has caused considerable difficulty, as to what may be exactly the definition of their relative rights. When the case came before the Vice-Chancellor he made a decree, which, as far as the wording went, declared that the brothers were partners, because by it the court declared that "the plaintiff was under the agreement made between them in 1869, in the plaintiff's bill mentioned, a partner of the defendant to the extent of one-eighth of the profits of the music hall." But then, when the Vice-Chancellor, at the close of his judgment was asked by the counsel this question, "Does your Honour treat it as a partnership dissolved?" The Vice-Chancellor answered, "No; I treat it as a purchase." When your Lordships refer back, however, to the decree of the Vice-Chancellor you find that, contrary to what is usual in such cases, there is no declaration as to what is the limit or duration of the partnership, or as to

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whether it is a partnership at will; nor on the other hand is there any order for the dissolution of the partnership, but there is this, which is certainly not very usual, an order for the accounts, which must be accounts of the profits of the partnership up to the time of the decree apparently, and an order for payment, without saying what was to be done for the future, whether the parties were to lapse again into a state of controversy and dispute, or whether they were to be declared to be connected in partnership for any particular length of time. Then when the question came by appeal before the Lords Justices their Lordships seem to have been pressed with this difficulty. They struck out from the decree all reference to a partnership, and, as I read their opinions, they do not proceed upon the footing of a partnership. James, L.J. certainly used the expression a "*quasi* partnership," which would seem rather to imply that there was not, at all events, a real partnership; but Mellish, L.J. seems not to have entertained the idea of a partnership, or a *quasi* partnership at all, but on the contrary to think that the agreement might mean an agreement under the Stat. 28 and 29 Vict. c. 86 which is a statute which negatives the idea of the existence of a partnership. Accordingly the decree, as altered by the Lords Justices, declared, not that the plaintiff and the defendant were partners, but that the plaintiff was, under the agreement of 8th June 1869, entitled to "one-eighth of the profits of the Music Hall called the Oxford and Tavern called the Boar and Castle in the bill mentioned." Whatever conclusion your Lordships may arrive at upon the subject, I apprehend that it is impossible that the case can be left in the state in which it is brought up to your Lordships. Your Lordships will, I think, have to determine whether on the one hand there is a partnership between these persons, or, on the other hand if there is not a partnership, whether there has been simply a contract of loan which either ranges itself under the provisions of the statute to which I have referred, or is a contract of loan which, however open to objection by an outside creditor, is at all events a valid contract between these parties. Fortunately the determination of this question has not to be sought for through any number of documents. It depends upon the construction of one document alone, the letter to which I have already referred, of the 8th June 1869, and to the construction of that document I now invite your Lordships' attention. The document is addressed by the appellant to the respondent; it passed between them just before the tavern or place of entertainment in question in Oxford-street was opened; and it was given by the appellant to the respondent on the occasion of the respondent's furnishing him with a sum of 250*l.* for the purpose of starting that speculation. It runs thus, "In consideration of the sum of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music-hall and Tavern, to be drawn up under the Limited Partnership Act (28 & 29 Vict. c. 86), called an Act to amend the law of partnership." Now the first objection that I make upon this letter is this: Whether your Lordships take it to be a letter pointing to a partnership or to a loan, neither in the one case or in the other is there any term specified as the duration of the partnership, or the loan, as the case may be. If it is a partner-

ship it is a partnership without a term, that is to say a partnership at will. If it is a loan, it is a loan without any term being specified for its duration, that is to say it is a loan which on the one hand may be called in, and on the other hand may be paid off without any notice. I asked one of the learned counsel who argued the case whether there were any words which they would point to which stipulated for any particular duration of the loan, or of the partnership, as the case might be. Mr. Cotton admitted that there were no such words, but he said that the court below had been struck by the great improbability that any person would have advanced money to a concern of this kind to be recompensed only by profits, if, before any profits were earned, he could be paid off without any interest. It is dangerous, I think, to speculate upon what we may suppose would have been the intention of the parties; but even upon that suggestion I might add a counter suggestion, that it might well be in the mind of the person advancing the money that he did not desire to fetter himself as to the right to call in his money, because the business might turn out to be an unprofitable one, and he might desire in that event, before further loss was incurred, to get back the capital of the money which he had advanced intact, and he could not be free to recall the capital of his money unless on the other hand the person to whom the money was paid was free to pay him off at any time. Therefore I submit to your Lordships that we must not indulge in any speculation or conjecture as to what the parties might have stipulated for. We must look at what they have stipulated for, and we find that they have not stipulated for any specific duration of the contract, whatever its nature may be. Then the only question is, what is the contract? Is it partnership, or is it loan? There again the only difference between those two constructions is this: if it is loan the person advancing the money, the respondent, is entitled to have his capital back, and his aliquot share of the profits made in the business up to the time of the repayment. On the other hand, if it is partnership, he will be entitled, if the assets are sufficient, not merely to be repaid the capital sum he has advanced and his aliquot share of the profits, but he will be entitled in some way to ascertain with regard to the assets of the partnership whether they are greater now in value than they were at the time the business commenced, in other words whether, if this business were to be sold as a going concern, after paying all charges upon it and all capital brought into it, there will be a surplus, to one-eighth of which he, as a partner, will be entitled. Now, I repeat, to which category, of partnership or of loan, is this agreement to be assigned? Your Lordships have at the outset these very strong and distinct words, which it certainly is difficult to get over, "I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall." The expression is clear, it is to be a "*co-partnership*." But then it is said, it is only to be a co-partnership in profits. A co-partnership in profits is a co-partnership in those assets by which the profits are made and produced. If, therefore, your Lordships are to take all the first part of this letter as containing the governing idea, it is a letter stipulating for a co-partnership. But then the second part of the letter bears in a different direction. The deed of co-partnership is

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"to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86, called an Act to amend the law of partnership." Now, if your Lordships take this latter clause of the sentence, not regarding the first clause, you arrive at the conclusion that the deed is to be drawn up in conformity with that Act of Parliament. But that Act does not contemplate, but rather negatives the idea of a partnership, and dwells upon the theory of a loan; therefore, if you were to take the latter part of this sentence alone it would lead you to a conclusion in favour of a loan, and not of a partnership. But is there no way to which the whole of the letter may be reconciled, and effect given not only to the first but to the second part of it? Undoubtedly it is inartificial in its terms, and has been drawn up by some person who had not a technical knowledge of law, and of legal terms. But what your Lordships find clear is this: there is to be a deed of co-partnership, and that deed is to be drawn up in some way that will carry into it the governing or leading idea of the Limited Partnership Act. Now that was an Act the essence of which was that it gave a protection against outside creditors. It provided that if the parties between themselves stipulated that there should be an interest in profits without any interest in loss, without any complete community between profits and loss, that alone should not make the person receiving profits in that way liable to outside creditors. I conceive that the construction which must be given to this letter is that the writer of it and the person to whom it was addressed had fastened their minds upon that idea. They wished that the respondent should have profits in the concern, but should not have loss, and in that way the idea of the statute would have effect given to it, but with that they wished that the deed should be "a deed of co-partnership,"—a deed of co-partnership, therefore, in which the stipulation in substance would be that the owner of the one-eighth of the profits was to have that one-eighth without any liability to be subject to the losses of the concern. In that way effect is given to every word of the letter, and I cannot myself help thinking that that is really what the parties intended. If that is so there is a partnership at will, entitling the respondent to one-eighth of the profits of the concern, and, like any other partner to have it known what his share of the assets of the concern may be. Has that partnership at will been terminated? I appears to me that it clearly was terminated when the answer was put in in this suit. That answer indeed attempts to say that it was terminated at an earlier period by a letter of the 20th Aug. 1872; but when your Lordships look at that letter you find that it is a letter going entirely upon the theory of loan, offering to repay the money as a loan, with a share of profits in lieu of interest, not taking any notice of a partnership, or of any interest in assets, but rather bearing in opposition to the idea of a partnership. I cannot see how that letter could of itself operate as a dissolution of a partnership which was repudiated at that time. But the answer appears to me to stand upon a very different footing. What it says, in substance, is this: "I, the defendant, as a matter of law dispute that there is any partnership, I say that there is a loan, and nothing but loan; but if there is a partnership, if that point is decided against me, and if this which is a question of law is determined in favour of my opponent, then I submit that it was

effectually determined by the letter of the 20th Aug." But if it was not terminated by that notice there is in this answer the clearest intimation that the will of the partner at whose will the partnership continued is against any continuance of it, and whether that will is expressed by a letter, or by an answer, or in any other way is immaterial. There is no technicality, no magic as to the mode of expression. There is here the clearest intimation given by the answer that if there is a partnership the defendant wishes it no longer to continue. Therefore the result in my opinion is that there was a partnership, but that that partnership was terminated at the time of putting in the answer. It is very true that on dissolving a partnership of this kind the ordinary course would be for the court to direct a sale of the assets, and if necessary a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers. Those provisions are moulded in every case by the court to meet the circumstances of the particular case, and it appears to me that looking at the nature of this business, and looking at the very small interest which was taken in it by the respondent, it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the court would have thought it right to authorise the owner of seven-eighths of the concern to lay proposals for purchase before the judge in chambers. I am about to submit to your Lordships a provision which will, I think, in another way arrive in substance at the same end. If your Lordships agree with me you will, in the first instance, reverse the decree of the Vice-Chancellor and of the Lords Justices, and substitute the decree I am about to read. I would propose to declare that under the letter of the 8th June 1869 the respondent became entitled as a partner with the appellant to one-eighth share of the profits of the Oxford Music Hall and Tavern in the pleadings mentioned; and that the partnership between them was dissolved at and from the 21st Feb. 1873 (the time of filing the answer of the appellant), and that the sum of 250*l.* mentioned in the said letter is to be taken as capital brought by the respondent into the partnership without interest. Then there will be a direction to take an account of the receipts and payments of and respecting the said music hall and tavern, and of the gains and profits thereof from the 8th June 1869 down to the 21st Feb. 1873 in order to ascertain the plaintiff's one-eighth part thereof. Then an enquiry what sum would represent the plaintiff's one-eighth share in the value of the said music hall and tavern if sold as a going concern, after deducting all charges thereon and all liabilities of the business. Then on payment by the defendant to the plaintiff within a time to be fixed by the judge in chambers of the 250*l.*, and the sums coming to him under those heads which I have read, no further accounts, but the defendant to pay the costs up to the hearing, and no subsequent costs. The costs of the accounts to be in the discretion of the judge in chambers. Then, if the payments which I have specified are not made by the defendant, direct a sale of the hall and tavern as a going concern.

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and a division of the assets of the partnership in the usual way, with liberty to apply in chambers as to the form of such direction.

LORD CHELMSFORD.—My Lords, this case must be determined entirely upon the written contract between the parties. [His Lordship read the contract, and continued.] This reference to the Limited Partnership Act shows that the parties have misunderstood its provisions. They appear to have thought that there might have been a deed of co-partnership in terms, but if expressed to be drawn up under the Limited Partnership Act, that the person advancing the money would not be a partner nor be responsible as such. But in order to bring a case within the Act there must be a contract in writing, and, according to my reading of the Act, the contract must, on the face of it, show that the transaction is a loan. The first section of the Act is in these terms: "The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract in writing with such person that the lender—shall receive a share of the profits—shall not of itself constitute the lender a partner—or render him responsible as such." Now the contract, so far from stating that the agreement between the parties was for a loan states the direct contrary. Its terms are "In consideration of the sum of 250*l.* this day paid," not lent, "to me, I undertake to execute a deed of co-partnership, to be drawn up under the Limited Partnership Act." But such a deed could not be so drawn because the Act requires a contract in writing upon the footing of a loan, and there is no such contract between the parties, and parol testimony to vary the terms of a written instrument, where by Act of Parliament it must be in writing, is inadmissible. Therefore upon these short grounds I agree entirely with my noble and learned friend as to the determination of this appeal, and as to the declarations which he has proposed.

LORD HATHERLEY.—My Lords, I entirely concur. There is no doubt some difficulty in giving a precise effect to every word contained in this contract, but in the first place I have to remark upon it that such a difficulty will not discharge any tribunal from their duty, if possible to give a construction, and as far as the words will admit of it a reasonable and coherent construction, to every part of the instrument. As regards a part of the case which has been argued before us, namely, that the instrument is so incoherent that the parties must be left to law to make the best of it, I only observe that that is the last resource of any court before whom a question of construction is raised, and that the first duty of the court is to give a reasonable construction if possible. Further than that it was said that this, being a case of specific performance, it would be sufficient for those who resisted that performance to say that the instrument itself was doubtful, and that they understood it in one sense, and the other party understood it in another and different sense, and therefore it is not to be performed. It is a good defence to a bill for specific performance to say that there was a mistake in fact on the part of either of the persons who engaged in the contract, which renders it inequitable that against such a mistake in fact a construction should be forced upon him which he was unprepared for in consequence of having been misled, not necessarily by his opponent, but as to the circumstances and facts of

the case. But there is nothing of that kind here. The whole question in the present case turns upon the construction of the document. Both sides agree that it was written out deliberately, and that at that time no other construction was put upon it than such as it might bear when properly construed. Therefore one approaches the instrument with a desire to make it intelligible and consistent as far as is possible, and it seems to me that the first part of it is intelligible beyond all dispute. It begins thus, "In consideration of the sum of 250*l.* this day paid to me." This does not necessarily indicate a purchase in itself, because a sum may be paid either in the way of purchase or of loan, and if it had rested there the case might have been left *in dubio*. But we must read further—"I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall." Nothing, of course, can be clearer than that contract as far as it has yet proceeded. It is an undertaking to execute a deed of co-partnership of one-eighth share, in other words to sell that one-eighth share in this business. Then it proceeds to mention that which has occasioned all the difficulty in the case, and that is that this deed is "to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86, called an Act to amend the law of partnership." That undoubtedly cannot possibly be done literally, because that Act would point to something entirely different, as between the parties to the instruments which are sanctioned by that Act, namely the express case of loans, whether loans upon which interest is to be paid, or loans upon which in lieu interest any specified share of the profits of the partnership is to be given, a circumstance which it is said expressly is not, in itself, to constitute a partnership. But I think that a reasonable construction to be put upon that phraseology as connected with the clear and indisputable phraseology in the first portion of the agreement with reference to selling the one-eighth share is that which has been put upon it by my noble and learned friend on the woolsack, namely, that *inter se* the intention of the parties was that the person who became entitled to this one-eighth share should not be on that account liable to losses as between the two parties to the engagement. They could not bind the external world, or creditors, no doubt, by any such arrangement between themselves; but as between themselves, having observed that there were cases in which under this Act deeds might be framed whereby those engaging in a transaction should stipulate that the profits of the concern should be divided between them, while one of the parties should not be liable to loss, we may take it that, as far as they comprehended the Act, the intention of the parties was to avail themselves of that mode of proceeding. If they could have done so they would doubtless have wished to extend it to the external world, but that was impossible. As between themselves at least their intention was that one party should have one-eighth of the profits of the concern without being liable to losses to accrue in respect of the partnership. The defect as it appears to me in each of the decrees is this. Having now read through the contract, whether it be a contract of loan or of partnership, we find that there is nothing whatever to limit the duration of the loan or of the partnership. Now, according to the general law in such cases, no term being expressed,

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either side would be at liberty, if it was a loan by payment, if it was a partnership by notice of dissolution—to put an end to this engagement. And those arguments which were addressed to your Lordships that such could not be the construction of the agreement, because, if it were a temporary arrangement, the money might be called back, or the partnership broken up the next day, really seem to me to have no bearing on the case whatever, because all parties entering into a contract of partnership have in the first instance the fullest confidence in each other, and consequently a number of things are often unprovided for which, on more mature reflection, would have been provided for in the contract. Now the present case cannot be compared to the case of an engagement for an adventure for trading, which is concluded after a certain time in the nature of things; it is wound-up, and the profits are ascertained. But with regard to the concern we are discussing there is no such natural period for its termination. The partnership holds leasehold premises for a long period, thirty-five years, but it is agreed that the plaintiff had no means of compelling the defendant to carry on the business for thirty-five years, or any other period of time. The fact of the contracting parties having omitted to specify any time for the duration of the partnership would only have this one result; the partnership would go on probably for a certain length of time, but not perhaps so long as if the parties had thought of stipulating a time, which they have not done in the present case. However, it has gone on for these three or four years, and now the time has come when the parties can no longer agree, and it is necessary to put an end to it; and the defect of the decrees which we have before us is that they indicate no term whatever to the arrangement, whether it be loan or partnership, and, what I venture to say is, a very extraordinary and unusual decree is granted; for it orders certain accounts between the parties to ascertain the profits and loss, without saying anything as to what is to be done for the future. I remember it was held by Sir John Leach that a bill was demurrable which prayed for accounts of a partnership without praying for a dissolution of it. That has been modified in some recent cases, but the principle was that when a partnership deed, not specifying a term, was brought before the court, unless there were some very unusual circumstances in the case, or some unusual contracts had been entered into in the ordinary state of partnership affairs, the accounts should be wound up, and the transaction settled once for all. In winding-up a transaction of this kind, with regard to ascertaining profits, I apprehend that whichever way the decision had gone it would have been necessary to have that done which my noble and learned friend on the woolsack has indicated, because when you come to terminate a matter of this kind the case is different from what has been going on during previous years. During previous years the person who was entitled to the one-eighth share has been per force content to take the profits as settled by those who are engaged in carrying on the business of the partnership, but when you come to bring the matter to a termination there is no reason why the person wishing to have his share of the profits should be content with taking the amount in that way. The plaintiff says, I want to have the whole thing wound-up,

and to ascertain what at this moment is the total amount of the profits made by this concern since I became engaged with you in it. In order to do that, whichever view is taken, whether it was a loan to be compensated by a share of the profits, or a partnership the profits of which were to be divided, in either case the valuation proposed is necessary. I think that the valuation proposed is all that under the circumstances of this case the plaintiff is entitled to ask at your Lordships' hands. I do not think he is entitled to ask for a sale of the concern, regard being had to the amount of his interest in it, and to the nature and character of that concern, and the injury that might result from having a sale of a business of such a description as this is. Under these circumstances it is quite competent for the court to direct such a course of proceeding as has been sketched out by my noble and learned friend in the decree which is now proposed to be made by your Lordships; and I concur in that decree, both in the shape in which it is drawn up, and in the principles which my noble and learned friend has enunciated as the ground of his decision.

LORD O'HAGAN.—My Lords, I concur entirely in the conclusion at which my noble and learned friends have arrived. I will, however, say that I had in the course of the argument considerable doubt, for a time, whether, on the grounds of the indefiniteness of the agreement in this case, and of some indications of mutual mistake between the parties to it, it is properly the subject of intervention by a court of equity. But I agree with my noble and learned friend who last addressed your Lordships that it behoves us, if possible, to deal with the matter effectively, and prevent the necessity of further litigation. I think the reasons suggested by Mr. Cotton warrant us in doing so, and in construing the document according to the fair interpretation of its terms, and with reference to the circumstances in which it originated, but not with reference to mere parol statements, which cannot legitimately help us to understand it. I am of opinion that the solution of the difficulties, which in any view it raises, proposed by my noble and learned friend, may be properly accepted by your Lordships. I do not say that to my mind it is entirely satisfactory, and I cannot fail to adopt it with some hesitation when I find it in conflict with the judgments of the learned judges of the courts below, which are also materially in conflict with each other. The agreement may be differently regarded by different minds, and whether it imports a partnership, or a loan, or some *tertium quid* partaking of the character of both, we can scarcely perhaps determine with perfect clearness. But having regard to the express undertaking "to execute a deed of partnership," it seems reasonable to hold with the Vice-Chancellor that the plaintiff and defendant were constituted partners, at least as between themselves, although their subsequent reference to the Act shows that they meant their partnership to be peculiar in its nature, and limited in its extent. And if they were partners, their relations as such not binding them to each other for any definite period, may fairly be taken to have been dissoluble at will, and to have been effectually dissolved, as has been shown already by my noble and learned friends. In whatever light the transaction may be regarded, as constituting partnership or loan of a special kind, I concur with them in rejecting as

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unreasonable a construction which could give in consideration of the sum advanced an interest in a business such as we are dealing with of indefinite duration, incapable of being terminated at any ascertainable period, and difficult, if not impossible, to be maintained in the various probable contingences which have been pointed out in the progress of the discussion. On the whole I think the proposed solution of the difficulties of the case the most acceptable, as being most in accordance with the language of the parties, and best calculated to do justice to both; and I concur in the suggestion of my noble and learned friend on the woolsack, as well with reference to the form of the decree as to the costs of the proceedings.

Decree appealed from reversed with a declaration, and cause remitted.

Solicitor for the appellant, *W. Millman.*

Solicitors for the respondent, *Barton and Pearman.*

Judicial Committee of the Privy Council.

Feb. 29, March 1, 2, and 8, and May 16.

(Present: The Right Hons. Sir JAMES COLVILLE, Sir BARNES PEACOCK, Sir M. SMITH, and Sir ROBERT COLLIER.)

THE MAYOR OF MONTREAL v. DRUMMOND. (a)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Lower Canada—Loss of access—Loss of custom—Expropriation—Compensation—Civil Code, Arts. 407, 1589—Stat. 27 & 28 Vict. c. 60.

The Civil Code of Lower Canada provides (Art. 407), "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid." And (Art. 1589) "In cases in which immovable property is required for general utility the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special law."

Stat. 27 & 28 Vict. c. 60 establishes a tribunal of commissioners for determining the value of property expropriated, and a system of procedure for such cases.

The respondent possessed house property in F-street, Montreal. Immediately to the south of his property a railway crossed the street by a level crossing, and there was a station at a short distance from the crossing. Passengers and others used to walk down the line, in contravention of the bye-laws of the railway company, from the station as far as the crossing at F-street, and the property of the respondent was increased in value by the custom of such persons.

The appellants, acting under statutory powers, erected a barrier across the street, cutting off access to the line, and making F-street a cul de sac. The respondent brought this action to recover compensation for the injury to his property. Held (reversing the judgment of the court below), that the respondent had failed to establish an "expropriation;" that closing one end only of a street was not such an interference with the right of access as to give a claim to compensation; that

the loss of the customers who came in an irregular manner from the station gave no such claim; and that the case did not come within Art. 407 of the Code as supplemented by Art. 1589.

Further, that the claim, if sustainable at all, should have been determined by the commissioners under the special Act.

This was an appeal from a judgment of the Court of Queen's Bench (appeal side) for Lower Canada (Taschereau, Ramsay, and Sanborn, JJ., Mackay and Torrance, JJ. dissenting), delivered on June 20, 1874, in favour of the respondent, affirming a judgment of Beadry, J., in action brought by the respondent against the appellants, the Mayor and Corporation of Montreal, for injury alleged to be caused to land and houses of the plaintiff's, by the stoppage of a street in Montreal called "St. Felix-street," under circumstances which appear fully in the judgment of their Lordships.

A. Wille, Q.C. and Gibbs appeared for the appellants.

Bompas and Kenelm Digby for the respondent.

In addition to the authorities quoted in the judgment the following were also referred to in the arguments:

British Cast Plate Company v. Meredith, 4 T. Rep. 794;

Dungey v. Mayor of London, 38 L. J. 293, C. P.; 20 L. T. Rep. N. S. 921;

Ferrar v. Commissioners of Sewers, L. Rep. 4 Ex. 227; 19 L. T. Rep. N. S. 485;

Husson, Législation des Travaux Publics, p. 329;

Smith v. City of Boston, 7 Cushing (Mass.) 254;

1. Sourdat, Traité de la Responsabilité, p. 427;

42 Sirey, pt. 1, p. 583;

26 Sirey, pt. 2, p. 196;

Sedgwick, On the Interpretation of Statutory Law.

Cur. adv. vult.

May 16.—Their LORDSHIPS gave judgment as follows: The action which gives occasion to this appeal was brought by the Honourable Lewis Drummond (the respondent) against the Municipal Corporation of the City of Montreal (the appellants), for damage sustained in consequence of the corporation having closed one end of St. Felix-street in Montreal. The declaration alleged that the plaintiff had built eight houses fronting St. Felix-street, which at one end opened into St. Bonaventure-street, and at the other into St. Joseph-street, and that these houses, being in immediate proximity to the Bonaventure Station of the Grand Trunk Railway Company, had acquired great value as boarding houses and shops. It then alleged that the corporation, "without any previous notice to the plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, *"et par voie de fait,"* closed up St. Felix-street, and built from the south end of his houses to the opposite side of the street a close wooden fence, about 15ft. in height;" that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress." It also alleged that the occupant of one of the houses had abandoned it in consequence of the destruction of his business. The pleas of the corporation (written in French) alleged that in closing the street they had not committed "*un acte de violence et illégalité ou une voie de fait*;" that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "*et qu'en exerçant ce privilège ils n'ont pas empiété sur la propriété du demandeur*;" that

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say: "1, *l'expropriation forcée*; 2, *le changement de site des marchés*; 3, *le changement de niveau des trottoirs*;" and that, whilst acting within the limits of their powers, they were not responsible for damage. The pleas then state that the street "*n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue*." The action, then, is founded on a trespass and wrong illegally committed by the corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and, therefore, no wrong had been committed for which an action in this form will lie; and (2) that the plaintiff was not by law entitled to any indemnity for the damage complained of. The following are some of the material facts: St. Felix-street opens, near the north end of the plaintiff's houses, into Bonaventure-street, and extends northwards beyond the latter street to St. Antoine-street. In its original state it ran southwards from the plaintiff's houses to St. Joseph-street. This part of it was crossed on the level by the lines of the Grand Junction Railway Company. The Bonaventure station was a short distance from the plaintiff's houses, the ordinary approaches to it being in Bonaventure-street. People could, however, go on foot from the station to St. Felix-street, but only by walking over some lines of railway, and contravening, in so doing, the bye-laws of the company. It appears that a large number of persons arriving by or waiting for the trains, went in this manner to St. Felix-street, and frequented a house kept as a restaurant by one of the plaintiff's tenants, which they could no longer do by this short cut after the fence complained of was put up. In the years 1863 and 1864 the Bonaventure railway station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across St. Felix-street to the south of the plaintiff's houses, making the passage there difficult and dangerous. To assist these arrangements of the railway company the corporation undertook to close the southern part of St. Felix-street and open a new street to the south of the station. The manner in which the corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from 10ft. to 15ft. high, across the street immediately to the south of the plaintiff's houses. The place where people used to enter St. Felix-street from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the plaintiff's tenant gave up the business. The authority under which the corporation closed the street is a bye-law made in pursuance of an Act of the Provincial Legislature (23 Vict. c. 72). Sect. 10 of this Act authorised the council to make bye-laws for various purposes, and, among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or discontinue the streets, squares, alleys, highways, bridges, side and cross walks, drains and sewers, and all natural water courses in

the said city." A general bye-law was afterwards passed, section 3 of which is as follows: "The council of the said city of Montreal may, and they are hereby authorised whenever, in their opinion, the safety or convenience of the inhabitants of the city shall require it, to discontinue any street, lane, or alley of the said city, or to make any alteration in the same, in part or in whole." And subsequently, on the 11th Sept. 1866, a special bye-law relating to St. Felix-street was made, which, after reciting that it was deemed expedient in the interest of the public to open a new street (describing it), "and to discontinue a portion of St. Felix-street," ordains and enacts that a new street called Albert-street be opened, and that a section of St. Felix-street, describing it by a plan and measurements (being the part to the south of the plaintiff's houses) "be henceforth discontinued." It was not disputed that under these powers the corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition, to indemnify the plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "*une expropriation*," which, it was urged, could only be lawfully effected in conformity with Article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the statute giving the power to make bye-laws to discontinue streets should be held to have been passed subject to the general law embodied in this article. Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid." A similar article is found in the Code Napoleon (Article 545). These articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "*De la Propriété*," and in both follow the articles which define property or ownership. The original article in the Code Napoleon was in effect the declaration of a principle which, in France, has been applied by numerous special laws. In the Canadian Code, also, Article 407 is supplemented by Article 1589, which is as follows: "In cases in which immovable property is required for purposes of general utility, the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws." In the special laws passed both in France and Canada, the principle of previous indemnity in cases of "*expropriation*," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency; and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle. A distinction has long been made in France, and indeed it exists in the nature of things, between "*expropriation*," properly so called, in respect of which previous indemnity is payable, and simple "*dommage*;" and a further distinction between direct damage, which gives

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the sufferer a right to compensation, and indirect damage, which does not. Great research was displayed by the learned counsel on both sides investigating the history of French law and procedure on these subjects, the powers conferred on the tribunals, and the conflicts between them. According to the opinion of Dalloz, the first complete system of procedure is to be found in the Law, 8 Mars, 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1. It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary court of law and the administrative tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the law, 8 Mars, 1810, that the courts of law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the administrative tribunals was confined to cases of damage; but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasi servitudes in public streets were a fertile source of them. Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy (vol. 12, art. 700): Assuming, as he does, that the owners of houses bordering on streets are entitled to indemnity when "*leurs droits d'accès ou de vues ou d'égouts*," are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parcequ'il ne s'agit pas d'une véritable expropriation, mais seulement d'un simple dommage, quoique ce dommage soit permanent, et nous avons déjà dit (referring to vol. 9, Art. 567), que telle paraît être aujourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie." Delalieu, in his "Traité de l'Expropriation," arrives at the same conclusion: (See Art. 152, 6th edit., pp. 85 to 87.) No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated as "*une expropriation réelle*." But in others it has been spoken of as being only analogous to it, as thus: "*comme s'il subissait une expropriation réelle d'une partie de sol*:" (See Delalieu, p. 86; Curasson, p. 221). Be this as it may, the result of the decisions appear to be correctly summed up by Demolombe, and it would seem that in France at the present day damage to rights such as "*droits d'accès*" to streets are not deemed to constitute "*expropriation*." Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded. The compensation allowed in France for "*dommage*," as distinguished from "*expropriation*," seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a

consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The distinction between the damage which grows from an expropriation, and that which arises from the execution of the works ("*l'exécution ultérieure des travaux*") is plainly put and illustrated by Delalieu. The latter, he says, is "*non la suite de l'expropriation, mais la suite de l'exécution de travaux*," and he shows how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalieu, Art. 301 to 305.) Assuming, then, that the plaintiff had rights in St. Felix-street, which have sustained damage, their lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the corporation wrongdoers, and their act in closing the street a trespass, and "*une voie de fait*," because such indemnity had not been paid. It seems to them that if he has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this corporation (27 & 28 Vict. c. 60), which will be hereafter considered. (See on this point *Jones v. Stanstead Railway Company*, L. Rep. 4, P. C. 98; 26 L. T. Rep. N. S. 456.) Their Lordships observe that one of the grounds on which Mr. Justice Taschereau has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion. Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case without considering the other points (more nearly touching the merits of the claim) which were argued at the bar. These were: that the plaintiff had suffered no injury which, by the French law, would give a right to indemnity; and that, if this were not so, the legislation authorising the act which caused the damage had taken away the right of action, without providing compensation. It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights "*d'accès ou de sortie, des vues, et d'égouts*" (vol. 12, s. 699), and the same rights are spoken of by Prudhon (vol. 1, Art. 369). The right of access to a house is of course essential to its enjoyment, and if, by reason of alterations in the street, the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the plaintiff's houses can go from them into St. Felix-street, and pass from it into other streets, and through them into all parts of the city. The only effect of making the street a *cul de sac* so far as the rights of access and passage are concerned (apart from the loss of customers to be presently noticed) is that the plaintiff's tenants

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have to go by other streets and further to reach the southern part of the city. The counsel for the plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other way. With all their industry, the learned counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the rights of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following:—"Comme si par exemple l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, s. 699.) In Dalloz "Répertoire," tit. "Travaux Publics," sect. 816, it is said that, to give a claim to indemnity according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in sect. 818 he gives as an instance of indirect damage, "La dépréciation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues." In Dalloz "Recueil," 1856, part 3, p. 61, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 francs. One of the considérants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows: "Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle Rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité," &c. It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in Canada. The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might pos-

sibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity. It was further contended for the plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated. But it is to be observed that there was no authorised road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the bye-laws of the company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See "Dufour, Droit Administratif appliqué," 275, 277, 323.) A similar decision was given by the House of Lords in *Rickett v. Metropolitan Railway Company* (L. Rep. 2 H. of L. 175; 16 L. T. Rep. N. S. 542). Whether, if the closing of the street had cut off the plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of the neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the plaintiff's houses, by which this part of the city can be reached, and which, whilst only a little further, is probably more commodious, being less liable to obstruction from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions in the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct: (See *Metropolitan Board of Works v. McCarthy*, L. Rep. 7, H. of L. 243; 31 L. T. Rep. N. S. 182; *Beckett v. Midland Railway Company*, L. Rep. 3 C. P. 82; 17 L. T. Rep. N. S. 499.) One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been

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erected darkens the plaintiff's houses. It may be that the plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly show a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Taschereau, J.'s, judgment, in which that learned judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier, it would be recoverable, if at all, under the Corporation Statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses. The other questions argued turned upon the special statutes relating to the corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given. Upon the English legislation on these subjects, it is clearly established that a statute which authorises works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutory authority. In the Canadian Act (23 Vict. c. 72), authorising the bye-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorises to be done. But in a previous Act (14 & 15 Vict. c. 128), provision for compensation is expressly made in two instances. Thus the power to make bye-laws for altering the footpaths or sidewalks of any street is conferred subject to the provision "that the council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make bye-laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain." The counsel for the corporation referred to two or three other instances of express provisions in former Acts relating to this corporation, and also to sets of Acts authorising roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given. On the other hand, the counsel for the plaintiff relied

on the fact that no compensation was provided by the Act authorising the bye-law in question, although the power it conferred would, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the article of the code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to article 407 of the code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage. Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 & 28 Vict. c. 60, they must now be read and considered with it. That Act is, indeed, a statute upon expropriations. After reciting in the preamble that much difficulty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the council, or by reason of the removal of any establishment subject to be removed under any bye-law of the council, "or to any party by reason of any other Act of the council, for which they are bound to make compensation." It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act (36 Geo. 3, c. 9), the powers of which were transferred to the corporation. Whilst, for the plaintiff, it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being, in effect, equivalent to the common clause in the English statutes containing the words "otherwise injuriously affected." Reading the clause in the latter sense, compensation would be expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas, if it be not made, the scheme of compensation provided by these Acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised—since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27th & 28th Vict. c. 60 was passed, they think that this enactment, by requiring that the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation," shall be ascertained in the manner prescribed by the statute, excludes, by necessary implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a

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kind which would fall to be determined by the commissioners under the special Act. It may be observed that the question of procedure in cases of this kind is not merely a technical one. This was pointed out in the judgment of this committee in *Jones v. The Stanstead Railway Company* (*ubi sup.*). It is there said: "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had." On the whole case, their Lordships find themselves unable to concur in the judgment pronounced by the majority of the judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both the judgments below, and to direct that the action be dismissed with costs. The respondent must pay the costs of this appeal.

Solicitors for the appellants, *Wilde, Berger, Moore, and Wilde.*

Solicitors for the respondent, *Bischoff, Bompas and Bischoff.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Saturday, July 8.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

SWINDELL v. THE BIRMINGHAM SYNDICATE; THE BIRMINGHAM SYNDICATE v. SWINDELL.(a)

Practice—Time for appealing—Appeal from refusal of interlocutory application—Special leave to appeal—Trial before judge and jury—Discretion of court—Rules of Court 1875, Order XXXVI., rules 3, 26; Order LVIII., rule 15.

Where an interlocutory application is refused, no order being made except that the costs shall be costs in the cause, the twenty-one days within which, by Order LVIII., rule 15, the appeal must be brought, run from the date of the refusal, and not from the date of entering the order as to costs.

In actions which under the old practice would have been within the exclusive jurisdiction of the Court of Chancery, the High Court, under Order XXXVI., rules 3 and 26, has a discretionary power to determine whether there shall be a trial by jury, and the Court of Appeal will not generally interfere with the exercise of the discretion by a judge of the High Court.

But, quære whether, if an action which under the old practice must have been brought in a court of common law be now brought in the Chancery Division of the High Court, the parties would lose the absolute right to a trial by jury, which they would have had under the old practice.

This was an appeal from a decision of Hall, V.C. These two suits were instituted before Nov. 1875, when the Judicature Acts came into operation.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

The first suit was for the specific performance of an agreement for the sale of a colliery; and the second suit sought to set aside the agreement on the ground of fraud.

On the 9th May the plaintiffs in the second suit gave notice of trial of the action and of their desire to have the issues of fact tried before a judge and jury, in accordance with the provisions of the Rules of Court 1875, Order XXXVI., rule 3.

They subsequently took out a summons in both suits, asking that the issues of facts might be ordered to be tried before a judge and jury. The summons was adjourned into court and came on for hearing on the 27th May, when Hall, V.C., said that there were mixed questions of law and fact, so that the case might ultimately be disposed of independently of any issues now directed; and that until the case was gone into at the hearing, when issues might, if necessary, be directed, it would be premature to direct them; that he had power, under Order XXXVI., rule 26, in a proper case, to order a trial before himself, without a jury; that he did not, however, now exercise that discretion, but simply refused the application, making no order except that the costs of the application should be costs in the second cause.

This order was passed and entered by the registrar on the 14th June.

The plaintiffs in the second cause appealed, giving notice of appeal on the 24th June.

Southgate, Q.C., Bristowe, Q.C., and W. P. Beale for the appellants.

Ingle Joyce (with him *Dickinson, Q.C.*) for the plaintiffs in the first cause raised a preliminary objection to the appeal. This appeal is too late. Order LVIII., rule 15, provides that no appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and that that period shall in the case of the refusal of an application be calculated from the date of such refusal. This application was refused on the 27th May, and notice of appeal was not given till the 24th June. That was clearly too late.

Southgate, Q.C. and Bristowe, Q.C. for the appellants.—The Vice-Chancellor's order was not a simple refusal of the application, but the order as to costs was one which required to be drawn up, and the period of twenty-one days should therefore be calculated from the time when the order was passed and entered, which was on the 14th June. [Their LORDSHIPS held that the addition of directions as to costs made no difference, that it was a simple refusal of the application, and that the appeal was therefore too late.] Then this is a case in which special leave to appeal should be given, for we have been misled, because it has been generally supposed in the registrar's offices that the time for appealing from an order of this kind is to be calculated from the time at which the order is entered. Moreover, a case of fraud, such as we set up by our bill, is peculiarly fit to be tried by a jury, and if, as we contend, we are absolutely entitled, under Order XXXVI. rr. 2 and 26, to have the case tried by a jury, we ought not to be deprived of our right by a mere technicality.

Russell Roberts for other parties.

JAMES, L.J.—I am clearly of opinion that this appeal ought to have been brought within twenty-one days from the date of the refusal of the appli-

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cation by the Vice-Chancellor. The application was simply refused, and the order as to costs can make no difference. An order as to costs alone could not be appealed from, and the appellants' object is clearly to appeal from the refusal of their application. An order refusing an application is almost always made in this form. It is of the utmost importance that there should be no delay in appealing from an order as to the conduct of a cause. The fact that the appellants chose to delay the drawing up of the order affords no ground for extending the time; if it did, litigation might be prolonged in the most oppressive way. No one could have any object in drawing up the order until it was desired to have the costs taxed. The express purpose of the rule 15 of Order LVIII. is that, on the refusal of an interlocutory application, time shall be calculated from the date of the refusal. I therefore think the appeal is too late. Then, as to the substance of the case, these suits would, under the old practice, have been exclusively within the jurisdiction of the Court of Chancery, and the Vice-Chancellor could then, if he had in his discretion so thought fit, have refused to allow them to be tried by a jury. In such cases I am of opinion that the discretion still remains; and as this is essentially a matter of discretion the Court of Appeal will not interfere with the Vice-Chancellor's discretion.

MELLISH, L.J.—I am of the same opinion. Rule 15 makes a clear distinction between the granting and the refusal of an interlocutory application. And there was good reason for doing so. When the application is granted, the exact terms of the order may be very material, and therefore, in that case the party desiring to appeal is to have twenty-one days for doing so after the time when he knows, or may know, what the terms of the order are. But when the application is refused, the party who desires to appeal is the one who made the application, and who would have to draw up the order. If he were to have twenty-one days from the date of the entering of the order, his right of appeal might, by his own delay be extended indefinitely. Then, if we were to admit the argument founded upon the fact that an order was made as to costs on the refusal of the application, we should practically abolish the distinction made by rule 15, between the granting and the refusal of an application. The appeal is therefore in my opinion, too late. I also agree with the Lord Justice that this is not a case in which special leave to appeal ought to be given, for this is essentially a Chancery case in which, before the Judicature Acts, the Court of Chancery would have had a discretion to refuse a trial by jury, and in my opinion the Chancery Division of the High Court has now the same discretion with respect to such a case. It is a different and more difficult question whether, upon the construction of Order XXXVI., rule 26, if an action were now brought in the Chancery Division of the High Court which could under the old practice have been brought only in a court of Common Law, the parties would lose the absolute right to a jury, which they would have had under the old practice. This appeal, however, must be dismissed.

BAGGALLAY, J.A.—I am of the same opinion.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Burton, Yeats and Hart*, agents for *Johnson, Barclay and Co.*, Birmingham.

Solicitors for the respondents, *Gregory, Rowcliffe, and Rawle*, agents for *Bernard and King*, Stourbridge; *Tucker and Lake*, agents for *Wragge, Evans, and Jesson*, Birmingham.

Saturday, July 29.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

SMITH v. GRINDLEY.(a)

Practice—Appeal from refusal of interlocutory order—Setting down appeal—Production of office copy of order—Rules of Court 1875, Order LVIII., rr. 8, 15.

Order LVIII., rule 8, which provides that the party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, does not apply to an appeal from the refusal of an interlocutory application, which, under rule 15 of the same Order, must be brought within twenty-one days from the date of such refusal.

A party appealing from the refusal of an interlocutory order, therefore, need not produce an office copy of the order appealed from.

This was an *ex parte* application, made under the following circumstances.

On the 30th June a Vice-Chancellor refused an interlocutory order made by the plaintiffs, and directed that they should pay the defendant's costs.

On the 19th July the plaintiffs gave notice of appeal from this decision, naming the 24th July as the day for the hearing of the appeal, in accordance with Order LVIII., rule 4, of the Rules of Court 1875.

It was the duty of the defendant's solicitor to draw up the Vice-Chancellor's order, and they did not obtain an appointment to settle it till the 18th July. The order was entered on the 22nd July, but the plaintiffs' solicitor could not procure an office copy of it till late in the afternoon of the 27th July, though he applied for it several times on the 24th, 25th, and 26th July.

On the 28th July the plaintiffs' solicitor attended at the registrar's office to set down the appeal, but the registrar refused to set it down, on the ground that the day named in the notice of appeal had already passed, and suggested that the point should be mentioned to the Court of Appeal.

Whitehorn, for the plaintiffs, now applied for directions to set down the appeal. There has been no default on our part. We gave notice of appeal within twenty-one days from the date of the refusal of their application in accordance with the requirements of rule 15 of Order LVIII., as explained in *Swindell v. The Birmingham Syndicate* (see preceding case). Rule 8 of the same order provides that the party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof. It was the defendant's duty to draw up the order, and, through his delay, the order was not entered till Saturday, the 22nd July. We made frequent applications for an office copy, but failed to get one till after the date named in the notice of appeal. We ought not to be deprived of our right of appeal under these circumstances.

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

Their Lordships directed the appeal to be set down, observing that the plaintiffs could not be deprived of their right of appeal by the delay of the other side in the drawing up of the order. Their Lordships wished it to be known at the registrar's office that rule 8 of Order LVIII., which requires the production of the order appealed from, or an office copy of it, does not apply to an appeal from the refusal of an interlocutory application, and that in such a case the appeal may be set down without the production of the order or an office copy of it.

Solicitors, *Sheffield and Sons.*

SITTINGS AT WESTMINSTER.

Thursday, Feb. 3.

APPEAL FROM EXCHEQUER DIVISION.

SWINTON v. BAILEY AND OTHERS. (a)

29 Car. 2, c. 3, s. 6, and 1 Vict. c. 26, s. 20—Will of lands—Obliteration—Effect of to revoke.

A testator duly made and executed a will dated 15th Nov. 1836 (before the Wills Act, 1 Vict. c. 26), and he thereby devised lands, of which he was seised in fee, to his mother "to hold to my said mother Elizabeth Eley, her heirs and assigns for ever." The testator died in 1836, and the will was proved in the same year by Elizabeth Eley, the executrix. After the testator's death it was found that a line had been drawn, as with a pen, through the words "Eley, her heirs and assigns for ever," and the word "Eley" had been re-written above the words so struck out. This erasure was not attested or noticed in the attestation clause. Elizabeth Eley died in 1859, having devised part of the lands to the plaintiff, who brought an action of ejectment against the defendants, who claimed through the testator's heir-at-law.

Held (reversing the decision of the Exchequer Division below), that the devise to "Elizabeth Eley, her heirs and assigns for ever," was divisible into two parts, and that, as a sensible devise was left remaining after the erasure of the words "her heirs and assigns for ever," those words constituted a "clause" within the meaning of the 6th section of the Statute of Frauds, which the testator could revoke by obliteration, and that consequently Elizabeth Eley took an estate for life in the testator's lands.

This was an appeal from a judgment of the Exchequer Division. The case in the court below will be found reported 33 L. T. Rep. N. S. 695.

The facts sufficiently appear by the head note to the present report.

In the action of ejectment, tried before Brett, J. at the Lincolnshire Spring Assizes of 1875, a verdict was entered for the defendants, leave being reserved to the plaintiff to move to have the verdict entered for him; the court to draw inferences of fact.

The plaintiff obtained a rule nisi, and on cause being shown, the court (Kelly, C.B. and Amphlett, B.) gave judgment for the plaintiff, making the rule absolute.

From this decision the defendants now appealed.

By the Statute of Frauds, 29 Car. 2 (after making provisions for the execution and attestation of wills of land (s. 5), it is enacted by sect. 6 "and moreover no devise in writing of lands, tene-

ments, or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable otherwise than by some other will or codicil or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

The above section was repealed by the Wills Act of 1837 (1 Vict. c. 26), and that Act, by sect. 20 (enacts as to wills made after the passing of the Act) that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid" (i.e. by marriage under sect. 18), "or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person, in his presence and by his direction, with the intention of revoking the same."

The question argued before the Court of Appeal was, whether or not the testator's obliteration of the words, "her heirs and assigns for ever," was effectual as revoking a whole "clause or devise." In other words, whether Elizabeth Eley took under the will a life estate, or an estate in fee in the lands.

It seemed to be admitted in argument that the testator himself made the erasure.

Wills, Q.C. and Mellor, Q.C. (with them Dunning) for the defendants.—The effect of the decision of the court below is that, supposing the devise had been "I give to Elizabeth Eley (and her heirs and assigns for ever)," the words in the parenthesis might have been struck out, but there is no real difference between such a devise and the present one. Wherever the obliteration is sensible, and leaves the unaltered portion of the will complete and coherent, the words obliterated are a "clause" within the meaning of sect. 6 of the Statute of Frauds. Here, by striking out the words, "her heirs and assigns for ever," the testator left remaining a perfect devise to Elizabeth Eley of an estate for life. The words, "her heirs and assigns for ever," are therefore a "clause or devise," which the testator could revoke, as he has done by obliteration. "Clause," in the 6th section of the Statute of Frauds must be read as equivalent to "part" in sect. 20 of the Wills Act of 1837. [MELLISH, L.J.—Sect. 20, where it speaks of "any part" of a will or codicil does not intend to alter the law as to what may be revoked from the old state of things.] In *Larkins v. Larkins* (3 Bos. & Pul. p. 16), where there was a devise to two joint tenants in fee, and the testator afterwards struck out the name of one of them, it was held that this was a revocation of the will *pro tanto*. There are in the present case two distinct devises, and two distinct clauses—(1) to Elizabeth Eley, and (2) to her heirs and assigns for ever. They cited and referred to the following cases and authorities:

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SWINTON v. BAILEY AND OTHERS.

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Sutton v. Sutton, 2 Cowp. 812;
Short d. Gastrell v. Smith 4 East, 418;
Re the goods of F. Lambert, 1 Notes of Cases, p. 181;
Re the goods of William Cooke, 5 Notes of Cases, 390;
Jarman on Wills, 2nd edit., vol. 1, p. 112;
Re the goods of John Woodward, 24 L. T. Rep. N.S. 40; and L. Rep. 2 Prob. & Div. 206;
Christmas v. Whynates, 3 Sw. & Tr. 81.

Cave Q.C. and *Romer* for the plaintiff.—Sect. 6. of the Statute of Frauds makes a distinction between alteration and revocation. Here, if you strike out the words "her heirs and assigns for ever," you are altering, not revoking the will. The policy of the distinction between revocation and alteration is an obvious one. In order to revoke you need do no more than burn or tear the will. To alter it you must go through the formalities prescribed by the Act. In *Larkin v. Larkin* the effect of striking out the devisee's name was to strike out the whole devise to him. In that sense it was striking out "a clause," although physically and grammatically it is only striking out part of a sentence; all the other cases cited for the defendant, and also those noticed by Mr. Jarman, are only in point where a whole devise has been eliminated. You cannot by merely striking out words enlarge the quality of an estate, e.g., in a devise to "all my children (except Thomas) as tenants in common," you cannot strike out "except Thomas," and then construe the will as though those words had never been in it. The testator could not have altered the fee simple of Elizabeth Eley into a life estate directly without attesting the alteration. Is he to be allowed to do it indirectly, because the words of the will afford him the opportunity of doing it by merely striking out "her heirs and assigns"? A devise in fee is one estate at law, and it cannot be severed in the way here contended for. In the 6th section of the Statute of Frauds "clause" must mean a part of a will which, in itself, contains a devise. "Heirs and assigns" are words simply defining the devisee's estate.

Wills, Q.C. replied.—In the 6th section obliteration is put upon the same footing as alteration, the object of the Act being to prevent the courts having to rely upon parol evidence. Where it is physically possible to make an alteration by simple obliteration it may be done. In *Larkins v. Larkins* the very point in this case was raised by Serjeant Sheppard, and the view contended for for the plaintiff here was rejected by the court.

COCKBURN, C.J.—I am of opinion that the judgment of the Court of Exchequer must be reversed, and that the defendants are entitled to our judgment. The question before us turns entirely upon the 6th section of the Statute of Frauds, and to that part of the statute which relates to wills. Now, I quite agree that you cannot, by merely striking out words, alter a will so as to enlarge the estate of a person who takes under the will, or so as to have the effect of granting a new estate to someone; but when the purpose and the effect is simply to revoke and undo something which has been done, and when the effect of striking out certain words is to revoke what has been given, and no more, it does not seem to me to be brought at all within the mischief contemplated by the Act, or to be inconsistent with the terms of the 6th section. That the testator intended to cut down the estate in fee simple, which he had given to his mother,

to a life estate, I cannot, looking at the will, entertain the slightest doubt. It is said that the words erased are not a "clause," and that, consequently, the 6th section having enacted that no devise or "any clause" thereof shall be revocable except by certain forms of revocation, or by some other will or codicil, or other writing, this is not a clause to which a power of revocation attaches. If it is not a clause then the case does not come within the section at all. But I do not base my judgment upon that narrow ground. I think that this is a clause within the 7th section, because, although it is a devise in fee simple, it is, I think (as far as revocation is concerned), divisible into two parts, and that the testator who, to begin with, has given the larger estate, may revoke his gift to the extent of cutting it down to the smaller gift or devise of an estate for life. Now that is all that this testator has done. It may be that you cannot add to the will without satisfying the requirements of the second part of the 6th section, but you may, by striking out words simply, effect a revocation without militating against the provisions of the section. It may be that the phraseology of a will is such that you cannot by merely striking out words, effect your purpose. Such a case would fall within those instances pointed out by Mr. Romer, but here the words are such that by expunging a portion of them a revocation can be effected, seeing that an estate in fee simple may be revoked to the extent of taking away not all the estate, but that portion of it which is an estate of inheritance. I see no reason why this should not be done where the phraseology of the will admits of it, and that I think is what the testator intended to do and has done. The view taken by the court below seems to me to be a mistaken one, based as it was on the question of whether this was a "clause" or not. I think that for all practical purposes in applying the statute this was a "clause," and it might therefore be revoked.

MELLISH, L.J.—I am of the same opinion. Looking at the whole of sect. 6, I think the word "clause" is not used in any strict or technical sense, but that it merely means the same thing, and has the same effect as "part" (as appears to have been the view of Sir H. Jenner Fust in the case of *The Goods of Francis Lambert*, and of Mr. Jarman; and that sect. 20 in the New Wills Act of 1837, which speaks of "no will or codicil, or any part thereof," means the same as what is here spoken of as "no devise nor any clause thereof," and what sect. 6 of the Statute of Frauds means to say is that revocation may be made in any one of the various ways pointed out in it, "or by burning, cancelling, tearing, or obliterating the same." Now, "the same" in that sentence means the will itself, the actual document, the paper which is to be torn, cancelled, burnt, or obliterated, and then it is plain that revocation may be shown either of the whole of the will, or of a part of the will, by tearing, burning, cancelling, or obliterating, and that is to be applied to the actual paper itself. Now, in construing a will the testator must have used such language that you are able to discover what his intention is in order to carry it out. So I think that for the purpose of revoking by obliteration, the obliteration must be of such a kind that the court can plainly see what the intention of the testator was. In the present case there is no

difficulty on that ground, because no one can doubt, and it is assumed that by striking out the words, "her heirs and assigns for ever," the testator's intent was to cut down the estate which he had previously given to his mother from an estate in fee to an estate for life. Therefore the court can see plainly what he intended. The question, then, is, can it be carried out? That seems to me to depend simply on this, Is it a revocation? Because nothing can be done by obliteration except a revocation. There can be no addition. The difference between revocation and alteration seems to be this: if something that was given before is taken away, then it is a revocation, but if something is added, or something else is given, then it is more than revocation, and cannot be done by mere obliteration. Here something is simply taken away which was given before, and the effect is to make the estate less than it was before. It does not give the mother anything which she had not before, because she had an estate for life before. The estate in fee includes an estate for life. It seems to have been the intention of the Legislature, as far as one can judge from the language they have used, that revocation might be accomplished by simple obliteration, without making a new attested will. It appears to me that this merely amounts to a simple revocation, because it simply takes away a part of the estate which had before been given.

BAGGALLAY, J.A.—I am of the same opinion. Having regard to the 5th and 6th sections of the Statute of Frauds, I assent to the argument which has been addressed to us by Mr. Cave and Mr. Romer, and which appears to have been assented to in the Court of Exchequer, that the words "clause thereof" in the earlier part of the 6th section must mean clause of the will. Then we find the provision is that no will in writing of lands, nor "any clause thereof," shall be revocable otherwise than in the manner mentioned in the further part of that section. But I am unable to assent to the limited construction which has been put on the word "clause" as used in that section. In fact, I am disposed to give it a more extended signification even than may be necessary for the decision of the present case. It appears to me to be used only in the sense of a part of a will, subject, perhaps, to this qualification, that the words revoked must be such as to leave the rest of the will intelligible. The provision is made for two classes of cases, total and partial revocation, and we find words used which are more or less applicable to both classes. We have in the first case a form applicable to both, namely, revocation by some other will or codicil in writing, or other writing declaring the same. Then we have four other modes of revocation, the first three of which, burning, cancelling, and tearing, would appear to be more applicable to the case of complete revocation, and the fourth obliteration might be applicable either to the one or the other. But I cannot see that those four alternative forms are applicable to any other classes of revocation than those which may be effected by will or codicil. Now, if this testator had made a codicil, and had said, "I desire that in my will the devise to my mother shall be read as if the words 'her heirs and assigns for ever' were omitted," it cannot be denied that effect could be given to that codicil, and those words

could be considered as not included in the will. Then, if the same effect can be produced by obliteration only, it appears to me this section expressly provides that it may be done by obliteration, and that is exactly what the testator has done. He has struck out these words by obliteration, and it has produced the same effect as if there had been a codicil executed in writing directing the same thing to be done.

MELLOR, J.—I am of the same opinion. I think the judgment of the court below gives much too narrow a construction to the word "clause." I very much incline to agree with Baggallay, J.A., and read it as equivalent to "part of the will," but at all events, when you can by obliteration strike out a portion of a will following other words, and yet leave an effective disposition by sensible words remaining, I do not see why that should not be done just in the same sense and in the way as revocation by some writing. To the extent to which the present obliteration goes, it strikes out words which enlarge the estate of the devisee, but it leaves words perfectly consistent and sensible and effective, which give a life estate. I read the clause, or paragraph, or sentence as manifestly divisible, because you can, by the mere obliteration of certain words, leave a perfectly effective devise of an interest, which is less than that which was before given by the testator. It appears to me, therefore, to come necessarily within the terms used by the statute, and to be a perfectly effective revocation.

GROVE, J.—I am of the same opinion. It seems to me that the judgment of the court below, and the arguments of the plaintiff's counsel here, do not give sufficient effect to the distinction between the terms "clause" and "devise." The argument would possibly have been sound if "clause" meant the same thing as "devise." As the Act has said "devise" as well as "clause," perhaps clause signifies something so far differing from "devise" as to mean any part which can be struck out leaving a remainder which is sensible.

Judgment for defendant. Judgment below reversed.

Solicitors for the appellants, *H. B. Clarke and Son*, for *Harrison and Smith*, Wakefield.

Solicitors for the respondents, *Speechley and Co.*

Feb. 21 and May 18.

ANCONA v. ROGERS AND OTHERS. (a)

Bills of Sales Act 1854 (17 & 18 Vict. c. 36) s. 1—
"Possession" or "apparent possession" of goods
—What amounts to—Right of trustee in liquidation as against grantees of debtor under unregistered bill of sale—Bailor and bailee—Interpleader.

Mrs. H., having borrowed various sums of money from the plaintiff, on the 10th Sept. 1874, executed a bill of sale to him of furniture and other articles as a security for the repayment of the money with interest. By the terms of the bill of sale Mrs. H. was to retain possession of the goods until payment of the debt was demanded by the plaintiff, who was entitled to take possession of the goods if the debt was not repaid with interest within twenty-four hours after demand. The bill of sale was not registered. Mrs. H., intending to

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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reside at O. Hall, the house of the interpleadant, delivered possession of some of the goods to one Bishop, who, under her directions, kept the goods for some time, and then took them to O. Hall. On arriving there Bishop was allowed to place the goods in four rooms, and having locked the doors, to take away the keys.

The plaintiff subsequently served Mrs. H. with a written demand for payment of the money owing to him, and not having been paid within twenty-four hours after such demand, he went to O. Hall and demanded possession of the goods from the interpleadant, to whom he gave notice of his title and threatened to take away the goods by force. The interpleadant, however, refused to allow him to take possession of the goods, or to enter the house. Subsequently, Mrs. H. filed a petition for liquidation, and the defendant was appointed trustee in liquidation.

Held (reversing the decision of the Exchequer Division below), that, when the petition for liquidation was presented, the goods were still in the "possession" of Mrs. H. within the meaning of the Bills of Sales Act (17 & 18 Vict. c. 36), s. 1, and that the defendant, her trustee in liquidation, was therefore entitled to them as against the plaintiff claiming under the bill of sale.

THIS was an appeal from a judgment of the Exchequer Division, making absolute a rule obtained by the plaintiff to enter a verdict for him against one of the defendants in an interpleader action.

The hearing of the case in the Exchequer Division below, with the arguments and judgment, will be found fully reported in 33 L. T. Rep. 749.

For the purposes of this report the facts are sufficiently set out in the head note above, and the judgment of the Court of Appeal (*post*).

M^cIntyre, Q.C. and Paterson, appeared for the defendants.

Philbrick, Q.C. and B. E. Webster, for the plaintiff.

In the course of the arguments (which were substantially the same as in the court below) the following authorities were cited and referred to:

- Ex parte Jay*; *re Blinkhorn*, 31 L. T. Rep. N.S. 280; L. Rep. 9 Ch. App. 697; 43 L. J. 122, Bank;
Robinson v. Briggs, 23 L. T. Rep. N.S. 395; L. Rep. 6 Ex. 1; 40 L. J. 17, Ex.;
Gough v. Everard, 8 L. T. Rep. N.S. 363; 2 H. & C. 1; 32 L. J. 210, Ex.;
Comyns' Digest, vol. 7, Trespass, B. 4;
Batist v. Hartley, 26 L. T. Rep. N.S. 968; L. Rep. 7 Q. B. 594;
Ex parte Lewis; *re Henderson*, 24 L. T. Rep. N.S. 785; L. Rep. 6 Ch. App. 626.

Cur. adv. vult.

May 18.—The judgment of the court (Cockburn, C.J., Mellish, L.J., Baggallay, J.A., Mellor and Grove, JJ.) was delivered by

MELLISH, L.J.—This was an appeal from a judgment of the Exchequer Division on an interpleader issue directed to try the question whether certain furniture and other goods were the property of the plaintiff, J. S. Ancona, as against W. B. Rogers, the trustee of the estate of Charlotte Bridget Hewitt, a liquidating debtor. The plaintiff claimed under a bill of sale executed by the debtor. The defendant disputed the validity of the bill of sale under the Bills of Sales Act, upon the ground that on the day when the debtor presented her petition the goods were still in her possession. Mrs. Hewitt borrowed various sums from the plaintiff

between April 1874 and July 1874, and on the 10th Sept. she executed a bill of sale of the furniture and goods in question, as a security for the money, with interest. By the terms of the bill of sale Mrs. Hewitt was allowed to retain possession of the goods until payment of the money was demanded; but if she did not repay the money, with interest, within twenty-four hours after demand, the plaintiff was entitled to take possession of the goods. The bill of sale was never registered. Mrs. Hewitt having given up her house at Gatwick, and intending to go and reside at the house of Mr. D. H. W. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, in a portion of his house to be afterwards arranged between them, delivered possession of the goods to one Bishop, to keep for her for some time, and then to convey them to Ogbeare Hall. On the 12th Oct. the goods were brought by Bishop to Ogbeare Hall. Mr. Horlock was not at home, but Mrs. Horlock allowed the goods to be placed in four rooms, and Bishop, without any objection on the part of anybody, locked the doors of the four rooms, and took away the key with him. On the 23rd Oct. the plaintiff served Mrs. Hewitt with a written demand for the payment of the money owing to him. The money not having been paid, the plaintiff, on the 27th of Oct., went to Ogbeare Hall and demanded possession of the goods both from Mr. Horlock's bailiff and Mr. Horlock himself. He gave notice to Mr. Horlock of his title to the goods, and threatened to take them by force. Mr. Horlock, however, refused to allow him to enter the house, or to take possession of the goods. On the 4th Nov. Mrs. Hewitt presented her petition for liquidation. Under these circumstances it has been held by the Exchequer Division that Mrs. Hewitt was not in possession of the goods at the time she presented her petition within the Bills of Sales Act, and the court, on that ground, ordered the verdict found for the defendant at the trial to be set aside, and a verdict to be entered for the plaintiff. From this decision the defendant has appealed. It seems necessary to consider, first, who was in possession of the goods after they were locked up in the rooms at Ogbeare Hall, and, secondly, what was the effect of the plaintiff having become entitled to the possession of the goods by demanding the money, and of his attempt to obtain actual possession of them. Now there can be no doubt that the goods were delivered by Mrs. Hewitt to Bishop, and that Bishop took possession of them as her bailee; but we are of opinion that the bailment to Bishop terminated when the goods were placed in the rooms at Ogbeare Hall. It is true that Bishop locked them up and took away the key, but he held that key as agent to Mrs. Hewitt, who was herself at Launceston; nor does it appear, and there is nothing to prove, that Bishop was intended to exercise any further dominion over them. We will next consider whether the goods came into the possession of Mrs. Horlock, and this depends upon the question whether what took place at Ogbeare Hall amounted to a delivery of the possession of the goods by Mrs. Hewitt to Mr. Horlock as bailee to hold for her, or to a delivery of the possession of the rooms by Mr. Horlock to Mrs. Hewitt. This is a question of considerable nicety, but we are of opinion that what took place had the effect of a delivery of the possession of the rooms to Mrs. Hewitt, for the purpose of keeping her goods in

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them. The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives the means of entrance. The possession of premises cannot be changed solely by the delivery of a key; but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession of the premises to which the key gives the means of entrance should be changed. It is true that in this case the key was not delivered to Bishop, but taken by him; but the rooms were appropriated by Mrs. Horlock to the reception and custody of the goods, and no objection was made then or afterwards to the key being taken by Bishop, who was acting in the matter as the agent of Mrs. Hewitt. On the contrary, Mr. Horlock, on returning home, assented entirely to what had been done in his absence. Mr. Horlock was under no obligation to give Mrs. Hewitt possession of those rooms, and if he had dissented from what was done in his absence, and had opened the doors of the rooms either forcibly or by another key, we think he would have re-obtained possession of his own rooms, and at the same time obtained possession of Mrs. Hewitt's goods as bailee. There is, however, no evidence that he ever did open the doors prior to the 4th Nov., and it is quite possible that he may have preferred to allow Mrs. Hewitt to have the use of his rooms to keep the goods in rather than to take upon himself the responsibility of being the bailee of them. We are of opinion, therefore, that Mrs. Hewitt was the only person who was in possession of the goods, whilst they remained locked up in the rooms at Ogbear Hall. If this conclusion is correct, the only other point which it is necessary to determine is whether the fact of the plaintiff having become entitled to the possession of the goods, and having, although unsuccessfully, endeavoured to obtain possession of them, takes the case out of the provisions of the Bills of Sales Act. Now if the case depended upon the Bankrupt Act there is no doubt that the endeavours of the plaintiff to obtain possession would afford abundant evidence that the goods did not remain in the possession of Mrs. Hewitt with his consent, but, as was observed in the case of *Ex parte Jay* (*ubi sup.*), there is a material distinction between the provisions of the Bills of Sales Act and those of the Bankrupt Act. In the Bills of Sales Act the words, "with the consent of the true owner," have been purposely omitted, and the Act is applicable, if at the time the grantor of the bill of sale becomes bankrupt the goods are in his possession, whether with the consent of the true owner or not. We think it was intended that if a man chooses to lend money on a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy. Although these observations are sufficient to dispose of the case, it may be desirable shortly to consider what would be the result if we are wrong in supposing that the goods were not delivered to Mr. Horlock as bailee. Now, if the goods were delivered to Mr. Horlock as bailee, there would be two questions to be considered; first, are goods in the possession of a bailee to hold on account of the bailor still in the possession of the bailor within

the meaning of the Bills of Sales Act; and, secondly, if they are, were the goods taken out of the possession of Mrs. Hewitt, by the plaintiff having required Mr. Horlock to allow him to take possession of them, and by Mr. Horlock having wrongfully refused to deliver possession of them. Now, with reference to the first question, there is no doubt that a bailor, who has delivered goods to a bailee, to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sales Act the word "possession" was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechicon, would, in a popular sense as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sales Act. As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him, and is exercising dominion over them, the case seems within the mischief against which the Act is directed. Lastly we have to consider whether the demand made by the plaintiff requiring Mr. Horlock to deliver up the goods, and the refusal by Mr. Horlock to deliver up the possession of the goods, assuming Mr. Horlock to be the bailee of the goods, had the effect of taking the possession of the goods out of Mrs. Hewitt. It was admitted in the argument before us, as it was impossible to help admitting, that this demand and refusal had not the effect of putting the plaintiff into possession of the goods. It was argued, however, that though the plaintiff never obtained possession of the goods, yet that the demand once refused had the effect of taking the goods out of the possession of Mrs. Hewitt. We cannot understand how, if the plaintiff never obtained possession of the goods, the possession could be changed at all by the demand and refusal to deliver them up. Mr. Horlock had no title to the goods of his own of any kind, and if he held the goods on Mrs. Hewitt's account before he refused to deliver them up, it seems to us he still held them on her account after he refused to deliver them up. There is no evidence that he either attorned to the title of the plaintiff, or set up any title of his own as against that of Mrs. Hewitt, prior to the 4th Nov. We think, therefore, that if the goods were ever delivered to Mr. Horlock, as the bailee of Mrs. Hewitt, he still continued to hold them as her bailee on the 4th Nov. On the whole, we are of opinion, that the judgment of the Exchequer Division ought to be reversed, and the rule to enter a verdict for the plaintiff discharged.

Judgment accordingly. Judgment below reversed.

Solicitors for plaintiff, *Pattison, Wigg, and Co.*
Solicitors for defendants, *Duignan and Smiles.*

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RIVER WEAR COMMISSIONERS v. ADAMSON AND OTHERS.

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Tuesday, May 23.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., DENMAN J., and POLLOCK, B.)

RIVER WEAR COMMISSIONERS v. ADAMSON AND OTHERS. (a)

Harbours, &c., Clauses Act (10 & 11 Vict. c. 27), s. 74—Damage to pier by abandoned vessel—Liability of owner—Act of God.*Sect. 74 of the Harbours, &c., Clauses Act of 1847, enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the buoys or works connected therewith," &c.**Held, by the court (unanimously reversing the decision of the court below), that the damage contemplated by this section was damage such as human agency could avert, and not damage caused by the Act of God, or of the Queen's enemies.**Dennis v. Tovell* (L. Rep. 8 Q.B. 10; 27 L. T. Rep. N.S. 482; 42 L. J. 40, Q. B.) overruled.*The defendants' ship, The Natalian, was driven ashore whilst endeavouring to make the port of Sunderland. The crew were saved and the ship abandoned. While the storm continued the vessel was driven by the force of the winds and waves against the pier of the plaintiffs and did damage to it to the amount of 1500l.**The plaintiffs sought to make the defendants, the owners of the vessel, liable under sect. 74 of 10 & 11 Vict. c. 27.**The cause was originally tried at the Durham Summer Assizes 1873, before Quain, J., and a special jury, when a verdict was entered for the plaintiffs, and leave reserved for the defendants to move to have the verdict entered for them on the ground that the damage was solely the result of the storm.**The Queen's Bench Division, on the authority of Dennis v. Tovell (ubi sup.) discharged the rule.**Against this decision the defendants appealed.**Gorst, Q.C. and Greenhow (with them the Attorney-General, Sir J. Holker, Q.C.), argued for the appellants.—This case is distinguishable from Dennis v. Tovell (ubi sup.). In that case there were still some of the crew on board. Here the ship was abandoned. [The MASTER of the ROLLS.—Supposing all the crew had been washed overboard with the exception of the cabin boy, what should you say in that case? The section also includes "float of timber," which generally has no one in charge.] If we make no exception the defendants might be liable for acts arising from the clear negligence of the plaintiff, or, again, in the case of salvors bringing in the ship, must the owner still be held liable for their negligence? [The MASTER of the ROLLS.—It is no answer to say that in a certain remote or not thought of case the application of the Act does not commend itself to our reason.] The latter part of the section shows that some exception was contemplated. The law compels the employment of a pilot—here the owner is compelled by the act of God. This court is not bound by the decision in Dennis v. Tovell (ubi sup.).**Herschell, Q.C. and H. Shield (with them C. Russell, Q.C.), contra.—The first part of the sec-**tion is general, and limited in no way—it starts with an absolute rule. The damage must fall somewhere; it should rather fall on the person whose property has done the damage, than on a person whose property has suffered the injury. It is somewhat dangerous to insert words into an Act of Parliament. Probably, by excluding the owner's liability when there was a plot on board, the Legislature showed they intended to include all other cases. [MELLISH, L.J.—When the law imposes a duty does it not always except what happens by the act of God or the Queen's enemies?] The terms of the law are precise and plain. In either case an innocent party must suffer.**JESSEL, M.R.—No doubt there are difficulties attending any proper construction of the section the meaning of which we are called upon to decide. It is equally indubitable that a mere literal construction would, on a consideration of the nature and objects of the statute, lead one to the conclusion that in every case the owner of the vessel was liable for any damage done by the vessel to the harbour, dock, or pier. But the conclusions to which such a construction would lead are so startling that I think we must consider that they could not have been in the contemplation of the Legislature. The first proposition is this, that if a vessel is driven by stress of weather without the fault of anyone, and is shipwrecked against the pier, the unfortunate owner of the vessel must not only lose his vessel by shipwreck, but must also pay the damage done to the pier. It is something like the hospitality which in the long past was shown to vessels when they had the misfortune to be wrecked on the coast. That would be a very startling conclusion to arrive at; but the matter does not stop there, because, if the vessel were driven against the pier by the undertakers themselves, so that it was their wrongful act which caused the vessel to be driven against the pier, the damage would still be done by such vessel. Again, a literal construction would lead to this result—that the person who did the act might make the person who was wholly innocent pay for the damage done by such wrongful act. There are many other cases which might be put. One was put in argument perhaps not so probable as the first I have suggested, but perhaps not more improbable than the second, the vessel might be taken by the Queen's enemies, and before condemnation be used either as a battering ram or otherwise against the pier, and then, being recaptured, the unfortunate owner in whom the title would revert would be liable for damage done to the pier by the Queen's enemies. A great number of other cases equally startling might be put as the result of construing the section literally. If that leads to so absurd and revolting a conclusion, then I think it is the duty of a court when construing the section to give it what they may consider a fair interpretation. In the first place on reading the section we find that it contains a limitation—there is a proviso at the end of the section—"provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel which shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of." The reason which appears tolerably obvious to my mind for that provision is this—the owner is com-*

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

pelled by law to put the vessel in charge of the pilot, and he ought not to be liable for the acts of the pilot when the State takes the charge of the vessel from him and puts it into the hands of somebody else. The pilot may be liable, but the pilot is only liable for negligence, so that if in the case I put of storm or tempest—or as we lawyers call it, by the act of God—the vessel is driven against the pier, the loss in that case would fall upon the pier owners. Therefore there is one case in which, at any rate, the pier owners are to take the chance, which every owner of a pier must know must result from the action of the weather, of damage in the same way as he might be damaged by a thunderstorm, or by any other accident, independently of any vessel being concerned in doing the damage. It appears to me, therefore, judging from that proviso, the Legislature did not intend to make the owner always liable where the matter happened from causes entirely beyond his control. Therefore we are driven back on the familiar maxim of law—"That where there is a duty imposed or a liability incurred, as a general rule, there is no such duty required to be performed, and no such liability required to be made good where the event happens through the act of God or the Queen's enemies." Considering that that is the general rule of law, and looking at the general object and purview of this Act of Parliament, and considering the exceptions I have mentioned, I think we may well come to the conclusion that the act of God and the Queen's enemies were not intended to be comprised within the first words of the section, and consequently, in this case, the defendants ought not to be liable. Therefore, I think the decision of the court below must be reversed.

KELLY, C.B.—I entirely agree with Mr. Herschell in the argument he has urged that we are not to disregard the express terms of an Act of Parliament because their literal construction does not provide against a possible case of inconvenience or even of injustice. But there are certain principles of law which, though not expressed either in the common law or in the judgments of judges, or in the language of Acts of Parliament, nevertheless must be held to qualify all that may fall from judges in expounding the common law and all that is to be found throughout the statutes in the various Acts of Parliament. Among those principles and maxims is this—that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God, and the justice of that maxim, and that it does apply to all cases, except where by express contract it is otherwise provided, is so clear that I think we ought to apply it to the present case, and though at first sight the Act seems to provide that the owner of the vessel shall be liable when it comes in contact with the pier, we must qualify that provision by introducing into it the maxim of the law that no man is to be answerable for the act of God. I think that is implied in the Act of Parliament, and we cannot hold the defendant liable here. But I must say upon a technical consideration of the language of the Act, I go further, and think that reading the whole of it together, it contemplated the case of a vessel or float of timber which was in charge of some person or persons. The words are: "The owner of any vessel or float of timber shall be answerable to the undertakers

for any damage done by such vessel or float timber, or by any person employed about the same to any harbour, dock, or pier, or the quays or wharves connected therewith"—if it had stopped there, no doubt the provision would have been general, absolute, and imperative; but it does not, there is a comma in the Act of Parliament after the word "therewith," and the section proceeds—"the master or person having the charge of such vessel or float," that is, continuing the same sentence, and, therefore, seems to imply that the sentence refers to a vessel of which some master or person has the charge; and then it goes on to say: "The master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same, and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same." Then what is the meaning of the word "also?" It is to superadd to the liability of the master or person by whose wilful act or negligence the mischief is occasioned—the liability there enacted by the statute. It appears to me that it is a reasonable construction of the statute, even apart from the implication to which the Master of the Rolls has alluded (and in whose observations I entirely concur), as to anything arising from the act of God. In addition to that, I think upon the reasonable construction of the statute itself the defendants cannot be held liable. I would only observe in regard to what has fallen from the Master of the Rolls, that it is clear it never was the intention of the Legislature to make the owner liable, except in the character of owner, for anything for which another is made expressly responsible, and which takes the power out of the owner's hands to prevent the act, whatever it may be, which may occasion the mischief. If it had been intended by the Legislature that from whatever cause, whether through the wilful act or negligence of the master or other persons, the pier had been injured, yet nevertheless the owner should be liable, they would never have introduced into the same section the provision that where there is a pilot whom the owner is bound to employ who takes the management of the vessel out of his hands, then he shall be no longer liable. It is to be observed upon this question, and that fortifies the construction which I must say, speaking for myself, I put upon the section taking it altogether, though this section exonerates the owner, it does not exonerate the master or any other person through whose wilful act or negligence the mischief is occasioned. It says the owner shall be liable where either the master or person in charge of the vessel, by wilful act or negligence, occasions the mischief to the pier, or runs the vessel against the pier, save only in the case of the pilot; but it also goes on to provide, and that is the principal object of that part of the section, that in addition to the liability of the owner, which no doubt is specially enacted, the individual who is the wrongdoer and who occasions the mischief, in question, whether the master or the person in charge, who is the real origin of the mischief, shall be likewise liable as well as the owner. I think, therefore, on all these grounds, the defendants are not liable, and consequently the judgment of the court below ought to be reversed.

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MELLISH, L.J.—I am of the same opinion. I think, taking the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law; because if that is not the intention it is not easy to see the objects of the section at all. Looking at the pointed language in which negligence is brought in, or "wilful act," and looking to the fact that the section goes on to speak of the master or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the owner nor the crew had anything to do with it. But the question arises, because we may decide that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever where the vessel physically damages the wall, the owner is to be liable? I am of opinion the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier. It is quite consistent with our law, that in certain cases a person may be made liable as insurer against the acts of all the men whom he may have under his control. And many examples of that may be put, but although that is the case with regard to the act of man, the act of God is in point of law opposed to that which may be said to be the act of man, and the act of God does not impose any liability upon anybody. Although, of course, the Legislature are not bound by any such rule, and may make a person liable for what is the consequence of the act of God if the Legislature so pleased, yet, in construing the words of the Act of Parliament, we are justified in assuming that the Legislature did not intend going against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend. Then the question is, looking at the whole of the section, did the Legislature intend to make the owner of the ship liable only for the act of man, or did they intend to make him liable for the act of God, or where without his own fault, or the fault of anybody whatever, but through the violence of nature the vessel has been taken against the pier? Looking at it so, without going through the words of the section again, it appears to me that I am bound to agree with the remarks which have been made by the Master of the Rolls and by the Lord Chief Baron, and that the section points to something that is done by the act of man, or to the act of the person in charge; it looks as though the Legislature considered somehow or other through the act of man damage might be done to the pier, and then they say, to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say he shall be liable; but if it was the consequence of the negligence of somebody else, that person is not discharged, but you have your remedy over. Then they make one exception to that rule in the case of the pilot. They say, if a pilot is in charge of the vessel, even although it may be by his act, the owner will not be liable. I do not think it was intended by the Legislature to put upon the ship-owner the absolute liability for damages occasioned

by the ship being driven against the pier when she is really upon the high seas, and thence being driven from outside the harbour by the violence of the winds and waves against the pier; therefore I agree that the judgment should be reversed.

DENMAN, J.—I am of the same opinion. No doubt, taking the words of sect. 74, it is possible to hold that they include an absolute liability on the part of the owner of the vessel to the dock-owner. The words are strong, intelligible, and grammatical; but I am of opinion that, taking the final words of the section, some qualification must be put on those words, not by introducing fresh words into the Act of Parliament, or supposing a clause to exist in it which does not exist, but by qualifying those words by well known principles of law which must be taken to override an Act of Parliament. I apprehend that there is no principle of law better established than this, that in every Act of Parliament words are not to be construed to impose a liability for an act or acts done, upon individuals, if those acts are not done by individuals, or not caused by their property or servants, but are acts which are substantially caused by a superior power, such as the law calls the act of God. In this case there can be no doubt, from the evidence, that the injury occasioned by the vessel was not the result of any neglect on the part of the owner, or on the part of any person having charge of the vessel, or indeed of any human being, but was really the effect of the violence of the winds and waves overcoming all control on the part of the master or owner of the vessel, and forcing the vessel against the pier. Under these circumstances I apprehend, upon the general principle, that every statute is to be so construed as to leave untouched a principle of common law which applies to all similar cases, we are not bound to hold, and ought not to hold in this case, that damage was done by the vessel within the meaning of the Act of Parliament, but that, on the contrary, it was damage that was occasioned by the act of God, and, therefore, no action lies. With regard to the other words of the section I think a strong argument arises from the words which contemplate the punishment of a person who had charge of the vessel. I do not myself, however, go so far as to think that there might not be a case where the owner of the vessel would be liable where no person was in charge. If there was a person appointed, although not on board, but who ought to have been controlling the vessel, and through his negligence the accident is occasioned, I think the section would apply. Therefore, I should put that qualification on the proposition that it must be the act of man. I think this section does not exclude the exception of the act of God, which, in my opinion, was the sole cause of the accident here; and, so thinking, I am of opinion the defendants are not responsible.

POLLOCK, B.—I am of the same opinion, although the process of reasoning by which I have arrived at that conclusion is not the one which has been adopted by the other members of the court. We are bound to put a reasonable construction upon the section. To put a reasonable construction is not to put a construction which might produce the result that may appear to the court reasonable, but it is to apply to the section that meaning which would seem to carry out the intention of the Legislature as applied to the subject matter

with which they were dealing. I find the ordinary Dock Act Clause providing for the cleaning of the dock the protection of things in the dock, and all the necessary provisions with regard to vessels and timber floats which may be placed in the dock, or which are going into the docks or going out of the docks. Looking at it in this aspect, one of the things the section intends to provide is that in the event of the structure of the dock being injured by vessels or floats of timber, the owners of the dock are not to be put to the proof of negligence or to the proof of showing how the injury was occasioned. I am not prepared to say that if it was the case of damage done during the night to one of the dock gates by a float of timber that it would be any answer to say it arose from some unforeseen cause or accident against which human providence could not protect it. I do not know what would be meant in that case by the act of God. We know what is meant by the act of God in the case of lightning, &c. I do not know how it may be as to matters as to which the providence of mankind may or may not prevent a particular result. Therefore, if that were the case here, I should pause before I came to the conclusion at which my brothers have arrived; but this is a case in which the vessel was extraneous to the dock, entirely out on the high seas, she met with certain risks and injuries which compelled her crew to leave her, and she became derelict, and in that condition, being wholly extraneous of the dock, she is, by force of the elements, driven against it. That seems to me to be an event which the section did not intend to provide against, and there is nothing, looking to the subject matter, and the difficulty of providing against it, unjust or unreasonable in it. In all other respects I agree with all that has been said, and I think the judgment ought to be reversed.

Judgment reversed.

Solicitors for plaintiffs, *J. W. Hickin, for Ralph Simey, Sunderland.*

Solicitors for defendants, *Johnson and Weatheralls for E. H. Haswell, Sunderland.*

Friday, June 16.

APPEAL FROM EXCHEQUER DIVISION.

(Before JAMES and MELLISH, L.J.J., BAGGALLAY, J.A. and QUAIN, J.)

WOOLER AND WIFE v. KNOTT. (a)

Landlord and tenant—Lease of public-house—Tenant's covenant not to do any act "to affect the licence"—Construction—Conviction of tenant by justices for offences against the Licensing Acts—Convictions not recorded on licence—Breach of covenant—Forfeiture—Licensing Acts 1872 and 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49, s. 13).

After the Licensing Act of 1874 came into operation the defendant became lessee of a public-house belonging to the plaintiffs, and by the lease (containing the usual clause of forfeiture for breach of covenant), the defendant covenanted "not to do, omit, or permit or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the said

public-house." Defendant was convicted before the justices of having committed, on the same day, two offences against the Licensing Acts, but the justices directed, under sect. 13 of the Act of 1874, that neither of the convictions should be recorded on the defendant's licence.

Held (affirming the decision of the Court of Exchequer below), that the licence was not "affected" within the meaning of the covenant in the lease by such convictions, and consequently that there had been no breach of covenant, and no forfeiture.

THIS was the plaintiff's appeal from a decision of the Exchequer Division (Kelly, C.B. and Huddleston, B.) allowing a demurrer of the defendant to the plaintiff's statement of claim in an action of ejectment for breach of covenant.

The case below is fully reported in 34 L. T. Rep. N. S. 362, where all the facts are set out. They sufficiently appear, however, in the headnote above. By the Licensing Act 1874 (37 & 38 Vict., c. 49), s. 13:

Where any licensed person is convicted of any offence against the principal Act (1872), which by such Act was to have been, or might have been endorsed upon the licence, or of any offence against this Act, the court before whom the offender is brought shall cause the register of licences, in which the licence of the offender is entered, or a copy of the entries therein relating to the licence of the offender, certified in manner prescribed by sect. 58 of the principal Act, to be produced to the court before passing sentence, and after inspecting the entries therein in relation to the licence of the offender, or such copy thereof as aforesaid, the court shall declare as part of its sentence whether it will or will not cause the conviction for such offence to be recorded on the licence of the offender, and if it decides that such record is to be made the same shall be made, &c.

Morgan Howard, Q.C. and Willis for the plaintiffs.—An act affecting the licence was complete, and the covenant in the lease was broken directly anything was done, which could be the ground of a conviction which might be recorded on the licence. Under the Act of 1872 every conviction was endorsed, and there was no discretion left in the justices as to whether they would or would not endorse a conviction on the licence. Directly an act, which might lead to a conviction, was done, the lessee had done all that she could do to endanger the licence. The act itself is the thing to look at, and not what the justices may do in dealing with it. [JAMES, L.J.—I grant that; but three indorsements are necessary to forfeit the licence, and can you say that an act or acts that will cause one or two indorsements—and are therefore, in some sense, on the road to the forfeiture of the licence—can be said to "affect" the licence in a sense involving forfeiture of the lease?] Then it is submitted that, by the operation of other sections of the Act of 1872, the licence has been "affected." Sect. 36 of that Act says a register shall be kept in which things affecting the licence shall be entered; and (sect. 55, sub-s. 3) that convictions shall be entered on the register. [MELLISH, L.J.—The words are "such conviction." That means a conviction that has been indorsed on the licence.] [JAMES, L.J.—Sect. 56 shows that repetition is the offence Parliament had in view.] The licence is a form of property, and the value of it to the landlord would be affected by a conviction. [JAMES, L.J.—The lease does not say "affecting the value of the licence;" you are really reading it as if the covenant were that nothing should be done against the licensing laws.] It

(a) Reported by W. AFFLICK, Esq., Barrister-at-Law.

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can scarcely be denied that the prospects of renewal are worse than they were; and, if so, how can it be disputed that the licence is "affected?" The very object of this covenant was to protect the renewal of the licence—it is for the benefit of the landlord. [MELLISH, L.J.—But the words are "the licence for the time being," and a licence never lasts longer than a year.] Suppose the action of ejectment had been brought the same day, it could not have been said that the landlord must wait till it is seen what the justices will do.

Cave, Q.C. and Heath, for the defendant, were not called upon.

JAMES, L.J.—I am of opinion that the decision of the court below was right and must be affirmed. It is argued here as if this covenant was equivalent to a covenant that no offence against the Licensing Acts should be committed. If that had been the intention it would have been very easy to say so; but that has not been said. The words are, nothing shall be done "that can or may affect, lessen, or make void either or any of the licences for the time being." An act, repetition of which, under certain circumstances, if followed by certain other acts, might "affect" the licence, is not itself an act "affecting" the licence. It is not to be presumed that the person will do the further acts and offences. It is not enough that it is possible or probable that the other acts will be done. An act which may affect the minds of the justices on a future occasion, as when they have to consider whether they shall renew the licence or not, cannot be said to be an act "affecting" the licence.

MELLISH, L.J.—I am of the same opinion. If the justices had ordered these two convictions to be recorded on the licence, then, I think, the licence would have been affected, for then its renewal would have been greatly endangered. As to whether one conviction recorded would have been enough I am in doubt, and will say nothing; but if none is recorded, I am clearly of opinion that the licence is not affected, so that a forfeiture must follow. I think the covenant does not relate to affecting the chance of renewal, but the existing licence.

BAGGALLAY, J.A. — Nothing would have been easier than to have made a forfeiture clause extending to all offences against the Licensing Acts. But that has not been done; and it is impossible to put such a construction on these words, occurring as they do, in a forfeiture clause, and, therefore, demanding a construction favourable to the lessee.

QUAIN, J. — These acts, and the conviction following upon them, do not affect the licence. They may affect the character of the tenant, but they do not affect the property of the landlord through the licence. That is as good as ever it was. If there had been any endorsement on the licence then, no doubt, a serious question would have arisen, but there has been none, and the licence is as good as if there had been no convictions. The covenant does not relate to the chance of renewal, but to the existing licence.

Judgment below confirmed. Appeal dismissed.

Solicitor for the plaintiffs, O. B. Wooler.

Solicitors for the defendants, Iliffe, Russell, and Iliffe, for Barron, Darlington.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON.)

Thursday, March 30.

LASCELLES v. BUTT. (a)

Mode of trial—Judicature Act 1873, ss. 56, 57—Order XXXVI., rules 2, 3, 5—*Right of plaintiff to elect more than once*—*Time*—*Practice*.

In a suit to ascertain boundaries the plaintiff gave notice of trial before a judge and obtained an order that the evidence should be taken vivâ voce at the trial. Five weeks afterwards he applied that the suit might be referred to an official referee, on the ground of saving expense and that a local investigation was necessary:

Held, that the application was out of time.

Held, also, that the plaintiff, having already selected the mode in which his action should be tried, could not afterwards resort to another mode of trial.

ADJOURNED SUMMON.

The original bill was filed on the 23rd May 1874, and was founded on an alleged liability of the defendant to erect a fence between the defendant's land and the land of the plaintiff. The plaintiff alleged that a covenant to that effect was to be found in the defendant's purchase deed.

The defendant's answer showed that there never was any such covenant, and the plaintiff thereupon amended his bill and, omitting all reference to the alleged covenant, converted his bill into a bill to ascertain boundaries.

The defendant, by his voluntary answer to the amended bill, submitted that in order to sustain a suit to ascertain boundaries the plaintiff must establish a clear title to some land in his possession, and that he had not done so and could not do so; that unless some equity was superinduced by the acts of the parties the court had no jurisdiction to settle boundaries, and would not interfere between two independent proprietors to force either to have his rights so determined, and that no such equity existed in the present case.

On the 14th July 1875, the plaintiff filed notice of replication.

On the 17th Nov. 1875, an order was made, on the application of the plaintiff, that the evidence to be given at the hearing of the cause should be taken vivâ voce.

On the 9th Dec. the plaintiff gave notice of trial before a judge for the 20th Dec.

On the 8th Feb. 1876, the plaintiff took out a summons calling on the defendant to show cause why, the trial of the cause having been ordered to be heard under the Judicature Act, the same should not be referred to James Anderson, Esq., one of the official referees appointed under the Act. In support of his application the plaintiff filed an affidavit stating "that it would be a great saving of time and expense to all parties concerned if this action is tried by the Official Referee of the High Court of Justice, inasmuch as the point in issue is the exact position of the boundaries of certain premises, and it will be very difficult, and will occupy much time, to explain all these matters to a judge who has not seen the same."

Swanston, Q.C. and Crossley, for the plaintiff, referred to the Judicature Act, ss. 56, 57, and Order

XXXVI., rules 2 and 3, and contended that taking the rules and the statute together, the plaintiff as a matter of right was entitled to choose in which of the five modes of trial pointed out by the rules he would have his action tried, subject, of course, to the defendant's right to have issues of fact tried by a jury; or that if the matter rested in the discretion of the court, then it was most expedient that in the present instance the court should refer the action to an official referee, because the case could only be decided by inspection of what was on the land, and this could only be done by a local investigation. They cited

Attorney-General v. Stillin, 10 H. of L. Cas. 762;
Wright v. Hale, 6 H. & M.
Maxwell on Statutes, p. 199.

B. B. Rogers (Kay, Q.C. with him), for the defendant.—Originally, when the plaintiff filed replication in July 1875, the cause was to have been heard under the old practice. But then the plaintiff changed his mind, and obtained an order that the cause should be tried under the new practice, and then gave notice of trial before a judge. Now he seeks a third change, but we contend that he is not entitled to it. Having regard to Order XXXVI., rule 5, the court can no doubt vary the mode of trial; but the court has already done so, the plaintiff has already elected and is bound by his election, and cannot apply for another change. Moreover, the application is not within the time prescribed by rule 5. Further, sect. 57 of the Judicature Act has nothing to do with the trial of an action generally, but refers only to issues of fact or questions of account arising in an action. Here, the defendant altogether denies that there is a question of boundaries, and there is a question of law to be decided at the hearing before there can be a reference to settle boundaries. Under the old practice, a plaintiff was not entitled to a decree to settle boundaries unless he showed that some of his land was in the possession of the defendant, or established his title to some equitable relief:

Speers v. Cawter, 2 Mer. 410;
Godfrey v. Little, 1 E. & M. 63.

Until that was decided the court had no jurisdiction to direct a commission to issue. That practice still holds good. Unless, therefore, the plaintiff obtains a decree at the hearing he will not be entitled to a reference to settle boundaries.

THE VICE-CHANCELLOR.—This is a mere matter of proceeding. I think the plaintiff conclusively determined his method of trial when he obtained an order that the cause should be tried under the new practice, and gave notice of trial by a judge. He is therefore precluded, in my opinion, from now seeking another method of trial. I have only to consider whether, when the plaintiff and defendant had joined issue, and subsequently the plaintiff obtained an order under the new practice for the evidence to be taken *visâ voce* at the hearing, the plaintiff can now, under Order XXXVI., resort to a totally different course of proceeding, because by that order five methods of trial are given him to select from. In my opinion, time is a sufficient answer to this application, and, even if the court could extend the time under rule 5, there is the preliminary question to be decided at the hearing before the plaintiff, if successful, can be held entitled to a reference to ascertain boundaries. Upon the ground, therefore, that this application is irregular, and unwarranted by the practice of the

court, and comes too late, the summons must be dismissed with costs.

Solicitors for the plaintiff, *Tucker, New, and Langdale*.

Solicitors for the defendant, *Prior, Church, and Co.*

March 6 and 11, and April 6.

BARING v. STANTON. (a)

Principal and agent—General agent for remuneration—Discount on insurances—Agent's right to retain as against principal—Custom of London merchants—Agency revoked on one insurance—Effect of on agent's right to charge commission for collecting policy moneys.

S., a shipowner, employed B. and Co., merchants, as his general agents at a remuneration, and transacted all his business through them. Part of the business was the insurance of S.'s ships, which was effected by B. and Co., who received a commission of 2½ per cent. for collecting the insurance moneys on lost ships.

In 1872 a ship was lost, and S. demanded of B. and Co. the policies in order that he might collect the insurance moneys himself. B. and Co., although they had no lien or claim on the ship, refused to give up the policies, and collected the policy moneys themselves, charging S. with the 2½ per cent. commission for so doing.

On a bill by B. and Co. against S., to assert a lien on certain ships, and for an account:

Held, that in taking the accounts, B. and Co. were entitled to retain for themselves the 10 per cent. discount allowed them by underwriters in respect of insurances effected by them for S.

Held, also, that as the agency of B. and Co. in respect of the lost ship had been revoked they had no right to withhold the policies, and were not entitled to charge S. with the usual commission for collecting the policy moneys.

THE defendant, George Stanton, was a shipowner, and from the year 1861 to the year 1872 kept a current account with the plaintiffs, Baring Brothers and Company, a firm of bankers and merchants, through whom he transacted all his business.

The course of business between the defendant and the plaintiffs in respect of the current account was, that they charged interest on all debit transactions at the rate of 5l. per cent. per annum, and allowed interest at the rate of 4l. per cent. per annum on all credit transactions, and charged also a commission of 1l. per cent. on the amount of what was called the "long leg of the account"—that is to say, that side of the account which showed the largest amount of transactions. They also obtained an advantage of 15l. per cent. on all premiums for insurances, and charged a separate commission of 2½l. per cent. for collecting moneys payable for losses under policies.

In May 1872, the plaintiffs filed their bill against the defendant, seeking to assert a lien on certain ships of the defendant for the balance due to them from him on his account current, and for consequential relief.

On the 24th Feb. 1875, a decree was made in the plaintiffs' favour, which directed an account to be taken of what was due to them for principal and interest. Under this order the plaintiffs carried

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in two accounts, one showing the current accounts from the year 1861 to the year 1871, the other showing the balance due from the defendant. Upon proceeding to take these accounts, two questions arose, first, whether the plaintiffs were entitled to retain the discount of 10l. per cent. allowed to them by the companies with whom insurances were effected; secondly, whether they were entitled to charge the defendant with a sum of 525l. for commission on receiving the policy moneys of the *Knightsbridge*, a ship which was never mortgaged to the plaintiffs.

As to the first point, the plaintiffs asserted that they were entitled to retain the discount in accordance with the well settled custom of London merchants. The defendant, however, denied that there was any such custom.

As to the second point, the facts were as follows: On the 24th Jan. 1870, the defendant received a telegram informing him of the destruction by fire of the *Knightsbridge*, which was insured with her freight for 21,000l. The policies on this ship were in the hands of the plaintiffs on the defendant's account. The same day the defendant wrote to the plaintiffs the following letter:

Gentlemen,—The policies on the ship *Knightsbridge* having been refused to be handed over to me this morning by your Mr. Theobald, with a reply that what I might require I had better inform you by letter, I therefore beg to say that the ship *Knightsbridge* having been destroyed by fire at sea it is necessary for me to give notice of abandonment to the respective underwriters and for this purpose may I ask you to be good enough to cause them to be handed over to the bearer, as no time should be lost.—Your obedient servant,

Geo. STANTON.

The same day the plaintiffs wrote to the defendant the following reply:

Sir,—In reply to your letter of this date we beg to say that as the insurance on the *Knightsbridge* was effected by us and in our name, we will give the requisite notice of abandonment to the respective underwriters.—Your obedient servants,
BARKING BROTHERS & Co.

In answer to the last-mentioned letter the plaintiff, on the 25th Jan. 1870, wrote as follows:

Gentlemen,—I am this morning in receipt of your letter of yesterday's date as to the insurance on the *Knightsbridge*. I reply, I beg to repeat my request for the policies, and offer to pay you the premiums in respect of them. . . .

The plaintiffs did not give up the policies, but themselves collected the insurance moneys and charged their usual commission for so doing.

On the 10th Feb. 1876, the plaintiffs took out a summons, now adjourned into court, to the effect (1) that in taking the accounts directed by the decree the plaintiffs might be allowed the full amounts debited to the defendant in the accounts they had brought in for insurances on the defendants' ships, or their freights, or ship's stores, or disbursements, without giving credit to the defendant for the discount received by or allowed to them by underwriters in respect of such insurances as claimed by the defendant.

(2.) That the plaintiffs might be allowed to retain as their own moneys the sum of 525l., being the difference between the sum of 21,000l. (the sum for which the ship, the *Knightsbridge*, was insured by the plaintiffs), and the sum of 20,475l. (the sum for which credit was given by the plaintiffs, as mentioned in their claim for the total loss of the same ship), which sum of 525l. was claimed and retained by them as their commission (at the rate of 2l. 10s. per 100l.) for collecting the

moneys payable for such loss, and that the defendant might be ordered to pay the costs of the summons.

Cotton, Q.C. and *J. Kaye*, in support of the summons.—On the first point they relied on *Great Western Insurance Company v. Cunliffe* (30 L. T. Rep. N. S. 661; L. Rep. 9 Ch. App. 525). They also cited

Xenos v. Wickham, 14 C. B., N. S., 435, 460;

Power v. Butcher, 10 B. & C. 329.

On the second point, they contended that as the insurance had been effected by the plaintiffs, not at the request of the defendant, but on their own responsibility and with a view to protect their own interests, they were entitled to collect the insurance money and charge their commission.

Kay, Q.C. and *Caldecott*, for the defendant.—*Great Western Insurance Company v. Cunliffe* (sup.) does not apply to this case at all. The distinction is, that the defendant in that case was employed as an insurance broker and nothing else; here the plaintiffs are general agents as merchants and not simply insurance brokers. They are general agents on terms of special remuneration, which does not include the right to charge specially as insurance brokers. Any profit, therefore, which they made over and above their commission as agents they must account for to their principal:

Turnbull v. Garden, 20 L. T. Rep. N. S. 218; 38

L. J. 331, Ch.;

Queen of Spain v. Parr, 21 L. T. Rep. N. S. 555; 39

L. J. 78, Ch.;

Williams v. Stevens, L. Rep. 1 P. C. 352.

As to the second point. The plaintiffs had no interest in the ship and no claim whatever on the policies except for the premiums they had paid, and these the defendant offered to repay them. Neither was the defendant bound to the plaintiffs to employ them as his agents in any special manner. When, therefore, he demanded the policies on the *Knightsbridge*, there was a revocation of their authority as agents in this particular transaction, which in point of law they could not resist. Therefore, as they refused to comply with his demand, and insisted on collecting the policy moneys themselves, they are not entitled to charge him with the usual commission.

Cotton, Q.C., in reply.

The VICE-CHANCELLOR.—Upon the first point the case is conclusively covered by the decision in *Great Western Insurance Company v. Cunliffe* (sup.), which makes it impossible for me to adhere to any opinion adverse to that decision. Lord Justice James there says (p. 537): "Whether you call him a broker or not, the person who is the agent for the merchant or anybody else, by a well established practice obtains the insurances, and receives a discount of 5 per cent., which he puts into his own pocket. He is paid by the underwriter instead of by his principal. And then, by a practice quite as well known, recognised by everybody connected with the business, recognised by the courts of law of this country, referred to over and over again, there is another thing—there is a gratuity which the broker receives upon the settlement of the accounts, being 12 per cent. upon the balance, if the balance should happen to be a favourable one, that is, if the underwriter finds it to be a profitable account he gives 12 per cent. upon it to the broker who brought the business to him. It is not, as I gather, upon the particular transaction, but it is upon the whole result of transactions which the broker has introduced to

the particular underwriter, and is calculated upon all the business during the whole year. That is the established remuneration which a broker receives for effecting that business, and in my opinion that is as right a thing as the 5 per cent." Then the evidence of the plaintiffs, although it does not conclusively establish the custom for which they contend, yet it proves the system on which they carried on their business. I cannot, therefore, in the face of that evidence and of the decision in *Great Western Insurance Company v. Cuntiffe*, come to any other conclusion than that the plaintiffs are entitled to the discount which they claim. As to the second point, that also, in my opinion, is abundantly clear. I quite agree that the plaintiffs were general agents of the defendant, and that unless their authority was revoked they were entitled to carry on the transaction to a conclusion. The defendant, however, was not bound to them by any special agreement, and he was therefore entitled to revoke their authority in whole or in part. True, they might have refused to continue to act as his agents altogether when he demanded back the policies, unless he permitted them to collect the insurance money. They did not do this, however, but insisted in collecting the money, and paid themselves a commission. In my opinion that was an unreasonable and unlawful claim on their part. In my opinion, the defendant had a right to say, "don't you receive that insurance money; I am ready to receive it myself." They choose, however, to go on and collect it perforce, but that did not give them the right to receive that which the defendant would have received himself. The defendant, therefore, is right on the second point and wrong on the first. I make no order as to costs.

Solicitors for plaintiffs, *Markby, Tarry, and Stewart*.

Solicitors for defendants, *Shum, Crossman, and Crossman*.

Thursday, May 4.

(Before Vice-Chancellor BACON.)

NANT-Y-GLO AND BLAINA IRONWORKS COMPANY (LIMITED) v. TAMPLIN. (a)

Company—Mortgage—Equity of mortgagor to set aside—Transferee of, for value and without notice—Equity of transferee as against mortgagor.

Although the transferee of a mortgage, without the mortgagor's concurrence, takes it subject to the equities affecting the account between the mortgagor and mortgagee, and can claim on his security no more than is justly due from the mortgagor; yet, if the transfer be for value and without notice of equitable grounds which render the security impeachable by the mortgagor as against the mortgagee, then, as between the mortgagor and transferee, the latter has the better equity, and is entitled to what is due to him on his security.

MOTION.

In July 1869, James Carlton sold certain coal and ironworks, situate at Blaina, in the county of Monmouth, for 132,000*l.*, to the Blaina Coal and Iron Company (Limited), which was promoted and formed by himself, and of which he was a director. 40,000*l.*, part of the said purchase-money of

132,000*l.*, was at the request of the company left on mortgage of the Blaina property, at 5 per cent. interest, and accordingly the company executed a mortgage for that amount to James Carlton.

The Blaina property adjoined extensive ironworks, which belonged to and were worked by a firm of J. and C. Bailey, and were known as the Nant-y-glo and Beaufort Ironworks.

In July 1871, the plaintiff company was duly incorporated and registered, with a capital of 750,000*l.*, divided into 7500 shares of 100*l.* each, and was established with the object of carrying into effect the two agreements following:

(a) An agreement, dated the 22nd July 1871, made between John Richardson and James Carlton of the one part, and George Henry Dean of the other part, for the purchase of the Nant-y-glo and Beaufort Ironworks and property connected therewith.

(b) An agreement, dated the 22nd July 1871, made between the Blaina Iron and Coal Company (Limited) of the one part, and the said George Henry Dean of the other part, for the purchase of the Blaina Ironworks.

The said agreements provided that 480,000*l.* should be the purchase-money for the Nant-y-glo and Beaufort property, and 220,000*l.* should be the purchase-money for the Blaina property. The mortgage of 40,000*l.* formed part of the consideration agreed to be paid by the plaintiff company to the Blaina Company for their property, that is to say, the plaintiff company purchased the Blaina property subject to the mortgage, and took upon themselves the liability of discharging the same.

In Nov. 1872, the original mortgage of 40,000*l.*, which was under the seal of the Blaina Company, was exchanged for one under the seal of the plaintiff company. This substituted mortgage bore date the 16th Nov. 1872, and was executed by the plaintiff company in satisfaction of the original mortgage, but it was for the same amount and upon the same property and for securing the same original debt, namely, the 40,000*l.* unpaid purchase-money on the original sale by Carlton to the Blaina Company.

In Oct. 1874, a suit of *The Nant-y-glo and Blaina Ironworks Company (Limited) v. Carlton* was instituted by the plaintiff company against James Carlton, Albert Grant, and others, the bill in which alleged that in 1870, the defendants, Carlton and Grant, entered into arrangements for promoting and bringing out the plaintiff company, which they ultimately did; that at the time these transactions were on foot, Carlton was a director and the vice-chairman of the Blaina Company, and that he and Grant were at the same time agents and promoters of the plaintiff company; that Carlton and Grant, on the occasion of the sales of the Blaina works and the Nant-y-glo and Beaufort works to the plaintiff company, severally received and retained out of the purchase-moneys large sums by way of commission and otherwise, which they put into their own pockets; and the bill prayed for a declaration that the defendants, Carlton and Grant, were trustees, agents, and promoters of the plaintiff company in carrying out the sales, and, as such, might be ordered to account for and make good to the plaintiff company all such sums as they had so improperly received and retained.

The defendants put in their answers in due course, and the suit was still pending.

On the 8th April 1875, Carlton transferred his 40,000*l.* mortgage to F. Tamplin as security for sums to the amount of 20,000*l.*, for which Tamplin

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became liable for Carlton in respect of commercial transactions in no way connected with the subject-matter of the suit of *Nant-y-glo and Blaina, &c., Company v. Carlton*.

On the 15th April the plaintiff company received notice of the transfer from Tamplin.

On the 1st June Tamplin served the plaintiff company with the usual notice requiring payment of the mortgage moneys within six months, and that in default of payment he should proceed to exercise his powers of sale.

On the 2nd Sept. the plaintiff company received from Carlton a letter of account, sent with Tamplin's consent, demanding payment of the interest due on the mortgage down to the 28th Aug. 1875, which after some demur was paid.

On the 25th Nov., a few days before the expiration of the six months' notice, the plaintiff company commenced this action against Tamplin and Carlton, the writ of summons being endorsed with a claim that the indenture of mortgage of the 16th Nov. 1872, might be set aside, and an injunction granted to restrain the defendants, or either of them, their or either of their agents, from selling the hereditaments comprised in the mortgage, or any part thereof, or taking any proceedings whatever under the mortgage for compelling payment of the sum thereby secured, or any part thereof.

The plaintiff company now moved for an injunction in the terms of the endorsement on the writ.

The defendant Tamplin filed an affidavit denying all knowledge or complicity in the transactions referred to in the suit of *Nant-y-glo and Blaina, &c., Company v. Carlton*, and insisting that he was a purchaser for value without notice.

Kay, Q.C. and E. S. Ford, in support of the motion.—We contend that it is clear upon the documentary evidence, which is not disputed, that on the sale by the Blaina Company, of which Carlton was chairman, of its property to the plaintiff company, he and Grant made a profit of £2,000l., and on the sale of the Nant-y-glo and Beaufort works they made 250,000l. They could not retain one shilling of these profits, but every shilling of it belonged to the plaintiff company, of which they were the promoters. Further, the agreements under which these gains were effected were not noticed in the prospectus of the plaintiff company which was issued by them. The suppression of these agreements, therefore, was a fraud on the part of Carlton, and he is bound to account and is personally liable for all the sums he put into his pocket: (*Gover's case*, 33 L. T. Rep. N. S. 619; L. Rep. 1 Ch. Div. 182). Next, the mortgage in question was part of the consideration for the Blaina property, and Carlton, therefore, can make no claim under it while this counter claim exists against him, and until he can satisfy the court that he is not amenable for all the sums he has retained. We further contend that when the accounts between the plaintiff company and Carlton are taken, a large sum will be found due from him; and, as his transferee takes subject to all the equities existing between the mortgagor and mortgagee, the defendant Tamplin is consequently in no better position:

Norrish v. Marshall, 5 Mad. 475;

Matthews v. Walkwyn, 4 Ves. 118;

Williams v. Borrell, 4 Ves. 386;

Chambers v. Goldwin, 9 Ves. 284;

Judd v. Green, 33 L. T. Rep. N. S. 597; 45 L. J.

108, Ch.

Lastly, we submit that on the evidence the transfer was not made *bond fide*, but simply with the object of harassing the plaintiffs, and that Tamplin took with notice of the suit pending against Carlton. We, however, offer to pay the amount due to Tamplin into court, to abide the result of the action, and ask the court to maintain the *status quo*, and to restrain any sale under the powers of the mortgage until the hearing.

Sir H. M. Jackson, Q.C. and Ford North, for the defendant Tamplin.—We decline the offer to pay the amount due to Tamplin into court, and we contend that no case has been made out to prevent him from exercising his strict rights under the mortgage. He has to meet liabilities to the extent of 20,000l. on bills which he has accepted for Carlton, and which become due in a fortnight. To keep this sum *in medio*, therefore, may result in his ruin, which the court will not do, especially when he is a *bond fide* assignee for value without notice: (*Gunn v. Bolckow, Vaughan, and Co.*, 32 L. T. Rep. N. S. 761; L. Rep. 10 Ch. 498.) Assuming that the plaintiff has a perfectly good case against Carlton that is no answer to Tamplin's claim, and they cannot set aside the mortgage without satisfying his rights under the assignment:

Judd v. Green (sup.);

Lord Aldborough v. Trye, 7 C. & F. 436, 463.

The plaintiffs, in order to succeed, must show that Tamplin took the transfer with actual *de facto* notice of all the transactions referred to in the bill in *Nant-y-glo, &c., Company v. Carlton*, but in this they have failed. In fact, Tamplin is no party to that suit, which, although it states the mortgage, in no way impeaches our security, but only asks for damages against Carlton.

Swanston, Q.C. and H. A. Giffard, for Carlton.—This action has nothing to do with the proceedings in the suit of *Nant-y-glo, &c., v. Carlton*, which have been dragged in here simply by way of prejudice. When that suit comes to a hearing we shall have a perfectly good answer on the merits. The plaintiffs have always paid the interest on this mortgage and cannot now be heard to impugn it, nor can they set-off against the mortgage debt an unliquidated sum to be assessed by way of damages, and this only on the assumption that they will prove their case at the hearing.

Kay, Q.C., in reply.

The VICE-CHANCELLOR.—The case is one by no means without difficulty, but the importance of it is infinitely greater than any difficulties it may present. The bill in *Nant-y-glo &c., Company v. Carlton*, and the evidence on this motion, charge the most improper dealings that can be suggested with the property of a joint stock company against not only the plain enactments of the law, but against every principle of good faith and fair dealing between men. Whether that will ever be established or not is a matter which I cannot at present even imagine. I am speaking of it only as a charge, and I most carefully guard myself against expressing any opinion as to the merits of the case or as to the possibility of establishing these charges. The charge is that these gentlemen, or one of them at least, who is in a fiduciary position towards the company, took advantage of his position to put money into his pocket which he could not honestly receive. That is the plain English of the charge. If that is established, then not only the principle of *Parker v. McKenna* (31

L. T. Rep. N. S. 739; L. Rep. 10 Ch. Ap. 96), but the principle of every case in which persons who are in a fiduciary position have been made to account in a court of equity, applies directly, and every shilling so received, if it were so received, the defendants who are charged would be liable for. The defendant Carlton, in his affidavit, justifies all that he has done. At the hearing of the cause he may succeed in establishing that justification, and then all that is raised by way of imputation against him will be scattered to the winds, and he will be entitled to the relief which the court gives to a man who is unjustly assailed. The other part of the case, that which relates to the defendant Tamplin, is of a totally different character. His case is, as I understand it, this, that being a man engaged in commerce he entered into certain regular and proper transactions with Mr. Carlton, in the course of which he came under liabilities for Mr. Carlton, accepted bills for him, and is at this moment liable for the payment of those bills—for they are current, I think, and some of them fall due in a fortnight—and he takes as a security a mortgage deed, which on the face of it appears to be a perfectly valid instrument. I bear in mind all that I decided in *Judd v. Green* (sup.), and I bear most distinctly in mind what was decided by the House of Lords in *Lord Aldborough v. Trye* (sup.). In *Judd v. Green* I was satisfied there were two points to be considered. The first was, whether the plaintiff had been cheated into executing a mortgage deed; the second was, what right the defendants could have to retain that deed, or the property secured by that deed, for some advances which they had made. On the authority of *Lord Aldborough v. Trye*, and on the plain positive evidence in the case, I was satisfied that the plaintiff had executed that mortgage in order that money might be raised upon it, and it came, therefore, not only within the principle but almost the letter of the decision in *Lord Aldborough v. Trye*, that a person who is applied to to lend money on the security of a deed which is executed for the purpose of raising money, cannot be held to more than (and undoubtedly he is so far held) to account for what is due between the borrower and the lender upon the original transaction, or the consideration, upon the account beginning with the sum stated in the security deed. I have not the least desire to withdraw from anything I decided in *Judd v. Green*, and I should be sorry to be under the necessity of doing so. In this case I find that Mr. Tamplin is very much in the position of the defendant, not the principal defendant, but the other defendant who held the security, in *Judd v. Green*. They had advanced their money, as Mr. Tamplin had advanced his money, on what was apparently good security, and were under no obligation to inquire farther than to examine the seals and signatures to that deed. I think, therefore, that the relief which the plaintiffs ask in this case can only be granted on the terms of paying to Mr. Tamplin that money which he says is due to him on the mortgage, and which, for aught I know, he may have urgent necessity for using to enable him to take up these bills which he has accepted; and I cannot grant the order which I am asked to make on any other terms. That will put an end to the case as against him. With respect to Mr. Carlton, the case is totally different. The charge against him is, that in Nov. 1872, some considerable time after 1871, when the transac-

tions were entered into, he took from the company a mortgage for 40,000*l.*, the mortgage in question, having at that time, if the plaintiff's charge is true, more than 60,000*l.* of the moneys of the company in his pocket. Upon a suit in which the validity of that mortgage, as regards Mr. Carlton, is called in question, without any taking of accounts, without any set-off, without any set-off of unliquidated damages against moneys which are secured by an instrument under seal, the plaintiffs, if they succeeded, would unquestionably be entitled to have that treated as a nullity. The only order, therefore, which I make now, and I am very sorry to have to deal partially with so serious a case as this, will be that on payment of the 20,000*l.* due to Mr. Tamplin, he and Mr. Carlton will be restrained from proceeding to exercise the powers which are contained in that mortgage deed. That is the only order I make, and it is made without prejudice to any questions whatever between the parties. The costs of all parties will be costs in the cause.

Solicitors for plaintiffs, *Shaw and Tremellen*.

Solicitor for Tamplin, *W. W. Wynne*.

Solicitor for Carlton, *Phelps and Sidgwick*.

COMMON PLEAS DIVISION.

Saturday, Feb. 12.

LORD HANMER v. FLIGHT.(a)

Pleading—Order XIV. r. 4—Landlord and tenant—Signing judgment—Assignee of lease.

*A statement of claim alleged that the plaintiff was owner in fee simple of certain premises which he had on the 26th Sept. 1859 leased to one M. for 31 years from the then next 25th Dec., at a yearly rent of 105*l.*, payable quarterly. The statement then set forth the covenants in the lease, to pay rent, repair, &c., and the conditions for re-entry for breaches of the covenants; and alleged that in the year 1870 the defendant took possession of, and since had occupied the premises, and that, at some time subsequent to 1870 he had become assignee of the lease, and that he had from 1870 till March 1874, paid to the plaintiff the rent in accordance with the terms of the lease. Then breaches by the defendant of the various covenants were alleged, and the plaintiff claimed (1) Possession of the premises; (2) 15*l.* 10*s.* for arrears of rent to the 29th Sept. 1875, or for use and occupation; (3) 600*l.* damages for breaches of covenant; (4) *Mesne profits* from the 29th Sept. 1875 to date of recovery of possession.*

*The defendant, in his statement of defence, denied that he was assignee of the lease, or that he had been guilty of breaches of covenant, but admitted that the lease had been avoided, and that the plaintiff was entitled to possession; he also therein admitted that he was in possession up to the 20th Sept. 1875, but alleged that he then ceased to be in possession. He brought into court 25*l.* to answer claim (4).*

*The court (Brett, Archibald, and Lindley, JJ.) held that, upon the pleadings, the plaintiff was entitled under Order XIV., r. 4, to sign judgment at once for 15*l.* 10*s.*, the rent to the 29th Sept. 1875. Under the present system of pleading, the facts must be stated, and then it is the duty of the court to decide upon what is the legal result of the facts*

(a) Reported by CYRIL DODD, Esq., Barrister-at-Law.

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stated; whereas the former system required the parties to set forth the legal result of the facts, and not the facts themselves.

If, on the facts, it is clear that a certain sum must, in any view, be recovered by a plaintiff, he may sign judgment at once for such sum.

THE statement of claim was as follows :

1. The plaintiff is the owner in fee simple and lessor of certain premises in St. Giles-in-the-Fields, being the premises demised in the lease hereinafter mentioned.

2. By indenture dated the 26th Sept. 1859 (the plaintiff (then Sir John Hanmer) demised to Patrick Mara for the term of 31 years, from the 25th December then next ensuing, the following premises. (Then followed a description of the premises.)

3. The rent reserved was 105*l.*, payable on the usual quarter days.

4. The said lease contained among others the following covenants material to this case :

(a) A covenant by the lessee to pay the rent at the proper time.

(b) A covenant by the lessee that he the said lessee would from time to time pay, or cause to be paid, all costs, charges, and expenses in respect of the said premises for all sewers and drains, and all other works executed under or by virtue of any order or orders of the District Board of Works, or other body having local authority, and all taxes, charges, rates, assessments, and impositions whatsoever, which, during the term thereby granted, should be taxed, charged, assessed, or imposed upon the premises thereby granted, or upon any person or persons in respect thereof; and also would, so far as the said premises, or any of them, or any part thereof, should or might be subject to the operation of The Metropolis Local Management Act, The Common Lodging Houses Act, The Nuisances Removal and Diseases Prevention Act, or the bye-laws of the Board of Works for the district in which the said premises, or any of them, are situate, conduct and maintain the same in all respects in conformity with the provisions of the said Acts and bye-laws, and at all times keep the said premises in a cleanly and wholesome state and condition, and cause the same and every of them to be well supplied with pure water during the said term; and from all such taxes, charges, and assessments, impositions, duties, and liabilities, should and would save harmless, and keep indemnified and exempted, the plaintiff, his heirs and assigns; and also should and would during the term thereby granted keep open and use the said tavern . . . for a tavern . . . ; and also that he, the said lessee, his executors, &c., would from time to time, and at all times during the continuance of the term thereby granted, when, where, and as often as need or occasion should be or require, at his and their own proper costs and charges, well and substantially repair, &c., and would at the end or other sooner determination of the said term, &c., yield up to the plaintiff, his heirs and assigns, &c.

(c) A covenant to repair and amend within three months after notice.

5. The said indenture contained the following condition for re-entry : (It was in the usual form, and provided for re-entry for non-payment of rent for twenty-one days, and for re-entry for breach of any of the covenants.)

6. In or about the year 1870 the defendant took possession of, and, save as hereinafter mentioned, has since occupied the premises. At some time between that date and the grievances hereinafter mentioned, the said indenture and term thereby created was assigned to and vested in him, and the defendant from 1870 till March 1874 paid rent to the plaintiff according to the terms of the lease.

7. The defendant has been guilty of the following breaches of covenant :

8. Since the 25th March 1874, no rent has been paid by the defendant or any other person, and the rent from that date is still due and unpaid.

9. The said tenements, so far as they have been subject to the operation of the Metropolis Local Management Act, the Common Lodging House Act, the Nuisances Removal and Diseases Prevention Act, and the bye-laws of the Board of Works for the district in which the premises are situate, have not been maintained and conducted, nor are they now maintained and conducted in conformity with the provisions of the said Acts of Parliament or the said bye-laws; and the notices and proceedings have been given and taken which are hereinafter mentioned. Nor have the premises been kept at any time, nor are they now in a cleanly and wholesome state, &c.

10. The plaintiff has not been kept harmless or indemnified from costs, charges, and expenses, in respect of the said premises for sewers and drains and other works executed under and by virtue of the orders of the District Board of Works.

11. (Statement of breaches of covenant to repair and keep in repair.)

12. (Statement of breaches of covenant to repair on notice, and averment of notice.)

13. In the year 1874 the said premises were, by reason of the non-observance by the defendant as aforesaid of the above recited covenants, in such a condition as to be unfit for human habitation. The District Board of Works served on the plaintiff notices requiring the demolition of part of the premises, and the repairs therein mentioned to the remainder. The plaintiff thereupon sent to the defendant a notice to repair, with a specification of works to be done, and also copies of the notices served on the plaintiff by the District Board of Works. The defendant has not taken any steps to have the premises repaired in pursuance of the notice, nor to comply with the order of the District Board of Works.

14. The plaintiff insists that the lease has been avoided for the causes of forfeiture aforesaid, and that the plaintiff is now entitled to re-enter.

15. In consequence of the defendant's breaches of covenant as to repair, the said premises are not now, nor can they be, given up to the plaintiff whole, &c.

The plaintiff claims, first, possession of the said premises; secondly, 15*l.* 10*s.* for arrears of rent to the 29th Sept. 1875, or for use and occupation of the premises; thirdly, 600*l.* damages for the defendant's breaches of covenant above set forth; fourthly, mesne profits from the 29th Sept. 1875, down to the date of the plaintiff's recovering possession.

The statement of defence was as follows :

1. The defendant denies that the said indenture and the term thereby created ever were assigned to or vested in him.

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2. The defendant denies that he has been guilty of any breach of covenant.

3. The defendant denies that any sewers, drains, or other works were executed under the orders of the District Board of Works, save as mentioned in paragraph 4.

4. The works executed under the orders of the District Board of Works were executed in pursuance of notices dated the 31st Aug. 1875, and orders of about the same date made and given under the Artisans and Labourers Dwellings Act 1868, and at the several times of making the said orders and giving the said notices twenty-one years of the said term did not remain unexpired.

5. The defendant admits that the lease has been avoided, and that the plaintiff is entitled to re-enter. The defendant denies that he was in possession on the 29th Sept. 1875. He ceased to have possession on the 20th Sept. 1875.

6. The defendant brings into court 25*l.*, and says that the said sum is enough to satisfy the plaintiff's claim in respect of mesne profits.

On the 26th Jan. 1876, Archibald, J., in Chambers, gave to the plaintiff leave, under Order XIV., rule 4, to sign judgment for 15*l.* 10*s.* arrears of rent to the 29th Sept. 1875.

Beasley, for the defendant, moved to rescind this order of Archibald, J.—The plaintiff is claiming, as the lessor, upon a lease with which the defendant has, as he states in his defence, no connection whatever. There is no privity between him and the plaintiff, if his pleading is true, and it is on the pleadings that this question must be considered, as the case made out for the plaintiff is, that the defendant has admitted on the pleadings his liability to the extent of 15*l.* 10*s.* [BRETT, J.—Your client does not deny that he was in possession, and that he paid rent to the plaintiff.] That is not evidence that he was assignee of the lease, and he distinctly avers that he is not. The 15*l.* 10*s.* cannot be claimed as for use and occupation, first, because there is no averment that defendant occupied with the permission of the plaintiff; and next, because if the lease is outstanding, use and occupation will not lie (*Churchward v. Ford*, 2 H. & N. 446; 26 L. J. 354, Ex.) In that case copyhold lands were devised to the plaintiffs in trust for F. for life, but the plaintiffs never were admitted to the copyhold. At the time of the death of the testator the lands were in the possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards relet them in her own name. Held, that use and occupation would not lie, because no contract could be implied, there being an existing contract between the defendant and F., and the occupation having been by permission of F.

C. Bowen, in support of the order of Archibald, J., was not called upon.

BRETT, J.—This case is one that shows clearly some of the advantages which have been obtained by the passing of the Judicature Acts. Pleadings now are no longer technical in the sense that they must show the precise legal form which the plaintiff's demand must take; they now show the facts, and then it is for the court, from the facts, to decide upon the legal result of those facts. In this case it is clear that something is due from the defendant to the plaintiff, though it may not be so clear what is the legal relation between the parties, or what would have been the exact form of pleading under which the amount due would,

under the former system of pleading, have been recovered. In the present case it is not denied by the defendant that he had possession of these premises, and that he paid rent for them at the rate of 10*5l.* a year (which is the amount reserved by the lease) up to Ladyday 1874, and that he continued in possession till September 1875, but that between Ladyday 1874 and September 1875 he has paid no rent. Surely then Order XIV. rule 4 is applicable to this case. "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due." It is clear that payment is due for the occupation of the premises for the period between Ladyday 1874 and September 1875. The defendant cannot now turn round and say to the plaintiff, after having paid him rent, "I am no tenant of yours." It is not necessary now to inquire into the precise legal relation in which the defendant stands to Mara, or to the plaintiff; when the question comes on for trial as to the want of repair, and as to the breaches of the other covenants of the lease, it may be necessary to do so. It is enough for us to see that the plaintiff is entitled to payment from the defendant for the occupation during the period in question, and seeing, as we do, that he is so entitled, we confirm the order of my brother Archibald.

ARCHIBALD and LINDLEY, JJ., concurred.

Motion dismissed with costs.

NOTE.—This judgment has since been reversed on appeal.

Solicitor for plaintiff, *Hall*, for *Frere, Foster*, and *Frere*.

Solicitors for defendant, *Lewis and Sons*.

EXCHEQUER DIVISION.

Wednesday, May 24.

(Before BRAMWELL, CLEASEY, and HUDDLESTON, BB.)

BAKER (BART.) v. THE VESTRY OF ST. MARYLEBONE.(a)

Damage to private property by public works—Raising level of streets—Obstruction of ancient lights—Property injuriously affected—Claim to compensation for—St. Marylebone (Local) Acts (35 Geo. 3, c. 73, s. 53; 57 Geo. 3, c. 29, s. 52)—Lands Clauses Consolidation Act 1845 (8 Vict. c. 18, ss. 6 to 15, and 16 to 68)—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120, ss. 98-150, 151, 152)—Incorporation of Lands Clauses Act in Metropolitan Act—Exclusion of compulsory clauses—Construction.

The defendants, as the vestry of St. Marylebone, were empowered by local Acts (35 Geo. 3, c. 73, and 57 Geo. 3, c. 29), to pave and repair, and to raise or lower the ground of the streets within their district, "without making compensation to owners of property thereby injured."

The Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), by sect. 98 empowers every vestry to pave and repair, and to raise or lower the ground or soil of the streets in their district as they think fit; and by sect. 150 they have power to purchase "any land or any right or easement in or over land," necessary for the formation or

(a) Reported by H. LEIGH, Esq., Barrister-at-Law.

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protection of any works authorised to be executed under the Act. By sects. 151 and 152 the Lands Clauses Act of 1845 (8 Vict. c. 18), except the compulsory purchase clauses, 16 to 68, which are expressly excluded, is incorporated; and by sect. 247 all Acts which are inconsistent with the Metropolitan Act are repealed.

Under the provisions of the said Acts, or one or more of them, the defendants raised and altered the road and pavement of a street in their district in a manner justified by the said Act, but thereby obstructed the ancient lights of and entrances to certain houses of the plaintiff, and "injuriously affected" the said houses.

Notice was given to the defendants under sect. 68 of the Lands Clauses Act to summon a jury to settle the amount of compensation, but the defendants refused to pay the compensation claimed, or to enter into any agreement, or to summon a jury.

Held by the court, Bramwell, Cleasby, and Huddleston, BB. (although doubting whether the Legislature intended that a public body should be enabled for the public benefit to do an injury to an individual without giving him compensation) that the works were done under the local Acts of Geo. 3, which were not repealed or superseded by the Metropolitan Local Management Act 1855; that, there having been no agreement to purchase, sects. 150, 151, and 152 of the Metropolitan Act did not apply; and that sect. 68 of the Lands Clauses Act being expressly excluded from the Metropolitan Act, the plaintiff had no claim under that section, and, therefore, the case was governed and concluded by *Ferrar v. The Commissioners of Sewers for London in the Exchequer Chamber* (21 L. T. Rep. N. S. 295), and the plaintiff was not entitled to compensation.

Per Bramwell, B.—Sect. 150 of the *Metropolis Local Management Act 1855*, means that the vestry may acquire an easement in or over land, and not that they may purchase an already existing easement belonging to somebody else.

Quære (per Bramwell, B.), whether sect. 68 of the Lands Clauses Act of 1845 is limited to compulsory purchase.

THIS is an action brought for the recovery of 250l. for damages occasioned to certain houses and tenements of the plaintiff by the defendants under the circumstances hereinafter stated, and by consent and by judge's order, dated 2nd July 1875, according to the Common Law Procedure Act 1852, there has been stated for the opinion of the court, without any pleadings, the following:

SPECIAL CASE.

1. The plaintiff is tenant for life of certain houses, known as Christ Church-buildings, situated in Little James-street, Lisson-grove, Marylebone, and which are now occupied by the Marylebone Association for Improving the Dwellings of the Industrial Classes, under a lease of which there are seventeen years still to run. The said houses have in them ancient lights overlooking Little James-street, Lisson-grove.

2. The defendants are the Vestry of St. Marylebone, in the county of Middlesex.

3. By the 53rd section of 35 Geo. 3, c. 73, being an Act among other purposes for paving, repairing, cleansing, and lighting the parish of St. Marylebone, it was enacted that it shall and may be lawful to and for the vestrymen of the said parish to pave and keep in repair, or to cause to

be paved and kept in repair, from time to time, all or any of the streets within the limit of the Act, and likewise to cause the ground thereof to be raised or lowered in such places, manner, and form, as they shall judge best.

4. By the 52nd section of 57 Geo. 3, c. 29 (local), being an Act for better paving, and improving, and regulating the streets of the metropolis, and for other purposes, it was enacted that it shall and may be lawful to and for the commissioners or trustees or other persons having the control of the pavements of the streets, in any parochial or other district within the jurisdiction of the said Act, from time to time to pave and keep in repair, or cause to be paved and kept in repair, all or any part or parts of the carriage ways or footways of all or any of the streets or public places in their respective parochial or other districts within the jurisdiction of the Act, and that they or their respective surveyor or surveyors of the pavements, or any inspectors or other officers by them appointed for the time being, shall and may from time to time cause the ground of any streets or public places within their respective parochial or other districts, to be raised or lowered in such manner as they or he should think necessary.

5. The Vestry of Saint Marylebone are the persons having control of the pavement of Little James-street, Lisson-grove, in the parish of Saint Marylebone, within the meaning of the said Act.

6. By the 98th section of 18 & 19 Vict. c. 120, being an Act for the better local management of the metropolis, it is enacted that it shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in into or through the same to be turned or altered in such a manner as they think proper.

7. The defendants under the provisions of the said Acts, or one or more of them, have raised and altered the road and pavement of the said Little James-street, which is a street within the limits and jurisdiction of the said Act. Such raising and alteration of the said road and pavement was done in a manner justified by the said Act.

8. In consequence of the said works in the last paragraph mentioned, the ground floor of Christ Church-buildings is converted into an underground floor more than 8ft. below the said street, and the light and air of the said ground floor of the said buildings are seriously affected. The plaintiff alleges that the ground floor is rendered unfit for human habitation, but this the defendants deny. An area wall has been built within 3ft. of the windows of the ground floor of the said buildings, and the access to the said buildings has been blocked up and a new door and other alterations have become necessary by reason of the above-mentioned works of the vestry. A plan of such works is annexed hereto and forms part of this case.

9. In consequence of the said works the said buildings together with the said ancient lights in the said ground floor have been injuriously affected, and it has been agreed that if the defendants are held liable they shall pay for such injury the sum of 250l.

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10. By sect. 151 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), it is enacted as follows: "For the purpose of enabling the said metropolitan board and every district board and vestry to obtain any land or right or easement in or over any land which they respectively may require for the purposes of this Act, The Lands Clauses Consolidation Act 1845, except the provision of the Act with respect to the recovery of forfeitures, penalties, and costs, shall, subject to the provisions herein contained, be incorporated with this Act, and the provisions of the said Act so incorporated with this Act, which would be applicable in the case of a purchase of any land, shall be applicable in the case of the purchase of a right or easement in or over any land;" and by sect. 152 of the said Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), it is enacted "That the provisions of the said Lands Clauses Consolidation Act with respect to the purchase and taking of lands otherwise than by agreement, shall not be incorporated with this Act, save for enabling the Metropolitan Board of Works to take land or any right or easement in or over land for the purpose of making any sewers or works for preventing the sewage or any part of the sewage within the metropolis from passing into the Thames, in or near the metropolis, or otherwise, for the purpose of the sewerage or drainage of the metropolis; provided also, that no land or right or easement, in or over land, for the purposes aforesaid shall be taken compulsorily by the said board without the previous consent in writing of one of Her Majesty's principal Secretaries of State."

No such consent has been obtained.

11. For the purposes of this case, but not otherwise, it is to be taken that the plaintiff gave notice to the defendants, under the 68th section of the Lands Clauses Act, to summon a jury to settle the amount of compensation payable by the defendants to the plaintiff by reason of his premises having been injuriously affected as aforesaid. And that the defendants refused to pay the compensation so claimed, or to enter into a written agreement for the purpose, or to summon a jury within twenty-one days after the receipt of such notice.

12. For the purposes of this case, but not otherwise, it is to be taken that all notices required by the Lands Clauses Act have been given.

13. The said Acts of Parliament are to be taken as part of this special case.

14. The court is to have power to draw all inferences of fact.

The question for the opinion of the court is whether, under the above-mentioned circumstances, the plaintiff is entitled to recover from the defendants the above-mentioned sum of 250*l.*, or any part thereof.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for 250*l.*, or such other sum as the court shall name, with costs of suit.

If the court shall be of opinion in the negative, then judgment, with costs of defence, shall be entered up for the defendants.

The plaintiff's points for argument.—First, that the Lands Clauses Consolidation Act is incorporated in the special Act. Sect. 68 of the Lands Clauses Act confers the right to compensation to the claimant. Secondly, that the damage sustained by the claimant is the subject of compen-

sation. Thirdly, that inasmuch as the right of action has been taken away by statute, the claimant is entitled to compensation. Fourthly, that there is nothing in the special Act to destroy the claimant's right to compensation by reason of the works carried out under the Metropolis Local Management Act.

Points of argument for the defendants.—First, that by the Acts of Parliament mentioned in the special case the defendants are expressly authorised to alter the level of the streets within their district, and to do the matters complained of in the special case. Secondly, that the said Acts of Parliament do not impose on the defendants the obligation of making compensation to the owners of property injuriously affected by the doing of the matters complained of. Thirdly, that it is expressly provided by the 152nd section of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 20), that the Lands Clauses Consolidation Act shall not be incorporated with the said Act except for sewerage or drainage purposes. Fourthly, that the matters complained of were not done by the defendants for such excepted purposes. Fifthly, that the clause about obtaining the previous consent of one of Her Majesty's Secretaries of State only applies to land or rights or easements in or over land taken for such purposes, and is not applicable to the present case.

A. L. Smith (with him was *Joyce*) for the plaintiff.—The decision of the Court of Exchequer Chamber reversing the decision of this court in the case of *Ferrar v. The Commissioners of Sewers for London* (21 L. T. Rep. N. S. 295; L. Rep. 4 Ex.; 38 L. J. 202, Ex.) is, I must admit, conclusive upon the present question against the plaintiff, unless the two cases can be distinguished, which it is submitted they can be. In *Ferrar's* case it was decided that when the Lands Clauses Act of 1845 (8 & 9 Vict. c. 18) was incorporated in the special Act under which the defendants there acted, but with the express exception of its compulsory clauses, the plaintiff, whose house was blocked up by the road being raised above its previous level, was not entitled to any compensation, and had no remedy either by action of trespass or for recovery of money damages. [BRAMWELL, B.—Do you mean that you are entitled to judgment if you would have been entitled to compensation under the Lands Clauses Act? Certainly, if the defendants have done wrong. BRAMWELL, B.—If they have a right to stop up your lights on making compensation under the Act, that would not be doing wrong.] Not if they paid us. [Sir *H. James*, Q.C.—It may save time to state the issue the defendants seek to raise, viz., that under their local Acts they were justified in doing what they have done, and that no compensation has been given. In the first place, sect. 68 of the Lands Clauses Act is not incorporated in any Act under which the defendants did their works; and if it were, still what they have done is not an "injuriously affecting." I admit that if we have committed any tort, or if the court think we are bound by sect. 68 to give compensation, or, in other words, if we come within that section, then the plaintiff is entitled to the sum which he claims.] It may be taken then as admitted by the defendants, that if the plaintiff could maintain trespass or a claim for compensation under the Lands Clauses Act, he is entitled to judgment. Now in *Ferrar's* case (*ubi sup.*) a private Act

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enabled the commissioners to raise the street, and that private Act incorporated the Lands Clauses Act, and made its provisions applicable to the special Act, "except so far as the same provisions were inconsistent therewith or were therein declared not to extend thereto;" and the Exchequer Chamber held that, inasmuch as sect. 68, and what Lord Cairns called that "faggot of clauses" comprised under the heading, "with respect to the purchasing and taking of land otherwise than by agreement," were excluded, therefore there was no right to compensation to one whose land had been "injuriously affected." Were the Metropolitan Act here the same as the special Act in that case I could not distinguish the two cases. But the present case is governed by, and must be decided by, the true construction of the Metropolitan Act (18 & 19 Vict. c. 120), sects. 98 and 247 of which repealed, or at all events superseded, the two Acts of Geo. 3 stated in the case. These works, therefore, were executed under the Metropolitan Act. By sect. 98 of that Act the vestries are made surveyors of highways, and by sect. 98 power is given to them to repair and raise or lower the level of the roads, and it is that section probably on which the defendants rely as entitling them to destroy the plaintiff's ancient lights and pay him nothing for so doing. Then comes sect. 150, by which the vestry is authorised to purchase easements. [BRAMWELL, B.—Does not that section mean that they may acquire an easement, and not that they may purchase an already existing easement belonging to somebody else?] The plaintiffs here had an easement of ancient lights over this street or road ("an easement in or over land," in the words of sect. 151) and that easement the defendants required for the purpose of their works. Under sect. 150 (a) they had power to purchase such an easement, and it must be assumed that they agreed to do so under that power, or they would have been trespassers. Then, by sects. 151 and 152, the whole of the Lands Clauses Act, except only the compulsory purchase clauses, is incorporated, and therefore the plaintiff has the benefit of clauses 6 to 15 of that Act relating to the purchase of land by agreement, for, by sect. 151, the purchase or taking of an easement is expressly stated to be the same thing as the purchase or taking of land. In *Ferrar's* case there was no Metropolitan Act, nor any sections such as sects. 150 and 151 here, but it turned on their special Act entirely. The Legislature never contemplated or intended that vestries should have the power to deprive persons of these valuable properties and rights without compensation. On the contrary, they have, by sects. 150 and 151, and the incorporation of the purchase by agreement clauses of the Lands Clauses Act, expressly provided for their acquiring the property and making due compensation.

Sir H. James, Q.C. (with him were *Crompton* and *Swan*) for the defendants *contra*, was not heard.

BRAMWELL, B.—I am of opinion that our judg-

(a) Sect. 150 of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) enacts that "it shall be lawful for the Metropolitan Board of Works and every District Board and Vestry, to purchase, or to take on lease for such term as they may think fit, any land or any right or easement in or over land which they may deem necessary or expedient for the formation or protection of any works which they are authorised to execute under this Act."

ment in this case must be for the defendants. Mr. Smith admits, and very properly, and indeed it is so, that the case is concluded by the case which he has cited of *Ferrar v. The Commissioners of Sewers for London* (*ubi sup.*) unless he is able to distinguish it in the way in which he proposed and endeavoured to distinguish it. Now, as I understand his argument, the way in which he proposed to distinguish that case is this, that sect. 98 of the Metropolitan Management Act repeals or supersedes the former local Acts of Parliament, and that the later Act is now the governing law. I should myself say that if there had been found in it such words as these: "They may raise or alter the road, or level the road, making compensation," then, no doubt, that would be a repeal of the former Act of Parliament, because it would be a different enactment, that is to say, if the local Act meant that you might do a man a damage without compensating him for it, and the Metropolitan Management Act said that you must compensate him if you did it, that would be a repeal of the former local Act, because the first would be an absolute right, the other would be a right with an accompaniment. But sect. 98 contains no such express words. But then Mr. Smith says: "If you look at sects. 150, 151, and 152, which must be coupled with sect. 98, you will there find such a qualification as I have stated." I cannot find that; and I cannot find it for many reasons. One is, that I think the 150th section has a different meaning from that for which Mr. Smith contends. It says: "It shall be lawful for the Metropolitan Board of Works or any district board," and so forth, "to purchase or take on lease, &c., any land or any right or easement in or over any land." And it is argued that that extends not merely to the acquisition of an easement by them, but to the purchase by them of an easement which somebody else possesses. I think I appreciate Mr. Smith's argument, but I do not agree with him. I think it means that they may either take land or acquire an easement over land, and not that they may purchase an easement. But, supposing it were so, another difficulty arises, namely, that in this case they have not purchased it. There has been no agreement of any sort or kind, and the easement of the plaintiff is not absolutely given, it is only lessened; he has it to some extent, though not so fully as he enjoyed it before. It seems to me, therefore, that sect. 150 does not apply to the facts of this case. But then, if it did, there is another difficulty, and that is, how is the compensation to be got? Not by the 68th section of the Lands Clauses Act, because Mr. Smith admits that it has been held that that section is not included in this particular Act, inasmuch as that section applies to compulsory purchase, and not to purchase by agreement. Then Mr. Smith says: "Be that as it may, I rely upon this, that there was an agreement here." But, so far from that, there is no agreement, or shadow of an agreement, nor, indeed, any statement of any agreement, and the only way in which Mr. Smith can suggest that there was an agreement, is by saying that they should have taken the plaintiff's easement by agreement, that they have taken it (which is not true, by-the-by), and therefore that they must have agreed to take it. It is an ingenious argument, but it fails the moment that it is examined. It seems to me, therefore, that we must hold the defendants to

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have the same right now under the Metropolis Local Management Act as they had under the former Acts to raise or lower roads, and that, if they formerly had power to damage a man's property without making him any compensation, they have it still. But, for my own part, and speaking with great respect for anybody who has so decided, I cannot help thinking that it is, as a certain conclusion was called yesterday in the Court of Appeal, "a revolting one." It seems to me to be really outrageous that 5*l.* worth of property cannot be taken without a man's consent, but that 5000*l.* worth of damage may be done to his land by its being "injuriously affected" by the works done under the authority of the Act of Parliament. I have, with all respect for the authorities who so decided, the greatest misgivings upon the subject. It seems that the defendants might almost as well say "We were raising the road, which we had a perfect right to do, and we saw you, the plaintiff, walking by, and although some of the stones fell upon you and broke your limbs or fractured your skull, yet we had authority to inflict that injury upon you under this Act of Parliament without making you any compensation." A perfectly rational meaning may, I think, be given to this Act of Parliament, though it is going out of one's way to do so, and that is to say, "As far as roads are concerned, you (the defendants) may alter them or raise them or lower them, but of course, as with anything else, you must not do any damage to anybody in so doing." However, that is concluded and past hope in this court, and also, as I understand, in a Court of Appeal. Mr. Smith has not even made the point, but I cannot help suggesting that there must be some doubt upon it. Another matter upon which I should like to reserve my judgment is whether sect. 68 of the Lands Clauses Act is limited to compulsory purchase. That I say nothing about at present; only if it should go to the ultimate court of appeal there would be time and opportunity to look further into the point and give it greater consideration. Meanwhile, our judgment must be for the defendants.

CLEASBY, B.—I am of the same opinion, and upon the statement of facts and the admitted law in this case, I cannot help coming to the conclusion, disagreeable as it is—I will not use any other expression—that the plaintiff is without redress. I should certainly have thought that the earlier Acts and the late Act did not contemplate such an act as has been done in this case, namely, an act which takes away the property of an individual without affording him any compensation. I can easily understand, as my brother Bramwell says, that so far as regards any interference with a public highway the defendants are not to commit a nuisance, or to place themselves in a wrong position in altering the level of the highway by raising or lowering it, although they have a right to alter it. I should have thought if the matter could have been brought before us free from the difficulties which the statement of the facts and the admission of the law creates, that this was a matter not to be answered by those Acts of Parliament at all. The case states that "the raising and alteration of the said road and pavement was done in a manner justified by the said Act;" that is to say, it is one of those things which the defendants are justified in doing to any extent if only it comes within the Act of Parliament.

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As regards the other question, the statutory authority under which the works in question were executed being admitted, it really is plain that the result of the legislation which has taken place upon that subject is, that in respect of injuries inflicted upon the owner of property by reason of a right of easement being taken away, as in the present case, there is no claim given by way of action and none by way of compensation. If there had been some agreement made between the parties here before the doing of the alterations or repairs which damaged his property, the plaintiff would have been entitled to have had the matter arranged and settled in the manner provided for by the earlier clauses of the Lands Clauses Act, which have reference to the acquisition by public bodies of property by agreement. But, as the board or vestry here have chosen to do the act compulsorily under the powers vested in them by statute, the effect of the decision in *Ferris's case* (*ubi sup.*), is that the plaintiff, the injured landowner, has no mode of getting compensation for the injury which he has sustained.

HUDDLESTON, B.—I am of the same opinion, and I regret very much that some means have not been pointed out to us by which the plaintiff might have been held to be entitled to compensation. I cannot suppose that it was contemplated by the Legislature that any board or other public body would be enabled, for the benefit of the public, to do what seems to have been a very serious injury to the plaintiff, without giving him compensation. Now, if this act was done, as it is alleged to have been done, under the Metropolis Local Management Act, and if sect. 68 of the Lands Clauses Act could have been held to have been incorporated in that Act, then justice would have been done; because, the road being raised and the plaintiff's property "injuriously affected," he could have claimed and would have obtained compensation under sect. 68; and really that does seem to be the reasonable construction. It has been said that it might be very well in the time of George III. to give power to a local authority to raise a road without affording compensation, but it certainly is not within the ordinary intention of Acts of Parliament of the present day that a public body should do an injury to a man without affording him some means of obtaining compensation for such injury. However, Mr. Smith admitted, on the part of the plaintiff, that he is concluded by the authority of the case in the Exchequer Chamber which has been referred to, and that he cannot successfully contend, after that decision, that sect. 68 does not come within the compulsory clauses, which are excluded from the Metropolis Local Management Act. This case, therefore, is entirely within that decision, except so far as it can be distinguished by introducing the power, under sect. 150 of the Metropolitan Act, to purchase by agreement. Under that the defendants might have had a power, had they chosen to exercise it, of purchasing this right of which they have deprived the plaintiff, and if they had done so then the Metropolitan Act points out in sects. 151 and 152, the means by which it might have been done, that is to say, the sections of the Lands Clauses Act, which relate to purchase by agreement would apply, and the compulsory clauses would be excluded, and so the purchase by agreement would be effected, and compensation for any damage

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thereby done to the plaintiff be provided for. But in fact there has been no agreement here at all. The defendants here have chosen to take it, and to say, "We will not make any agreement." Therefore those clauses do not apply, and that throws us back upon the state of things which is governed by the case of *Ferrar v. The Commissioners of Sewers for London* (*ubi sup.*). The result is, that, in obedience to the decision of the court of error in that case, we must hold that the defendants are entitled to our judgment. I can only say that I deeply regret that I am obliged to come to such a conclusion, and I fully agree with the strong expression, which seems to be of very recent introduction, that this decision is somewhat of "a revolting" character.

Judgment for the defendants.

Solicitors for the plaintiff, *Gregory, Rowcliffes, and Rawle.*

Solicitors for the defendants, *Clarkson, Son, and Greenwell.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

June 1 and 24, and July 11.

(Before JAMES, L.J. BAGGILLAY, J.A. and LUSH, J.)

MADDY v. HALE. (a)

Capitular lease—Trust for renewal—Refusal of lessor to renew—Accumulations for renewal—Rights of tenant for life and remaindermen.

A testator gave to trustees the great tithes to which he was entitled under a lease from a dean and chapter upon trust to renew the lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife between her and four other persons, and he directed that after his wife's death the said tithes should become part of his residuary estate. And he gave his trustees an absolute power to sell the said tithes, and gave his residuary estate to his six grandchildren. After the testator's death the trustees renewed the lease for 21 years in 1866, and since that date accumulated out of the tithes a fund for further renewals. The reversion became vested in the Ecclesiastical Commissioners, who refused to renew.

Held (reversing the decision of *Malins, V.C.*), that the lease of 1866 should be sold, and the proceeds of the sale, together with the fund accumulated for renewal, be invested, and that the tenants for life were entitled to the dividends only.

Re Wood's Estate (23 L. T. Rep. N.S. 430; L. Rep. 10 Eq. 572) followed.

Tardiff v. Robinson (27 Beav. 629n); *Morres v. Hodges* (1 L. T. Rep. N.S. 426; 27 Beav. 625), and *Re Money's Trusts* (2 Dr. & Sm. 94) distinguished.

THIS was an appeal from a decision of *Malins, V.C.* The facts of the case were as follows.

By his will, dated the 16th June 1851, the Rev. John Maddy gave to his executors, Edwin Maddy, Joseph Eaton Hale, and Edwin Palmer Clarke, his

share of the great tithes or commutation rent-charge in lieu of tithes arising out of the parishes of the Holy Trinity and St. Mary, in Ely, to which he was entitled under a lease from the Dean and Chapter of Ely upon trust to renew the said lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife Finetta Maddy equally between her and his four grandchildren, Gertrude Hyde Harbord, Louisa Julia Elizabeth Hyde Lateward, Nathan Wrighte Hewett, and Edward Hyde Hewett, and after the decease of his said wife he directed that the said tithes should become part of his residuary estate. And he empowered his said executors at any time after his decease, if they saw fit, to sell the said tithes or rentcharge and to invest the money arising therefrom in the 3l. per Cent Consolidated Bank Annuities. And, after giving certain legacies and making certain devises of real estate, as to all the rest, residue, and remainder of his estate and effects, both real and personal, the testator gave and devised the same unto the said Edwin Maddy, Joseph Eaton Hale, and Edward Palmer Clarke, their heirs, executors, and administrators, upon trust for sale and investment, and to pay the principal and interest of the investments unto and equally amongst all his grandchildren, Emily Hyde Burlton, Gertrude Hyde Harbord, John Maddy Moore Hewett, Louisa Julia Elizabeth Hyde Lateward, Nathan Wrighte Hewett, and Edward Hyde Hewett, share and share alike, on their respectively attaining the age of twenty-five years, with benefit of survivorship amongst such grandchildren, in case any of them should die under the age of twenty-five years without leaving issue.

The testator died on the 17th June 1853, without having altered or revoked his will, which was duly proved on the 16th Feb. 1854, by Joseph Eaton Hale and Edward Palmer Clarke, the third executor named in the will, Edwin Maddy, having renounced probate.

At the time of his death the testator was equitably entitled to one equal tenth share of and in the rectory of the Holy Trinity and the Blessed Mary the Virgin in Ely, within the town of Ely, and the chapel of Chettisham, with their appurtenances within the Isle of Ely, and certain glebe lands, and all manner of tithes and rentcharge in lieu of tithes to the said rectory and chapel, or either of them belonging, except certain portions of the said tithes, for the residue of a term of twenty-one years, commencing from the 29th Sept. 1838, granted of the entirety of the said premises by the Dean and Chapter of Ely, by an indenture of lease dated the 1st Oct. 1838; and the entirety of the said premises comprised in the said lease for the said term was vested in trustees upon certain trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits derived from the property leased, or by mortgage thereof, the necessary fine for renewal, and subject thereto upon trust for certain persons in certain shares, and as to one-tenth share in trust for the testator, John Maddy.

A suit was instituted for the administration of the testator's estate, and by an order made on the 20th April 1857, on the hearing of the cause, on further consideration, it was ordered that Joseph Eaton Hale and Edward Palmer Clarke, after retaining during the years 1855, 1856, 1857, 1858,

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

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and 1859 such a sum as would be sufficient to provide a fund for the renewal of the lease, the amount so to be retained to be invested in Consols and accumulated, should pay one-fifth of the surplus of the rentcharge in lieu of tithes for the parishes of Holy Trinity and St. Mary at Ely, to Finetta Maddy during her life, and should pay the remaining four-fifths during the life of Finetta Maddy to the other four tenants for life (naming them) in equal shares. And it was ordered that they should within two months after the renewal of the lease divide the residue (if any) of the fund set aside for that purpose, after deducting the reasonable costs, charges, and expenses attending such renewal, into five equal parts, and pay the same in manner directed with reference to the before mentioned five parts, provided Finetta Maddy should be then living; and that they should after the year 1859 divide the whole of the surplus of the rentcharge (without any deduction in respect of such renewals) into five parts, and pay the same in like manner to the before named persons, providing Finetta Maddy should be then living, and during her life until further order of the court.

The trustees in whom the entirety of the premises comprised in the lease of 1838 was vested renewed the lease in 1859, and again in 1866, on which latter occasion the renewal was effected by two leases, one of the tithes and the other of the glebe lands, each being for a term of twenty-one years from the 29th Sept. 1866.

One-tenth part of the fines and expenses required for the renewals of 1859 and 1866 was contributed by deductions from the share of the testator, John Maddy. Since the renewal of 1866 the trustees of the testator's will had raised and accumulated out of the profits of the testator's share a fund for renewal of the leases of 1866, which now amounted to 1003*l.* 6*s.* 7*d.* Consols.

The reversion upon the lease of 1866 had become vested in the Ecclesiastical Commissioners for England, and they had refused to renew the leases, and it was now impossible to procure any renewal of them.

The testator's share in the two leases of 1866 produced a net annual income of about 300*l.*

Under these circumstances John Maddy Moore Hewett, one of the residuary legatees, presented a petition, praying that it might be declared that the renewal fund of 1003*l.* 6*s.* 7*d.* Consols ought to be treated as corpus, and the dividends paid during the life of Finetta Maddy to the five tenants for life; that the testator's one-tenth share of the property comprised in the two leases of 1866 should be sold, and the proceeds of the sale treated as corpus for the purpose of answering the disposition made by the testator's will.

The Vice-Chancellor dismissed the petition with costs, being of opinion that the tenants for life were entitled to enjoy the leaseholds in specie, and were also entitled to the whole of the renewal fund.

His Lordship delivered judgment to the following effect: The Ecclesiastical Commissioners having refused to renew, what is the position of the tenants for life? I am of opinion that they are entitled to enjoy the leaseholds in specie, and that the lessor's refusal to renew cannot in any way prejudice their right. The next point is as to the renewal fund. Are the tenants for life or the remaindermen entitled to it? If there were no

authority on the point, I am of opinion that justice would be met by putting the parties as nearly as possible in the same position they would have been in if the renewal had taken place in due course. In the present case, the income of the leaseholds being about 300*l.* a year, the renewal fund might have been apportioned between the tenants for life and the remaindermen in the proportion of 250*l.* to the former, and 50*l.* to the latter. But such an arrangement is not possible, the point having been expressly decided otherwise by Lord Eldon so long ago as 1819, in the case of *Tardiff v. Robinson* (cited in *Colgrave v. Manby*, 6 Mad. 82, 83; and stated in 27 Beav. 629). That case is binding on me, and I must decide that the present tenants for life are entitled to the whole of the renewal fund without deduction. The only case in which Lord Eldon's decision has not been followed is *Re Wood's Estate* (23 L. T. Rep. N. S. 430; L. Rep. 10 Eq. 572), decided by Vice-Chancellor James. From that decision I am bound, both on principle and on authority, to dissent. The rule of the court on this point was also laid down in *Re Money's Trusts* (2 Dr. & Sm. 94), which, I believe, was affirmed on appeal. Moreover, in the present case, the question has been concluded in accordance with the principle laid down in *Re Money's Trusts* by the order made on further consideration of the suit to which the petitioner is a party. By that order, made in 1859, the two trustees have been bound since that date to pay the whole of the tithe rentcharge, without any deduction, to the tenants for life. In setting apart a fund for renewals out of the tithe rentcharge, the petitioner and his co-trustee disobeyed the terms of that order, and therefore the petition must be dismissed with costs.

From this decision the petitioner appealed.

Hastings, Q.C. and Langworthy, for the appellant.—In *Re Wood's Estate* (23 L. T. Rep. N. S. 430; L. Rep. 10 Eq. 572), where there was a trust for renewal of ecclesiastical leaseholds almost identical with that in the present case, and the Ecclesiastical Commissioners refused to renew, and part of the leaseholds were taken by a railway company, and the purchase money, when invested in Consols, gave a diminished income to the tenant for life, James, L.J., then Vice-Chancellor, held that the tenant for life was not entitled to be recouped the deficiency of income out of the corpus of the fund. In *Hollier v. Burne* (28 L. T. Rep. N. S. 531; L. Rep. 16 Eq. 163), Lord Selborne, sitting for the Master of the Rolls, adopted the same principle. The ground of both those decisions was that the testator intended the trust for renewal to be paramount to the interest of the tenant for life. The same ground exists here; the first trust in the will is to renew the leaseholds out of the proceeds of the tithes, and it is only the surplus that is to be divided among the tenants for life, the primary intention being to secure the corpus for the remaindermen. It being impossible to renew the leaseholds, they should be sold and the income of the proceeds paid to the tenants for life. They are not entitled to more, nor are they entitled to the fund that has been set apart for renewals. The Vice-Chancellor thought he was bound to arrive at a contrary decision by *Tardiff v. Robinson* (27 Beav. 629 n), *Morres v. Hodges* (1 L. T. Rep. N. S. 425; 27 Beav. 625), and *Re Money's Trusts* (2 Dr. & Sm. 94). But those cases are distinguishable from the present

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case on the grounds stated by James, V.C., in *Re Wood's Estate*. *Hayward v. Pile* (22 L. T. Rep. N. S. 893; L. Rep. 5 Ch. 214), where Hatherley, L.C., refused to sanction an arrangement for the purchase of the reversion in part of certain renewable leaseholds in consideration of the surrender of the other part against the wish of the tenant for life, whose income would have been considerably reduced by the purchase, does not apply to this case, for there was no absolute trust for renewal. As for the order made on further consideration in 1859, it was manifestly made by mistake, and under those circumstances *Brandon v. Brandon* (7 De G. M. & G. 365) shows that a re-hearing may be granted, notwithstanding the lapse of time.

Collier, for a respondent in the same interest, was not heard.

Glasse, Q.C. and -Vaughan Hawkins, for the tenants for life.—*Tardiff v. Robinson* expressly decides that when a renewal cannot be obtained, accumulations made with a view to renewal belong absolutely to the tenant for life. And *Hayward v. Pile* shows that the court will not order the leaseholds to be sold against the will of the tenant for life. As for *Re Wood's Trust*, that is quite distinguishable from the present case, for it was a case where parts of the leaseholds were taken by a railway company under its compulsory powers. They referred at great length to the following authorities:

Richardson v. Moore, 27 Beav. 629;
Lewin on Trusts, 6th edit. p. 325;
Colegrave v. Manby, 6 Mad. 72; 2 Russ. 252;
Lord v. Godfrey, 4 Mad. 455;
Howe v. Earl of Dartmouth, 7 Ves. 150;
Milington v. Mulgrave, 3 Mad. 491;
Mortimer v. Watts, 14 Beav. 616;
Re Cooper's Legacy, 4 De G. M. & G. 757;
Cooke v. The Stationers' Company, 3 My. & K. 262;
Tucker v. Boswell, 5 Beav. 607;
Fisk v. Attorney-General, L. Rep. 4 Eq. 521;
White v. White, 9 Ves. 561;
Bennett v. Colley, 2 My. & K. 225.

Lawson, Dunning, Berkeley, and Miller, for other parties were not heard.

Hastings, Q.C. in reply.—It is a pure question of intention, and the testator clearly intended that the trust for renewal should override the interest of the tenants for life. The law on this subject is very clearly stated in *Hill on Trustees*, p. 441: "If there be an express trust for the renewal of the lease, the tenant for life will not be suffered to reap the exclusive benefit on the non-renewal, for the interest *minus* the expenses of renewal is all that is given him, and the remainderman will not be deprived of the benefit of this exception, which was expressly reserved for his advantage out of the previous particular estate." And in a note to this passage Mr. Hill says that *Tardiff v. Robinson* must be considered as overruled.

Cur. adv. vult.

July 11.—BAGGALLAY, J. A. delivered the following written judgment.—The question involved in this appeal is as to the respective rights of persons entitled under the will of the Rev. John Maddy to estates for life and in remainder in certain leaseholds held under the Dean and Chapter of Ely, which were renewable at the respective dates of the testator's will and of his decease, but which can no longer be renewed by reason of the reversion having become vested in the Ecclesiastical Commissioners. The testator, John Maddy, by

his will, dated the 16th June 1851, gave to his executors his share of the great tithes or commutation rentcharge in lieu of tithes arising out of the parishes of Holy Trinity and St. Mary in Ely, to which he expressed himself to be entitled under a lease from the Dean and Chapter of Ely, upon trust to renew the lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife, equally between her and four of his grandchildren, and he directed that after the decease of his said wife, the said tithes should become part of his residuary estate. He further empowered his executors at any time after his decease, if they saw fit, to sell the said tithes or rentcharge and to invest the proceeds in Consols; and he gave all his residuary estate in trust for his aforesaid four grandchildren, and two other grandchildren, namely, the present petitioner, Mr. Hewitt, and the defendant Emily Burlington. At the time of his decease the testator was equitably entitled to one equal tenth part of the rectory of Holy Trinity and St. Mary the Virgin, and of certain glebe lands and tithes of the said rectory, the entirety whereof were vested in trustees for the remainder of a term of twenty-one years, from the 29th Sept. 1838, upon certain trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits of the property leased, or by mortgage thereof, the necessary fines for renewal, and subject thereto upon trust for certain persons in certain shares, being, as to one-tenth part thereof, in trust for the testator, John Maddy. In the year 1859, and again in 1866, the trustees renewed the lease, and on the latter occasion the renewal was effected by two leases, one of the tithes and the other of the glebe lands, each being for a term of twenty-one years from the 29th Sept. 1866. One equal tenth part of the fines and expenses required for the renewal of 1859 and 1866 was contributed by deductions from the share of the testator. Since the renewal of 1866 the trustees of the will of the testator have raised and accumulated out of the profits of the testator's share a fund for renewal of the leases of that date, and such fund now amounts to 1003*l.* 6*s.* 7*d.* Consolidated Bank Annuities, but the reversion of the said leases having become vested in the Ecclesiastical Commissioners, it is now impossible to procure any further renewal, and the leases will expire in 1887. A state of circumstances has thus arisen in which it is impossible to comply literally with the directions contained in the testator's will, and the actual question for decision is in what way should the leasehold and the accumulated fund be respectively dealt with. The Vice-Chancellor was of opinion that the tenants for life were entitled to enjoy the leaseholds in specie, and were also entitled to the whole of the renewal fund; and he dismissed with costs the petition of Mr. Hewitt, which prayed in effect for a sale of the leaseholds, and that the produce of such sales and the renewal fund should be treated as corpus, and dealt with accordingly under the trusts of the will. From that decision the present appeal is brought. It should be mentioned that upon the hearing of the cause on further consideration on the 20th April 1857, an order was made directing the trustees to retain out of income and invest annually until the year 1859 such a sum as would be sufficient to provide a fund for the renewal of

the leases, and to pay the surplus of the income to the tenants for life, and also to pay to them the surplus of the accumulated fund, if such fund should be more than sufficient for such renewal. And it was by the said order further directed that after the year 1859 the trustees should, during the life of the testator's widow, divide the whole of the surplus of the tithe rentcharge between the tenants for life without making any deduction for renewal. The substantial question raised by the present appeal would appear to be materially affected, if not substantially decided, by the order so made on further directions, and from which there was no appeal. But leave having been asked by the present appellants to appeal against that order notwithstanding the lapse of time, it has been agreed that the whole matter shall now be disposed of as if the order on further consideration was now under appeal. Now in this case, as in all others of the same description, it is the duty of the court to ascertain what was the paramount object of the testator in the dispositions made by him. Were such dispositions, so far as they provided for renewal, simply of a permissive or discretionary character, or did he intend that upon the death of the tenant for life the remainderman should succeed to the enjoyment, as nearly as might be, of the corpus of the same property as that to the income of which the tenant for life was entitled? This was the test applied, and I think correctly applied, by James, L.J., when Vice-Chancellor, in *Re Wood's Estate* (23 L. T. Rep. N. S. 430; L. Rep. 10 Eq. 572). In that case the testator directed that a portion of the rents to be derived from his leasehold property held under the Dean and Chapter of Westminster should be set apart as a renewal fund, so that the estate might be always kept renewed, and then devised it upon trusts, which were in effect for his wife for life, and after her decease for his children. The property was held under two leases which, by practice and usage, were renewable every fourteen years. One was renewed in 1856 and the other in 1864, so that the usual times of renewal would have been, for the one in 1870, and for the other in 1878. In 1865 and 1866 a railway company, acting under parliamentary power, gave notices to purchase certain parts of the leaseholds, and as the purchase-moneys when invested in Consols produced a diminished income, the question was whether the tenant for life was entitled to be recouped the deficiency out of the corpus of the fund. The Vice-Chancellor was of opinion that the paramount object of the testator was to have the estate renewed for the equal benefit of all the persons entitled in succession, and held that the tenant for life was only entitled to the income produced by the investment of the purchase moneys. It may be noticed that in the case of *Re Wood's Estate* the notices were served by the railway company before the right to the reversion had passed to the Ecclesiastical Commissioners, and the leaseholds were consequently converted into Consols through the act of the Legislature. It thus illustrated in the simplest manner the principle upon which a court of equity would act when dealing with successive interests in leaseholds which have been forcibly converted into the equivalent of a fee simple estate, instead of being perpetually renewed in the manner directed

by the testator. The same principle was acted upon by Lord Selborne in *Hollier v. Burne* (28 L. T. Rep. N. S. 531; L. Rep. 16 Eq. 163.) In that case the testator, after bequeathing leaseholds held under the Dean and Chapter of Bristol in trust for his daughter for life, and after her death for her four children, authorised his trustees to set apart an annual sum for renewal, with directions that if the annual sum so set apart was not sufficient for that purpose, the deficiency should be made up by the persons for the time being entitled to the income. The will also contained an absolute power for the trustees to sell the estate. The reversion became vested in the Ecclesiastical Commissioners, who declined to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest, and the payment of a sum of money, and upon the application of one of the parties interested in the reversion. Lord Selborne being of opinion that the trusts for renewal were paramount to the interests of the tenant for life, held that the proposed arrangements were within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the court had power to carry it into effect, notwithstanding the opposition of the tenant for life, who opposed it on the ground that her income would be greatly diminished. If, then, the same test is applied to the present case as was applied by the Lord Justice in *Re Wood's Estate*, and by Lord Selborne in *Hollier v. Burne*, and we proceed to inquire what was the paramount intention of the testator as indicated by the dispositions made by his will, it appears to me impossible to arrive at any other conclusion than that he intended that those entitled in reversion expectant upon the decease of his wife should succeed to the enjoyment of substantially the same estate as that the income of which was to be enjoyed by those designated to take it during his wife's life. The circumstances of the present case would appear to be almost stronger in favour of this view than they were in either of the cases to which I have referred. The first trust declared by the will is that the trustees should from time to time renew, and raise the necessary funds out of income, and it is only in respect of the property from time to time renewed at the cost of income that the testator proceeds to declare trusts in favour of the beneficiaries, and this view of the case is strengthened by the fact that an absolute power of sale is conferred upon the trustees. The Vice-Chancellor appears to have been of opinion that the point raised upon this petition had been expressly decided by Lord Eldon in *Tardiff v. Robinson* (6 Mad. 82, 83; 27 Beav. 629n.), and that that decision had been followed by Vice-Chancellor Kindersley in *Re Money's Trust* (2 Dr. & Sm. 94), and by Lord Romilly in *Morres v. Hodges* (27 Beav. 625), and that the only case in which it had not been followed was that decided by the Lord Justice—*Re Wood's Trust*—to which reference has already been made. Now in *Tardiff v. Robinson* certain Crown leaseholds were settled by deed—not by will—upon trust for the Countess Tardiff for life, with remainder as she should appoint, and with a proviso that it should be lawful for the trustees at the usual and ascertained times, and at the request of the countess during her coverture, and afterwards at their own discretion, to renew the lease and to raise the fines out

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of the rents, or by mortgage; and the countess by her will appointed the funds, subject to the payment of certain annuities to her husband for life, with limitations over. It will be observed that the trusts or directions for renewal were in the deed only, though a further fund was provided by the will for payment of the fines. In such a case it appears to me that it would have been impossible to hold that there was any over-riding trust for renewal. Not only was the question whether there should be a renewal or not left, after the death of the countess, to the discretion of the trustees, and it was not until after her death that the question arose, but they were in any event bound by the strict terms of their trust, which conferred upon them the power of raising money to renew at the usual and accustomed times, and at those times only, and, the Crown having absolutely refused to renew, such times would never arrive. Lord Eldon accordingly declared that, as no renewal could be obtained, no accumulation of the rents and profits could take place. It is immaterial to consider whether, if the trusts in that case had been created by will instead of by deed, a different conclusion might not have been arrived at. The decision in *Richardson v. Moore* (6 Mad. 82, 83), which had reference to the same property, depended upon the provisions of an earlier deed of settlement, but such provisions did not substantially differ from those which had to be considered in *Tardiff v. Robinson*. As regards *Re Money's Trusts* (2 Dr. & Sm. 94) it does not appear from the report whether the will contained any trusts or directions for renewal, and Kindersley, V.C. appears to have decided the case upon the authority of Lord Romilly's decision in *Morres v. Hodges* (27 Beav. 625), in which case Lord Romilly considered himself bound by Lord Eldon's decision in *Tardiff v. Robinson*. It is also to be noted that in *Morres v. Hodges* the question arose upon a deed, and that there was no express trust to renew, but only a direction to the trustees to use their best endeavours to renew. *Hayward v. Pile* (22 L. T. Rep. N.S. 893; L. Rep. 5 Ch. 214) was also cited by the respondents; but in that case, also, there was no absolute trust for renewal. The trusts were that the trustees should, if they thought fit, but not otherwise, at the usual times or periods, or at such other times or periods as they should deem expedient, procure a renewal of the leases, and should for that purpose raise money as therein mentioned. Upon a full consideration of all these cases, I have come to the conclusion that the cases of *Richardson v. Moore*, *Tardiff v. Robinson*, *Morres v. Hodges*, and *Hayward v. Pile* are distinguishable from those of *Re Wood's Estate*, *Hollier v. Burne*, and that now under consideration. In no one of the former was there, whilst in each of the latter there was, a predominant trust for renewal over-riding the dispositions in favour of the successive beneficiaries. The intention of the testator being thus ascertained, the question remains, how can that intention be best effectuated? The decisions in *Re Wood's Estate* and *Hollier v. Burne* would indicate that the strictly correct course to have followed would have been for the trustees to have exercised their power of sale over the leaseholders as soon as it was ascertained that the leaseholds could not be again renewed, a period corresponding in the present case with that of the

last renewal, viz., in 1866; and had the power been so exercised, the beneficiaries, during the life of the widow, would have been entitled to the income arising from the investment of the amount so produced. This course, however, was not followed; but a certain sum has been annually retained by the trustees, equivalent, as I understand, to the amount which would have been properly retained for the purpose of renewal, had renewal been still possible. If the amount so retained was accurately ascertained, and there appears to be no reason to doubt that such was the case, the aggregate of the produce of a sale now to be effected, and of the accumulations until sale, would substantially represent the value of the leaseholds at the time they ceased to be renewable. The result is that the order of the Vice-Chancellor should be discharged, and an order should be made in accordance with the prayer of Mr. Hewett's petition. The order should contain a recital to the effect that the order on further consideration was by consent treated as under appeal. I may add that Mr. Justice Lush entirely concurs in the judgment which I have just now pronounced.

JAMES, L.J.—I have reconsidered my judgment in *Re Wood's Estate* (23 L. T. Rep. N. S. 430; L. Rep. 10 Eq. 572) in the light of the observations of the Vice-Chancellor Malins in the case before us. I have also had an opportunity of reading the judgment which the Lord Justice has just pronounced, and I have arrived at the conclusion that his judgment is the correct one.

Order of Malins, V.C. accordingly discharged.
Costs of all parties out of the fund.

Solicitors for the appellants, *Whites, Renaud, and Co.*
Solicitors for the respondents, *Shoulbridge; Berkeley.*

SITTINGS AT WESTMINSTER.

Feb. 10, 14, and 25.

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Letters patent—Infringement—User of patented invention by third person under contract with the Crown—Liability to patentee.

The defendants contracted with the Crown to "provide and deliver" a quantity of Martini-Henry rifles at a fixed price per rifle, and according to a specification. The stock and the tubes for the barrels were to be supplied to the defendants by the Crown, and the rifles, when completed, were to be submitted to officers of the Crown for approval. In order to carry out this contract the defendants were compelled to make use of an invention for breech action, for which letters patent in the usual form had been granted by the Crown to the plaintiff:

Held, first (affirming the decision in Feather v. The Queen (12 L. T. Rep. N. S. 114; 6 B. & S. 257), that the Crown's right to use the invention was not affected by the grant of letters patent for the use of it to the plaintiff:

Secondly (reversing the judgment of the Queen's Bench), that the defendants' contract with the Crown being one of service and not of purchase and sale, the principle laid down in Feather v. The Queen applied, and that the defendants

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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were within the protection and immunity enjoyed by the Crown, and therefore were not liable in an action by the plaintiff to recover damages for the infringement of his patent.

APPEAL from a judgment of the Queen's Bench, on a case stated by an arbitrator.

The case in the court below will be found fully reported 33 L. T. Rep. N. S. 830.

The Court of Queen's Bench gave judgment for the plaintiff, and from this judgment the defendants now appealed.

The Attorney-General (Sir J. Holker) (*C. Bowen* with him) for the appellants.—The case of *Feather v. The Queen* (6 B. & S. 257; 12 L. T. Rep. N. S. 114) has decided that the Crown is not precluded from using an invention for the use of which it has granted letters patent. The Crown gives a patent right against all the rest of the subjects, but not against itself. The defendants in the present case were more contractors than servants of the Crown, but our contention is that what they did was really done by the Crown. The contract was one of service and not of sale and purchase as was assumed in the court below. The letters patent must be read as though they contained an express reservation to the Crown of a right to the full and perfect use of an invention like this. Public policy demands that the Crown should have that right, for an inventor might be in a position to refuse the Government the invention at a critical moment when the interests and safety of the state demanded it. The principle laid down in *Feather v. The Queen* must be extended to this case. It would be a very narrow construction of the Crown's privileges that, although it might by its own servants manufacture the patented articles by millions, it could not contract with another person to manufacture them. The defendants' contract here is clearly to manufacture. The Crown supplies the stocks and barrels, and the defendants are to manufacture and supply a complete Martini-Henry rifle. The acts of infringement complained of and stated in the case show this. *Feather v. The Queen* is a good decision, and I ask the court to follow it.

Sir W. V. Harcourt, Q.C. and Aston, Q.C., (with them *Maerory*) for the plaintiff.—This is not a contract to manufacture. It is to provide and deliver, and it is a distinction that the materials used by the defendants do not remain the property of the Crown. In *Feather v. The Queen* the Queen was the defendant in a petition of right. Here it is a suit between subject and subject, and in order to maintain their position the defendants must bring them within the immunity enjoyed by the Crown. They cannot do so, for they are contractors and not servants. Upon the face of the contract there is no evidence that the Crown did not intend the patentee to be paid for the use of his invention. The defendants could perfectly well have fulfilled their contract without manufacturing at all. They could have procured the locks from the patentee or his licensee. Assuming that the privilege claimed by the Crown exists, it lies upon the defendants to show that that privilege has been asserted in this case. In other words the privilege is of the Crown and not of the contractor. This is a grant by the Crown for good consideration that the patentee shall disclose his invention for the public good at the end of the term. It differs, therefore, from ordinary prerogative grants, and the Crown ought not to be allowed to derogate

from it. The defendants here obtain a profit by the manufacture of these articles, the Crown having previously granted the whole profit to the patentee. The prohibition in the letters patent, against persons, bodies politic, &c., using the invention during the term, and the proviso for cesser of the same letters patent if the patentee shall not supply to the Crown the articles patented, show that the Crown did not intend to retain the general right of using the patent, and these clauses satisfy all the requirements of public policy. The decision in *Feather v. The Queen* cannot be upheld. It has been overruled by the decision in the Queen's Bench in this case. In the course of the argument the following cases and authorities were referred to:

Millar v. Taylor, 4 Bur. 2303;
Elmslie v. Boursier, L. Rep. 9 Eq. 217;
Harmer v. Plane, 14 Ves. 130;
Williams v. Williams, 3 Meriv. Rep., 157;
Nielsen v. Harford, 1 Webster's Rep. 295;
Carp. Rep. on Patent Cases, vol. 1, 709;
Steph. Com. on Blackstone, vol. 2, p. 551;
Bac. Abr. Prerog., p. 516;
Allin's Prerog., 158.

C. Bowen replied for the Crown.

KELLY, C.B.—This is an action brought in the Court of Queen's Bench by a patentee, Mr. Dixon, for the infringement of a patent for the exclusive use and manufacture of an article, called the Martini breech action, to be applied to a rifle. There can be no doubt on the facts of the case that a patent has been granted, that it is a valid patent, and that it secures to the patentee, the plaintiff, the exclusive right of manufacturing the article in question, and that unless a good defence can be set up to the action, the defendant is liable to the verdict and the judgment, which have been found and pronounced against him. But his answer is that, although it is true that he has manufactured great numbers of the articles in question, the manufacturing of each of which would be an infringement of the plaintiff's patent, he claims to justify the act he has done under the authority of the Crown. He says that he manufactured these different articles under the express direction of the Crown, under contract indeed with the Crown, but also under the employment of the Crown. Upon that state of facts two questions arise: The first, which is a great and important constitutional question, and which it is to be hoped that this case, whether carried further on appeal or not, will finally settle, is whether the Crown is bound by any provisions whatsoever in any Act of Parliament, under which patents are granted for the benefit of the patentee, without a reservation to itself; that is, to the Sovereign herself, of the right to use and exercise the patent exactly as the patentee himself may think fit to do, and that without permission, without his licence, and without making any compensation. The ground upon which I am of opinion that such a right exists, and is reserved in this and every other patent, and is a part and parcel of the prerogative of the Crown is, that this maxim, if it is to be called a maxim, lies at the very foundation of the question, whether it has been expressly used or referred to in former cases or not, that the Crown is not bound by any provisions whatsoever in any Act of Parliament, unless expressly named, and by the term "expressly named" must be understood so named as to impart either expressly, or by a necessary and

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inevitable implication and inference, that it was intended that the Crown should be named by the provision, whatever it may be in question. The Crown is not named in this patent in any such terms as to lead to any such inference or such an implication; and, therefore, upon that ground alone, I am opinion that the Crown is not restrained from the unlimited exercise conferred by that patent, namely, the right to manufacture the article in question. But, further, there is also the maxim that has been expressly referred to and relied upon, and said to be the chief foundation of the decision of *Feather v. The Queen*, namely, that letters patent should also be taken and construed in the most favourable and beneficial sense to the Crown. But I should add that those words do not preclude the Crown from the use of the invention protected by the patent even without the assent of, or compensation made to, the patentee, and the ground is that the language of the patent and the particular invention which the patent contains, and the effect also, should be used and understood, and should always be construed in a manner favourable to the Crown, and against the patentee, differing in that respect, although not without exception, from all the deeds, documents, or instruments whatsoever, passing between subject and subject. But in the case of patents, or in any other instrument or instruments to which the Crown is a party (and specially in all cases of grants of the Crown), the language of the grant is to be construed most favourably to the Crown, and against the subject to whom the grant is made. Those being the general principles governing the grant of patents, and indeed every other grant, and almost, I might say, the execution of any instrument by the Crown, whether under statute or under common law, or by virtue of its prerogative, we have next to consider whether we are not bound by authority, and whether the authority of the case of *Feather v. The Queen*, is not decisive of the whole question before the court. The question (subject to the second point to which I shall hereafter advert) is whether the patent being granted by the Queen, the case of *Feather v. The Queen* is not conclusive that, where in the grant there are no express words, the Crown has reserved to itself the right to use the patent at its free will and pleasure without restriction, and without compensation. I may say also, before I refer to the language of the court in the judgment pronounced in *Feather v. The Queen*, that in that case there was not only a grant of the patent and the sole and exclusive use of it to the patentee in the strongest terms which language could express, but there was also a condition and provision that the patentee should supply articles of the invention for the use of the Crown, at and upon such reasonable terms as should be settled by the officers of the Crown requiring those articles. And, undoubtedly, were this *res integra* it would be, and it is an argument well worthy of consideration, and one that may fairly be adduced in favour of the plaintiff, that the Crown having actually and expressly reserved to itself the right to use the invention, but only on making compensation to the patentee in a way pointed out, *Expressio unius est exclusio alterius*, and we must suppose that the Crown had no general and absolute constitutional right to use the invention if no such clause had been inserted.

But the very existence of such a clause in a grant of this nature founds a *prima facie* argument that otherwise the Crown would have been entitled to use the invention as they have done in the present case. I need not go at length into the case of *Feather v. The Queen*. I have already adverted to the terms of the patent, which were as favourable to the patentee as any that can well be imagined; but we find that upon all the arguments being used that have been referred to, and upon every case which seemed to have a bearing on the subject being submitted to the consideration of the court, there is this statement of the view of the court, "Our view as to the construction to be put upon a grant of this nature becomes materially confirmed by what is clearly settled to be the law in respect of another class of grant emanating from the same branch of the prerogative. By virtue of its authority in matters of trade and commerce, the Crown, from a very early period, exercised the power of granting to individuals the right of holding fairs and markets, and, as incidental thereto, of taking tolls," and a very ancient form of Comyn's Digest is referred to in support of that. The judgment proceeds: "This appears strong to show that, in granting a privilege otherwise of universal application, the Crown will not be bound, unless it expressly declares its intention to that effect." Now that is really conclusive of the whole question. There is no expression here that the Crown is to be bound notwithstanding its prerogative, and here is the language of the court clearly and manifestly holding that the Crown will not be bound unless it expressly declares its intention to that effect. "And that grants of privilege, however general in their terms, can, in the absence of express words to bind the Crown, be taken only as conferring the privilege as against the subject exclusive of the Crown." Then we have to consider whether the case before the court is distinguishable from *Feather v. The Queen*, as determined. Now, upon looking through the arguments, and especially the judgments, in the report of this case in the court below, I am at a loss to see any distinction, except that pointed out by Lord Chief Justice Cockburn in his judgment. He says, after alluding to the case of *Feather v. The Queen*, "But this case is very different. The manufacturer in this case entered into a contract to furnish certain articles. To my mind there is nothing in principle which creates any difference between articles sold to the Crown and articles manufactured for the Crown." Now, when we look at the distinction which exists between articles manufactured for, and articles sold to the Crown, I think it is obviously this—if a man enters into a contract to supply, say 10,000 of the patented articles, to the Crown for a certain sum, and they are deliverable at certain periods to the officers of the Crown, he must either purchase them himself before he can deliver them to the Crown, or he must manufacture them, and that either before the contract is entered into or before it is completed. If he purchases them no doubt he will have to pay for whatever benefit should result to the patentee, but if on the other hand he has manufactured them, or has to manufacture them under a contract of this nature, he has clearly infringed the patent, because he was without any authority directly or indirectly from the Crown. He would himself have manufactured them for his

own profit, in order to obtain a certain price; and the difference is obvious. If he purchases, he has already paid the patentee. If he manufactures, he must obtain a licence to manufacture, or he is liable to an action for infringement of the patent. But the case is surely different where the manufacturing of the article itself has been effected at the direction and under the authority of the Crown; and when we come to look at the contract, and to raise the second point in this case, we must undoubtedly look a little minutely at the terms of this contract, and the papers which constitute it, before we pronounce a decision, because it may well be that if the effect of this contract has been that the defendants must have possessed themselves of the articles before they sold and delivered them to the Crown, then the result would follow that they must either have manufactured them themselves, without the authority of the patentee, and so be liable for an infringement, or they must have purchased them, in which case, undoubtedly, they would have satisfied the patentee. But when we look at this contract, the question arises whether there is any doubt at all, or whether it is possible to argue, that this is a mere case of a contract for sale and purchase of 10,000 rifles, or whatever the number may be, or whether it is not an agreement between the defendants and the Crown, or the officers of the Crown acting under the authority of the Crown, for the manufacture by the defendants of the number of articles in question. Now we have only to look at the contract to see that this is necessarily so, and that, although there are general words in the contract, the words, for example, that the defendants will provide a certain number of these rifles to the Crown, that may be ambiguous, it is impossible to look at the second, third, and fourth clauses to be found in this instrument without seeing that there is a direct authority on the part of the Crown to the defendants to manufacture the articles, and, they being so manufactured, to deliver them at a certain price to the officers appointed to receive them. In the case itself you find it stated that the acts of infringement complained of were as follows: "On or about the 16th April the defendants tendered to the Secretary of State for War for the supply for the public service of 13,875 Martini-Henry rifles, and on the 29th day of the said month, the said tender was accepted by Her Majesty's said Secretary of State, and a contract was entered into at the price, and on the terms mentioned in the said contract." Now we have to observe here that first of all this is an act done, whatever may be its precise nature and character, under the direct authority and command of the Crown, the patentees and the defendants on the one hand, and the Secretary of State for War on the other. It has been observed, incidentally indeed, but it has been observed more than once in the course of the argument, that the Queen cannot go and manufacture or make any rifles for her great army in her own person, neither can the Secretary of State for War do so, and if he desired to have a number of these rifles, 10,000 or any other number, for the public service, he must employ somebody to manufacture them, or he must, as he might do, go and buy them at once in the market. Well, what is it he has done here? First, then, it is the Secretary of State for War who gives the direction, and who enters into

the contract. The next article then proceeds: "The defendants under and in pursuance and performance of the said contract on their part, made, manufactured, and delivered, according to the terms stated in the said contract, a portion of the said number of 13,875 Martini-Henry rifles, which said rifles were accepted of and from the defendants by Her Majesty's Secretary for War, and for the use of Her Majesty and the public service aforesaid, and the defendants have been paid for and in respect of a part of the same rifles so made, manufactured, and delivered." We have here the very word itself. They do not buy, and having bought, say, "provide and deliver;" but they made, manufactured, and delivered according to the terms stated in the said contract, a portion of the articles which were accepted from the defendants by Her Majesty's Secretary for War, "for the use of Her Majesty and the public service as aforesaid, and the defendants have been paid for, and in respect of part of the same rifles so made, manufactured, and delivered." I am referring to the precise terms of the contract, where we find it expressly stated, "If under and by virtue of this contract." Then we come to see how the contract was performed, and performed to the satisfaction of both parties. The rifles have been delivered by the defendants, accepted for the Crown by the Secretary for War, and paid for by him to the defendants. Without more, I should say that if the case rested here it was a case in which the Crown directly employed the defendants to manufacture this quantity of rifles, and that, in contemplation of law there is no difference between the manufacture by the Crown itself and the manufacture by the defendants under the Crown's authority, and the difference in fact is only the necessary and inevitable one arising from the impossibility of the Queen herself manufacturing a quantity of rifles. Without reference to the precise terms of the contract, it would be enough to say here, that by the finding of the case it is shown that the rifles were manufactured by the defendants. Then comes the question, with which I have already partially dealt, whether the manufacture being by the defendants for the Crown and by the direction of the Crown, it would not be impossible, if there be any distinction as has been here contended for between manufacture by the Crown and manufacture by others under the Crown's direction, to give the effect to the rule of law laid down in *Feather v. The Queen*. Unless we are to suppose the possibility of some of the Crown officers themselves manufacturing such articles, it cannot signify whether they employ a manufacturer or 100 workmen in Woolwich Dockyard, or anyone else. It is enough that whoever manufactures is employed by the Crown. The Queen, by virtue of her prerogative, and the implied exception in the letters patent, is entitled to use the patented invention herself, and she does in effect use it, when she tells other persons of whatever number or description, to manufacture the article in question for her use. But, when we look at the terms of the contract again, the matter is still clearer. In the first schedule a number of articles are specified "rifles, Martini-Henry, without swords, bayonets, or scabbards, at 3*l.* 10*s.* each, less 7*s.* 6*d.* each for steel tubes, and 2*s.* 2*d.* each for stocks, patents and specifications to be seen at the Royal Small Arms Factory, Enfield. Materials for barrels and stocks will be issued

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from the Government stores." How can it be said that the defendants have done any other act than manufacture these rifles. They have to begin with the barrel and stock, and they manufacture them into a Martini-Henry rifle. What else have they to do? Nothing else is pointed out here. They have the two parts found for them, and they have to manufacture the breech-loading and any other part necessary to complete the manufacture of the entire article. Going on to another part of the contract the second of the articles we find this: "Previous to the articles being received into store, they will be examined by the officer or officers appointed for that purpose, and if found inferior or defective in quality, they will be rejected, and the contractor is to remove the same at his own expense, within ten days after he is requested to do so, without any allowance being made to him for such rejected articles." Then comes the contract on the part of the defendants. "We the undersigned hereby agree and bind ourselves to provide and deliver the articles enumerated in the list or schedule hereunto annexed, and we do agree to abide by and fulfil all the conditions, &c., and in default to pay a certain penalty to the Queen. Here we have as minutely as language can express it, a contract of manufacture to "provide and deliver," and the defendants undertake to perform and execute that contract at the direct employment of the Secretary of State for War. Under these circumstances any question that might arise had this been a mere contract for purchase and sale of the articles, has no application to the present case. I am of opinion that the case comes entirely within the principle of *Feather v. The Queen*, as being a case of manufacture, and manufacture only, upon the Queen's employment, and at her direction. I go on to observe, in conclusion, that the power which is vested in the Queen, like all other branches of the prerogative, is entirely for the benefit of the public. That power is of the very highest importance to the very highest requirements of the nation. Supposing a war to break out, and 100,000 rifles are required with as little delay as possible in order that our armies may take the field; if the Crown was obliged to wait until all the patentees of one patent got machinery, and another patentee could be satisfied and induced to enter into an agreement, the kingdom might be invaded and conquered (if we may suppose such a thing) before the agreement could be made and the manufacture take place. It is, therefore, greatly to the benefit of the Crown, and of the nation itself, that the Crown should have the power to take into its own hands the entire manufacture and purchasing of any number of articles necessary for the State in war, and that with or without compensation. I need only add that there is no fear in this country of the Crown itself in the character of the Sovereign, and still less where there is a House of Commons in which every member can be heard on any subject of complaint, that the Crown will ever do injustice in violating the rights of the patentee by making no compensation to him. In later times there is an express provision under which compensation can be made, although it is not secured by this patent, and is not material. There is no doubt that the Crown is always ready upon petition or enquiry to make ample compensation for whatever may be the just

claim of the patentee, wherever he has suffered by the Crown adopting or using his patent. Under the circumstances, therefore, I hold that, this being a manufacture really by the Crown itself, it is privileged, and that the defendants, who have been the instruments of the Crown in the manufacture in question, are within the immunity and prerogative of the Crown, and exempt from any action or claim whatsoever at the suit of the patentee.

JAMES, L.J.—I am of the same opinion. Whatever may have been the ideas prevalent in the public mind, and in certain legal minds, as to the extent of the obligation of the Crown with respect to the rights of patentees before the case of *Feather v. The Queen*, it appears to me that, when the question once was raised for legal decision before a legal tribunal in this country, it would have been impossible for any lawyer to arrive at any other conclusion than that which the Court of Queen's Bench came to in that case, having due regard to the well established principles which have at all times prevailed in this country as to the construction of grants of the Crown, and as to the construction of Acts of Parliament, by which the Crown is supposed and might be supposed to be bound. I say it seems to me that the moment the question was first raised and stated as a mere legal question for the decision of a legal tribunal, it was impossible to hold that there is anything in the letters patent, or any letters patent which extended to the Crown itself the prohibition or injunction which the Crown, by these letters patent, imposed upon its subjects, or anything by which the Crown could be supposed to be entering into a covenant or bargain with the patentee that it was not itself to use the invention. I say that it appears to me that *Feather v. The Queen* was decided upon principles impossible to be questioned, and that the authority is now a binding authority. Starting with that, it appears to me that the decision of *Dixon v. The London Small Arms Company*, which we have to deal with, is one which (with all respect to the learned judges who decided that as they decided the case of *Feather v. The Queen*) is a decision which is given on what appears to me an equally well settled principle of law in this country. It appears to me to have been settled in all kinds of cases that what a person may lawfully do himself he may lawfully do by his attorney, his bailiff, his contractor, his agent, his servant, his workman; that it is a sufficient plea in certain cases, that the thing was done by the authority, at the request, or on behalf of the person who had a legal right to do it. Almost every great work in this country is done by contractors who act under the authority of the bodies who have received authority from Parliament to do what is required to be done. If it be the case, as it appears to me to be the case here, that it was done by the authority and the express authority, for the use, for the benefit of the Crown, it is, to my mind, merely saying that it was done by the Crown. The Crown has done it by such person or persons, in such a way, under such circumstances, as the officers of the Crown thought fit to do it. It appears to me, when it was stated in the court below that there was nothing in principle that created any difference between articles manufactured under a contract for the use of the Crown and articles sold to the Crown—I say it with all unfeigned deference and respect for

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those who so stated it—that there is a difference between an affirmative and a negative in the two things, because in the one case the man would be able to allege with truth that he has done it at the request or by command and for the use of the Crown; in the other case he would not be able to allege that he had so done it. He could only prove that he had done it for his own use and speculation, and the wrong which he had committed would not be purged by the fact that the Crown, or the Crown's servant, had subsequently made an independent bargain with him for the article itself. It appears to me there is this distinction, in the one case it is a manufacture for themselves, in the other case it is precisely the same, it seems to me, as if the Crown had hired the defendants' warehouse and their servants, and had employed the defendants to manufacture for them. For whether the Crown pays a sum for the article manufactured in the workshop in gross, or pays a sum for the servant, and pays somebody for superintending it, and pays them a remuneration for it, it seems to me the same thing. That is, the articles themselves are made, delivered, and prepared by the order and for the use of the Crown and therefore they are within the right of the Crown, to manufacture for its own use.

MELLISH, L.J.—I am of the same opinion. I entirely concur with the reasons given in the case of *Feather v. The Queen* for that judgment. It appears to me that it necessarily follows from the well established rule of law that in the construction of Acts of Parliament and in the construction of grants by the Crown, the Crown is not bound unless expressly mentioned. By which I understand that an Act of Parliament or a grant professing to bind all persons in general is not sufficient to bind the Crown, but that it must in terms, say that it is intended to be applicable to the case of the Crown. I can see no reason why the grant of letters patent is not to be construed like all other grants on behalf of the Crown. It is said that it amounts to a contract between the Government and the patentee, and that consideration is given. No doubt, for certain purposes, learned judges, in considering patents have treated them as if they were contracts, but when you look at the patent itself it professes to be a grant, stating that the patentee had found out a certain invention, and that it would be a benefit to the public that he should have letters patent, and then there is a grant which purports in terms to be a grant from the Crown, and that grant is made subject to a variety of conditions upon the non-compliance with which that patent is to be forfeited. The patentee does not bind himself to anything, but certain conditions are imposed by the Crown, upon non-compliance with which the patent is lost. Almost the entire argument which has been presented to us for the purpose of showing that it is in the nature of a contract, and for the purpose of showing that it was intended to bind the Crown, has depended upon those conditions. But most of these conditions (I rather think almost all of them) have been inserted from time to time since the Statute of Monopolies. But it was perfectly obvious that if the Crown would not have been bound by a patent granted a day after the Statute of Monopolies had passed, and when there were no conditions at all, the mere fact that, out of precaution and for the benefit of the public, the Crown has since thought fit to insert a number of con-

ditions in the letters patent, cannot alter the construction which previously prevailed and make that a grant binding the Crown, which previously was a grant only binding the subject of the Crown, and not binding the Crown itself. Therefore, I am of opinion the Crown is not bound. Then, the Crown not being bound, is entitled to use the invention specified in the letters patent for the purposes of the public, and being entitled to use the invention specified in the letters patent for the purposes of the public, the Crown is entitled to get it manufactured, and the question we have to decide, and the only question upon which we differ from the Court of Queen's Bench, is that, admitting that the Crown is entitled to get it manufactured by its servants, is the Crown also entitled to get it manufactured by employing a contractor to manufacture it? Part of the difference in the court below arises upon the construction of the contract itself. I think some learned judges seem only to have looked at the printed part of the contract which consists, first, of the tender, which is published by the Government, and which contains the general conditions of the contract, and which the parties see before they tender, and the acceptance of an offer under the tender which is contained in it, without considering that it refers to a schedule and that the most material parts of the contract are contained not in the printed part but in the written schedule annexed to it. In the written schedule, when we look at the contents of it, it is plain the Crown was to provide the steel tubes and the stocks, and then the contractor was to manufacture the steel tubes and the stocks into a perfect Martini-Henry rifle, which was to be inspected during the process of manufacture by the Crown officers at the particular place where it was to be manufactured. Therefore, it plainly was a contract to manufacture certain articles for the purposes of the Crown. Now, if the Crown has the right to have the patented article manufactured by its servants, has it not the right to have it manufactured by entering into a contract with the contractor? What is the difference between the relation of employer and contractor and the relation of master and servant? No doubt there is one perfectly well established difference between them, namely, that the master is answerable for the acts of the servant done in the course of the employment, even though they are not expressly authorised by him. He is answerable for the negligent acts of the servants, and for any acts done by the servants, if they are within the scope of his general authority in the course of the employment. Whereas, in the case of a contractor and employer, the employer is not answerable for the acts of the contractor, if done negligently, in the course of executing the contract, and which are unauthorised by him. But as far as his acts are expressly authorised by the contract, I am not aware that there is any difference between the employer and contractor and master and servant. The acts of the contractor expressly authorised by the contract are the acts of the employer. That may be illustrated by the cases which happen every day with reference to contracts for railway companies. If the railway companies employ a contractor to do any of the numerous works which the railway companies are authorised to do by Act of Parliament, there is no doubt at all that the contractor may justify doing the act under the authority of the railway company. If, on the other hand, the rail-

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way company employ the contractor to do any act which is illegal, and which they are not authorised to do by Act of Parliament, then the person who is damaged by that illegal act may bring his action, not only against the contractor who does that act, but against the railway company who are his employers. The act of the contractor expressly authorised by the contract is the act of the employer, just as much as the act of the servant is the act of the master. Therefore, when the Queen employs these defendants to manufacture for her stocks and barrels into these Martini-Henry rifles, that is really, in point of law, the act of the Queen herself, and the contractor may justify, just as the servant may justify. I should rather think it would be found, if you referred to the old system of pleading, such as was used in the days of pleading to special demurrers, you might justify in the same words. It would not be necessary to say whether the act was done in the relation of master and servant or employer and contractor, but it is sufficient that the person, whether master or employer, was entitled to do that act, showing how he was entitled to do it, and then by the authority of the master or employer, he did the act in question, and that would be proved by showing that he was employed as a contractor to do it, or by showing that he was employed as a servant to do it. Therefore it is impossible to make a legal distinction between the two cases. Therefore, as I think, *Feather v. The Queen* was rightly decided; I am of opinion that it necessarily follows, from *Feather v. The Queen* being rightly decided, that the defendants have a good defence to this action.

GROVE, J.—I am of the same opinion. I think that *Feather v. The Queen* was rightly decided, and I do not intend to go over the grounds of that decision, but only to advert to one or two points which have been pressed in argument before this court. It has been said, assuming and admitting that the Crown are not bound, except expressly named in the patent, that (although it cannot be contended that the Crown is in terms expressly named) yet, from the words which are used, the necessary implication arises, and there is something tantamount to the naming of the Crown, and that the Crown is in fact bound by this grant, not because the Crown *eo nomine* is named, but because there is one clause in the letters patent which cannot be fairly construed without assuming that the Crown is bound by them. I do not read the letters patent as containing or importing any such construction as would force us to assume that the Crown was bound. The first branch of this argument—which is the only argument I think it necessary to advert to—is that the grant is for the sole use and exercise of the said invention. It is said that the word “sole” there excludes the Crown, but if the clause is read, it shows it is the sole use as between her Majesty’s subjects, and the next proviso or prohibition is, “We do by these presents, for us our heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, or degree, name, or condition soever they be, within our United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, that neither they or any of them, at any time during the continuance of the said term of fourteen years hereby granted, either directly or indirectly, make use or put in

practice the said invention.” There is not a word there about any understanding on behalf of the Crown that the Crown itself should be bound by an injunction upon the subjects of the Crown that they should allow the patentee, as between the Crown and the patentee, the sole use, and should not put in practice the invention. Then it was said that there are certain dicta and judgments of learned judges, especially of Lord Eldon, which say that the terms of the patent are a bargain between the Crown, acting on behalf of the public, and the patentee. In one sense the term “bargain” may be used. The Crown, in granting a monopoly to one subject as against the remaining subjects of the Crown, has to see, on behalf of the public, that the monopoly is not abused, and for that purpose the Crown insists and has insisted from time to time as I pointed out to Mr. Aston, during his argument, upon proper provisos being inserted, which describe the invention accurately, and so on. In the reign of Queen Anne, and considerably after the statute of James, whereby these letters patent were legalised, if I may say so, to the true and first inventors, that important proviso was put in no doubt in one sense, it being a bargain that the patent should be void unless these provisos were complied with, but not as making the Crown a party to a deed in the nature of a covenant, so as to enable the patentee to sue the Crown as upon a contract, not as a bargain on the part of the Crown upon which the Crown itself could be sued. Several other clauses and provisos for the protection of the public have been inserted in letters patent; not provisos which bind the Crown itself, but provisos which tell the patentee, “If you don’t comply with the stipulations, your patent will be void.” And now I come to the only other remark which I shall make upon *Feather v. The Queen*, which struck me as the most plausible argument in this case in favour of the judgment the learned counsel was supporting, which was the clause for the supply of the patented article, for it does not apply only to arms. “If the said patentee shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same, that then, and in any of the said cases, these our letters patent, and all remedies and advantages whatsoever hereby granted, shall utterly cease, determine, and become void.” Now it is said that is inconsistent with the Crown having the right to use the invention, because if the Crown have a right to use the invention, why does the Crown insert these stipulations for a supply? It appears to me perfectly capable, at all events, of being viewed consistently with the right of the Crown to use it. It often happens, and often happens as we know in the present day, that patentees manufacture their own patented articles, and keep the manufacture entirely in their own hands. If I recollect rightly, I believe it was the case with Mr. Betts’s patent capsules. No doubt there are many cases where the patentee keeps the matter in his own hands, and by that means

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they attain a high perfection of manufacture. They license nobody, but only supply them with the articles that they themselves manufacture. They sometimes have a monopoly of materials as in the paraffine case, by which means they are enabled to manufacture better than any other of Her Majesty's subjects, and by the aid of the monopoly granted by the letters patent to purchase the best materials for the purpose of manufacturing that patented article. But the Crown may have no means practically, if suddenly called upon, of finding any manufacturer to compete with such manufacturer of such patents for some years after he has by the letters patent monopolised the manufacture of the article. It is necessary that the Crown should have a right to manufacture, and that they should also have the right to compel the patentee to manufacture for them. Assuming the right of the Crown to use the patent, it does not enable the Crown to imprison the patentee because he does not manufacture for the Crown, and therefore they provide that the patentee shall, at the proper price and upon proper terms—nothing being said about paying for licences and so forth—but at the proper price and upon proper terms, shall manufacture for the Crown. It is said that the patentee may not be able to manufacture. That is a question which we need not inquire into. I suppose if the Crown were to make an impossible demand that would not void the patent; but the question is, whether that clause implies that the Crown must be bound by the letters patent. It appears to me that the clause is capable of a perfectly reasonable construction consistent with the Crown having the right to manufacture itself, and to use the patented article. It may pay the patentee if, by those means alone, the Crown can conveniently get the use of the patented article, if the use of the patented article is required for the public service. I make no further observations upon *Feather v. The Queen*, but I want to make one or two remarks upon this part of the case, which, assuming the case of *Feather v. The Queen* to be good law, renders it applicable to the present case. It is said, true *Feather v. The Queen* decides that the Crown may, by its servants, manufacture the patented articles, but it cannot agree with another person to manufacture them for it, because that becomes a matter of purchase and sale, and not a matter of service. I have great difficulty in seeing the distinction; no doubt there are distinctions between servants and contractors in many points of view, as, for instance, as to the responsibility of the master, where he may be liable for the act of his servant whom he has under his control, and not for the act of the contractor who is an independent man, who is contracting to do something for which he is to be paid. But that is not the case here. It is admitted that the Crown has the right to manufacture the invention by other hands than its own, if you can apply the words "hands" to the Crown. Where is the difference between saying to a man, "Come into my service for six months, I will pay you so much a month for manufacturing goods for me," or telling a man, "I want 1000 rifles to be manufactured in six months, and I will pay you 1000*l.* for the job," assuming that 1000*l.* is the profit, or the wages that a man would get if he was in the employer's service? Is there any difference? In such a case he is equally the servant of the Crown.

He is only hired for that purpose. The Crown cannot oblige him to do anything else if they hired him only to make rifles, therefore the difference really seems to be upon the mode of payment. Then comes the question, is this a sale as contradistinguished from an employment? If the defendants had been persons making arms for the purpose either of general sale to the public, or upon a speculation that the Crown, or the department of the state, being the persons who would be most likely to purchase the articles, would purchase them—it is not necessary to decide the point—but it may be, if they made articles they would have been infringing the patent, because they make them as manufacturers for themselves upon the speculation of selling them to any person. It is not necessary to decide that case but that is establishing a difference which we had not contended for here. This is not a case where a man has manufactured on his own account on speculation, and then afterwards sells to the Crown. How that may be I do not know. There he has not been acting under the direction of the Crown, but acting as a speculative tradesman. It might, in such a case, be decided that the infringement was complete, because he has manufactured and put in practice the patent. But it seems to me that is extremely different from the case here, where it is an order from the Crown to manufacture, for I should be inclined to go the length of saying that here the Crown supplies the materials, and simply orders the manufacture of an unmanufactured article. It is not necessary to decide the point whether, if the Crown orders these articles without supplying any portion of them, and without superintending the manufacture, it would be an infringement. I should be disposed to say that it is a protected manufacture, because there are things made not in infringement of the patent, but ordered by the Crown, and really done for the Crown. But it is not necessary to decide that point here, because the materials for the stocks and barrels are supplied by the Crown. The wood and iron are issued from the Government stores. The work is to be superintended by an officer or officers at a place named by the Crown during the progress of the process of manufacture, and the patents and specifications are prepared at the Royal Small Arms Factory at Enfield, which, I presume, is an establishment belonging to the Crown. Therefore, it is distinctly brought under the control of the government. Is not that a manufacture by the Crown just as much as by the contractor? Is there any difference in it because they happen to be paid by the job instead of being paid by the day? But then, it is said, the Crown has the power of rejecting those that are not efficiently made, and therefore the property cannot be said to be the Crown's at that time. It seems to me that that amounts to no more than this—the person manufacturing has the first right to manufacture the patented article, but he makes the patented article badly, and therefore it is rejected, and gets back into the possession of the manufacturer because it is improperly made; and it is said, therefore, that the manufacturer is an infringer, not for something he afterwards does with those articles which are thrown on his hands, but for something he has done when preparing them for the privileged person. I am unable to see the force of that argument. What would

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become of the defendants here if, when those rejected articles had been rejected by the Crown, the defendants chose to sell them for themselves, is another question which I think is quite foreign to the present. For these reasons I am entirely of opinion, with the rest of the court, that the judgment of the Queen's Bench should be reversed, and that our judgment should be for the defendants.

Judgment for defendants—Judgment below reversed.

Solicitors for the plaintiff, *Stibbard and Cronshey.*

Solicitor for the defendants, *The Solicitor to the War Office.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Thursday, June 29.

Re FRITH AND OSBORNE(a).

Vendor and purchaser—Title—Power of sale and exchange—Partition.

A settlement of an undivided moiety of certain freehold hereditaments contained a power authorising the trustees to sell, dispose of, convey, and assign the said undivided moiety, or any part thereof to any person or persons by way of absolute sale for such a price in money, or by way of exchange for such equivalent in lands and hereditaments as to them should seem reasonable, and for that purpose to revoke the old uses, and to limit such new or other uses as they should think necessary.

Held, that the power authorised a partition.

THIS was an adjourned summons under the Vendor and Purchaser Act 1874, to obtain the opinion of the court whether a power of sale and exchange authorises a partition.

By a settlement dated the 9th May 1865, one undivided moiety of certain freehold hereditaments was vested in trustees, and the settlement contained a power authorising the trustees to sell, dispose of, convey, and assign the said undivided moiety, or any part thereof, to any person or persons by way of absolute sale for such a price in money, or by way of exchange for such equivalent in lands and hereditaments as to them should seem reasonable, and for that purpose to revoke the old uses, and to limit such new or other uses as they should think necessary. The other undivided moiety of the same hereditaments was at the date of the partition deed hereinafter mentioned, vested in the trustees of a settlement of the 3rd April 1861, which contained a power of partition. By the partition deed dated the 22nd Feb. 1868, after reciting that it had been agreed to make a partition of the hereditaments (being those comprised in the two settlements), it was witnessed that in pursuance of the agreement, and for effectuating the partition, the trustees of the settlement of the 3rd April 1861 revoked the uses of their undivided moiety of the hereditaments comprised in the first part of the schedule of the said partition deed (being one-half part of the said hereditaments), and appointed the same to the uses of the settlement of the 9th May 1865; and it was also witnessed that the trustees of the last-men-

tioned settlement revoked the uses of their undivided moiety of the hereditaments comprised in the second part of the schedule (being the other half part of the said hereditaments), and appointed the same to the uses of the settlement of the 3rd April 1861. The trustees of the settlement of the 9th May 1865, having contracted for the sale of the hereditaments comprised in the first part of the schedule to the partition deed, the intending purchaser raised the question as to the validity of the partition.

Whitcombe for the vendors.

W. W. Karslake for the purchaser.

The following authorities were referred to:

Dart's V. & P. 5th edit. p. 78;
Abel v. Heathcote, 4 Brown's C. C. 278;
McQueen v. Farquhar, 11 Ves. 467;
Doe v. Spencer, 2 Ex. Rep. 752;
Attorney-General v. Hamilton, 1 Mod. 214;
Bradshaw v. Fane, 1 N. B. 159.

JESSEL, M.E.—The first question which I have to decide is whether an ordinary power of sale and exchange does or does not authorise a partition. I prefer putting my decision upon the broad ground, though I will show presently that this title is quite independent of it. The title depends upon articles for a settlement, and which have been carried into effect by an actual settlement, by which the legal estate was conveyed to trustees of the names of Frith, Ross, and Sparkes. The power contained in the settlement was "to sell, dispose of, convey, and assign the said hereditaments and premises," referring to what was conveyed, which was an undivided moiety. [His Lordship read the power.] It will be seen that it is not in fact a power simply to exchange, but it is to sell, dispose of, convey, and assign by way of absolute sale, or by way of exchange. Of course, the word "sell" refers to "sale," and the word "exchange" refers to "dispose of," and therefore the question comes to this, whether a trust (for this is a trust estate) including a power to dispose of by way of exchange, for an equivalent in other lands and hereditaments, authorises the trustees to dispose of one undivided moiety for the other undivided moiety. Why it should not I cannot conceive. The power is to dispose of the undivided moiety by way of exchange for such equivalent in value of other hereditaments, which included an undivided moiety, as they may think fit. They do think fit to dispose of their undivided moiety by way of exchange for another undivided moiety. The words are not "in exchange," but "by way of exchange;" but I do not much rely upon that. Standing alone, it is difficult to see what the doubt is. Upon this particular instrument no doubt the word "hereditaments" includes an undivided moiety. They may convey their own undivided moiety by way of exchange for an undivided moiety of some other lands, then why may they not convey for an undivided moiety of lands which happen to be held under the same settlement? I should not know, reading it for the first time, and not knowing anything of real property law, what the doubt could be. That it is doubtful is plain from what Mr. Dart says in his book, at page 78, when he says it is doubtful. Upon looking at the last edition of Lord St. Leonards' work on Powers, published in the year 1861, he does not put it so strongly. At page 856 he says: "It has frequently been a question among conveyancers whether the usual power of sale or exchange does not authorise a partition,"

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

that is, does not authorise a partition in effect; because when I come to look at what was done in this case, I find that though they recite that they intend to make a partition, what they do is to convey an undivided moiety of one half of the lands in consideration of the undivided moiety in the other half being conveyed to them. It is not a strict partition, but a conveyance by way of partition. Seeing that the estates are equitable, I should have looked at the substance of the thing, if that had not been the mode in which it was carried out. Then Lord St. Leonards says: "And several partitions have been made by force of such powers under the direction of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of *Abel v. Heathcote* (sup.) Mr. Fearn thought the power did authorise a partition, on the ground that the partition was in effect an exchange." Then he discusses the case which I shall have to discuss again, of *McQueen v. Farquhar* (sup.), and he continues: "Until the question shall receive a further decision, it can scarcely be considered clear that a power to exchange will authorise a partition." Now, therefore, he does not go so far as to say it is doubtful, but until the question shall receive a further decision it can scarcely be considered clear. From this I should imagine that Lord St. Leonards thought that it ought to be decided that it was clear. In a subsequent passage he comments on *Doe v. Spencer* (sup.) and says that if the judges were right in holding, as they did, that at common law two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow, where the moiety of an estate is settled to uses with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one on the uses of the settlement, the other by the party entitled to the other moiety." So that he says, "if they were right, it must follow." Whether the word "if" means to intimate a doubt whether they were right or wrong, I do not know; but, assuming *Doe v. Spencer* to be right, he says it must follow. Therefore, according to Lord St. Leonards, the only thing remaining doubtful was, whether the decision in *Doe v. Spencer* was right. This being a question as to the law of real property, it does not depend upon the individual notion of any judge as to what the law ought to be, but upon what is decided upon authority. It is too late to argue any question as to real estate in this country upon the question of principle. Real estates are held upon title, the law as to which is founded upon the extraordinary caprices of former real property lawyers, supposed to be derived from feudal tenure. It is often impossible to find the principle upon which the old decisions are founded, or whether there is any principle at all, therefore it does become incumbent upon every judge to look at the authorities, and see how far the authorities have settled the law, and to follow them implicitly, if he finds that the law is settled. The case of *Abel v. Heathcote* is the first case which it is necessary to refer to, and the best report of it is to be found in Brown's Chancery Cases, vol 4, p. 278. That seems to be decisive of this particular case before me, because the words of the power there are to my mind undistinguishable from the words of the power in the present case. There the legal estate was in

trustees, a circumstance which was very much relied on by Lord Loughborough, who decided the case. It was "to make sale of and convey, surrender, and assure, or convey in exchange, for or in lieu of other manors, lands, and hereditaments, all or any of the said freehold and copyhold lands, &c., thereby granted for the best price in money, or for such other equivalent in manors, lands, or hereditaments as should to them, the trustees, seem reasonable." Here the words are, "such equivalent or recompense in land or hereditaments:" they are plainly undistinguishable. I think that the criticism of Lord St. Leonards upon Lord Loughborough's judgment, speaking with great respect of such great authorities, is not well founded. I think that Lord Loughborough was right, who construed the words "to make sale of and convey, surrender, and assure, or convey in exchange," as referring to separate things. There might be something in an exchange which required a surrender as well as on a sale, and he read it, "to make sale of, and convey, settle, and assure, or to convey and exchange;" and I think that is a fair reading, and that evidently was the opinion of Sir Thomas Plumer in commenting upon it in *The Attorney-General v. Hamilton* (sup.) He evidently thought that the power was to be read in that way. I must take the construction as the judges have taken it. In the opinion of Lord Eldon, who doubted the general proposition attempted to be laid down by Lord Loughborough, at all events *Abel v. Heathcote* was well decided, because if the power were to convey for such equivalent in lands as the trustees should think fit, they might convey an undivided moiety, and in that way there would be a partition, and to that extent *Abel v. Heathcote* would still be an authority. But Lord Loughborough went further. Though the commissioners doubted and differed, when the case came before Lord Loughborough, he laid down the general proposition that the ordinary power of sale and exchange would authorise a partition. It was not until the case of *McQueen v. Farquhar* (sup.) that there was any doubt about that. Lord Eldon says (11 Ves. 475), "In the ordinary settlement of great estates, powers of sale, partition, exchange, &c., are inserted. As to the first, special caution is used, if there is not a previous power of revocation, to declare at what time the uses shall be revoked, and the seisin shall attach upon the new use, and no cesser or determination of the old uses or creation of new uses arise, except in the very circumstances described. This is a power of revocation, but to the intent to do some other act, and that intent, as prescribed by the instrument, must accompany the revocation in order to make the revocation essential. It is clear this was not disturbed by decision, though there were floating opinions, until the case of *Abel v. Heathcote*. I doubt whether the language which I hear and have read, that a power of exchange is well exercised by a partition, is authorised by anything in that decision. Exchange and partition are very different. According to Sheppard's Touchstone and other old books—whether he had looked at them I do not know; the only old book referred to in the Touchstone is Perkins—"you cannot exchange till there has been a partition. There is infinite difficulty in saying a partition under the execution of a power by a tenant for life with those who have the in-

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heritance in the other moiety, can be called an exchange." If that means anything, it means this, that having legal uses to deal with, the act must be good at law if good at all. Exchange is different from partition, and you cannot exchange until after partition—that is the ground of Lord Eldon's doubt. Of course, after that decision, the point was considered, and was treated by Sir Thomas Plumer, in the case of *Attorney-General v. Hamilton*, as too doubtful for a title depending on it to be forced on a purchaser. The next case which bears on the subject is the case of *Doe v. Spencer*—for the present purpose the power of sale and exchange contained in the Inclosure Act referred to in that case, is not distinguishable from the ordinary power of sale and exchange contained in any settlement. The question was, whether that which was in fact a partition could be effected under the power of exchange. The point arose directly, and the question was one of common law, whether there is any substantial difference, as was put in the Touchstone, between exchange and partition. The decision was, that as regards tenants in common at all events (and the parties before me are tenants in common), there is no ground for the assertion. I may observe that Mr. Preston, in his valuable edition of the Touchstone, puts in brackets after the dictum, "Where is the objection to such an exchange of an undivided moiety?" He could not find any objection. But whatever authority the Touchstone standing alone might be, as a recognised text book, it is overruled by *Doe v. Spencer*. After saying it is essential that an exchange, properly so-called, should be between two parties only, Rolfe, B., who delivered the judgment of the court, says this, "But if A. and B. be tenants in common of Blackacre and Whiteacre, we can discover no principle which is to prevent A. from giving his moiety of Blackacre to B. in exchange for B.'s moiety of Whiteacre." That is an express decision (of course I must not go further than the decision) that a power of exchange where an undivided moiety is settled does enable a partition to be made by exchanging with the owner of the other undivided moiety. The only other case which I need cite is the case of *Bradshaw v. Fane* (sup.). The question there arose on title, and the point was not decided because the title was considered too doubtful to force upon an unwilling purchaser. Kindersley, V.C., there said (I am reading from the report of the case in the Jurist): "First of all there is the abstract question which has been so much disputed, both before me now and in several other cases, whether the ordinary power of exchange authorises a partition, that is to say, not only a partition strictly in the form of a partition, but also in the form of an exchange. Now, as to the abstract question, the conclusion at which I shall arrive is this, that so far as the decision upon this question turns upon this point, I must consider it too doubtful to force the title upon an unwilling purchaser. The authorities stand thus: The earliest case is that of *Abel v. Heathcote*, in which Lord Rosslyn certainly expressed his opinion that a power of sale would authorise a partition at all events in that particular case. In *M^cQueen v. Farquhar* the question was raised by Lord Eldon whether the power of sale authorised a partition, and that gave rise to a discussion as to the power of exchange, and Lord Eldon, commenting on

Abel v. Heathcote, expressed his opinion strongly that a power of exchange would not authorise a partition, and that *Abel v. Heathcote* depended upon the special words, and though we have no report of the case to which reference was made, yet it appears from a note in Belt's edition of 4 Bro. C. C. 285, that Lord Eldon expressed an opinion that a power of exchange would not authorise a partition. In the case of the *Attorney-General v. Hamilton*, the question was whether certain persons should be made parties, which depended upon whether a power of sale so authorised a partition as that it was unnecessary to have these parties before the court, and it was considered so doubtful that they were held necessary parties. Then came the case of *Doe v. Spencer*, in which the judgment of the present Lord Chancellor (Lord Cranworth) was given, the question arising under an inclosure Act which authorised exchanges, the language of the Act being much the same as that in ordinary powers; and there all the cases were commented on, and it was said that there is no authority for that which is laid down in *Shep. Touch. 222*. There a clear decision was come to by the Court of Exchequer, that in the case of two coparceners it might be done, but where there were three it could not. Now, so far as I am at liberty to express an opinion, I should say that I agree in the proposition that the rule as laid down in the Touchstone is not correct as to tenants in common, though it may be as to joint tenants." Then he goes on to say he does not understand why, if it could be done as to two, it cannot be done as to three. That is another point which is not now before me. It very seldom occurs, and perhaps it is not worth discussing. Then he says, "but after this case the question arose in the case of *Brassey v. Chalmers* (16 Beav. 223), which was under a power to sell and dispose of, and the question was whether these words, either by themselves or taken in conjunction with the other words, would authorise a partition; and it is evident that the opinion of the Master of the Rolls was that it was a doubtful question, and I think the inclination of his mind was that it would not. These, I believe, are the only authorities which can be brought distinctly to bear upon the question; and with the exception of *Abel v. Heathcote* and *Doe v. Spencer* they are dicta merely. Then if we refer to the text books we find that Lord St. Leonards, whose authority in every respect stands higher than that of any other person, represents the matter as being still uncertain. Chance, p. 147, is of opinion that it is unsettled. Jarman (6 Jar. Conv. 594) expresses his opinion to be that a power of exchange would not justify a partition. Preston, in his note to the Touchstone, says he does not think the position in the Touchstone to be good law." Then he winds up by stating his opinion really to be in favour of the power of exchange, including power to partition; but he says that it is so doubtful upon the authorities that he would not decide the abstract proposition in order to force the title upon an unwilling purchaser. He did decide the case upon another point, namely, the wording of the power, and on that he decided that the title was good. That is the state of the authorities. Lord St. Leonards says, that the point wants a decision to make it quite clear, and I am willing to give that decision (supposing the doubt is not already taken away by the decision of the Court of Exchequer followed by Kindersley, V.C.) I hold

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that the passage in the Touchstone is not good law, and that there can be such an exchange. And if you can have such an exchange why cannot there be an exchange of an undivided moiety in Whiteacre for another undivided moiety in Blackacre? I decide that there can be such an exchange. There is a conflict between what the judges said in *Doe v. Spencer*, and what the Vice-Chancellor intimated his opinion to be in *Bradshaw v. Fane*. It is not necessary for me to decide that question. If I had to decide it, I should feel inclined to follow the decision of the Vice-Chancellor, for if it can be done as between two I do not see why it cannot be done as between three. But I have not to decide that question now.

Solicitors: *Sandys and Trevenen*, for J. and W. B. Sparks, Crewkerne; *Wood, Street*, and *Hayter*, for E. Budge, Crewkerne.

July 6 and 11.

LACEY v. HILL; LENEY v. HILL (BAILEY'S CLAIM). (a)

Partnership—Misappropriation of partnership property by deceased partner—Bankruptcy of surviving partners—Right of proof by trustee in bankruptcy of surviving partners against separate estate of deceased partner.

Sir R. H., being in partnership with Messrs. K., as bankers, abstracted large sums of money from the coffers of the bank by means of fictitious credits and forged bills of exchange without the knowledge of his partners. On the death of Sir R. H. Messrs. K. became bankrupts. The trustees in bankruptcy of Messrs. K. sought to prove against the separate estate of Sir R. H., which was being administered in Chancery, for the amounts so misappropriated by him.

Held, that they were entitled to prove.

THIS was an application by the trustees in bankruptcy of the surviving partners in the banking firm of Harvey and Hudsons to be allowed to prove for the sum of 634,000*l.* against the separate estate of Sir Robert Harvey, the deceased partner, whose estate was being administered by the court. The 634,000*l.* was made up of amounts which Sir Robert Harvey had from time to time abstracted from the coffers of the bank by means of fictitious credits entered in the books of the bank, and also by means of forged bills of exchange, which were by his directions entered in the books of the bank as securities held by the bank.

Southgate, Q.C., Fry, Q.C., and Cozens Hardy, for the applicants, referred to *Ex parte Harris* (2 V. & B. 210).

J. Brown, Q.C. and Romer, for the plaintiffs.—Before the joint estate can be allowed to prove against the separate estate, it is necessary to show that the separate estate has been increased by the misappropriation, and that has not been done.

Benjamin, Q.C., Davey, Q.C., B. B. Rogers, and *Dundas Gardiner*, for creditors of the separate estate, having liberty to attend the proceedings, argued that the amount which had been abstracted by Sir Robert Harvey should be attributed to his capital in the bank, and that the breach of faith having been acquiesced in by his co-partners, the joint creditors could not make any claim against his separate estate.

Merewether for the defendant.

The following case was also referred to:

Ex parte Young, 3 V. & B. 242.

JESSEL, M.R. — The facts of this case, stated shortly, are as follows: In June 1860 Sir Robert Harvey (being then Mr. Harvey, and who, it appears, succeeded his father in a bank which had been formerly known at Harvey and Hudson's Bank) was carrying on business alone as a banker. It appears from the affidavit of Mr. Whinney, and it is my own view also, that it is at least doubtful whether Sir Robert Harvey was solvent at that time; but there is no doubt that the large capital which then nominally stood to his credit was not real. However, being apparently the owner of considerable capital, he took into partnership a country gentleman possessed of considerable property of the name of Kerrison, who appears not to have had any knowledge of banking at that time, but was induced by Sir Robert Harvey to join him in the bank without bringing in any capital. On the 18th June 1860 the partnership between Mr. Harvey and Mr. Kerrison commenced. It was an ordinary partnership in most respects, except that Mr. Kerrison was not bound to attend to the business of the bank. He did, in fact, attend to it to a certain extent, because he was in the habit of going every Saturday and taking some part in the business of the bank; but I am satisfied, from the evidence, that he was not a banker in the sense of being a man of business, and that he did not, as he says he did not, either look at the books or make those inquiries which probably a man of business would have made, and which might have stopped these frightful frauds at a very much earlier period than they were. He swears he was in fact entirely ignorant of the mode in which Sir Robert Harvey conducted, or rather misconducted, his business from 1860 until the time of his bankruptcy in 1870. That seems extraordinary at first sight; but when we consider Mr. Kerrison's position and state of knowledge, and that Sir Robert Harvey supplied him every year with fictitious accounts in the shape of stock-taking accounts, which he relied upon, and when we consider also Sir Robert Harvey's position as a baronet of supposed large fortune, a gentleman of large property in the county, and a hereditary banker, we are not so much surprised that Mr. Kerrison never distrusted him, but relied upon his honour and integrity implicitly. However, it seems to have been so. It is hardly necessary to mention the articles of partnership in other respects, but there was the usual clause against overdrawn, and a clause about the annual stock-taking. Soon after the partnership Sir Robert Harvey either began or continued speculations on the Stock Exchange, and the result was—the ordinary result in the case of people who are outside speculators—that he lost a very large sum of money. In order to pay these sums of money, of course he might have sold or mortgaged his landed estate in the county of Norfolk, but I need not say that such a proceeding would have injured, if not ruined, his credit as a banker; therefore it was very desirable to find out some other way, and the method he adopted was simply that of stealing—I use Lord Eldon's expression, for there is none other to use—the moneys from the bank; he took the money out of the bank coffers and paid it to the stockbrokers. The stockbrokers were entitled to be paid; they bought or sold for

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Sir Robert Harvey, as the case might be, and these sums were the differences that they were entitled to. Sometimes he took up stock and paid the purchase money of the stock; and in those cases also he found it convenient to steal the money from the bank. This went on for years, and continued until just before the close of Sir Robert Harvey's life, which preceded the bankruptcy of Mr. Kerrison. Mr. Kerrison, jun., had been taken into the bank, and it seems that, either by returning himself as a partner, or by signing notes, or in some other way, he had become a person who in law had held himself out as a partner, and therefore became liable to third persons, and he was made a bankrupt also, but he was not a partner *inter se* as between himself and Mr. Kerrison, sen., and Sir Robert Harvey. It is, however, hardly necessary to mention his position at all. Sir Robert Harvey drew out the money sometimes by debiting his private account, and sometimes by entering a fictitious credit in the books to somebody or other as the person to whom the bank had advanced the money, and very often when he had paid the money to a broker he actually entered the broker's name as the borrower; in other instances they were simply fictitious accounts. Sometimes he overdraw his private account, and latterly he forged bills, so boldly that he actually forged them in the names of non-existing firms, and he covered the advances to his private account by crediting the account with the forged bills, and putting the forged bills into the till of the firm. On other occasions, as I said before, he simply opened fictitious credits in the books, debiting these persons who never borrowed money, but who in fact had been his creditors, and from whom he had received sums to the extent of hundreds of thousands of pounds in the whole, running over these seven or eight years. The crash came at last in 1870, and Sir Robert Harvey withdrew himself from earthly justice by committing suicide. Mr. Kerrison, who had never drawn a farthing out of the firm in any way, and who had shown his thorough confidence in Sir Robert Harvey, not only by leaving his supposed profits there (for the accounts showed profits, although in fact there were none), but by paying money into the bank, was utterly ruined and made a bankrupt. The real question I have now to decide is one in which Mr. Kerrison is not at all interested, because his estate is insolvent. It is a question between what is called the joint estate, that is, the estate of the firm of Harvey and Hudsons, and the separate estate, that is, the estate of Sir Robert Harvey. When I say between the two estates, of course that is only nominally so—the question is really between the creditors of the two estates, that is, between the depositors of the bank on the one side, and the stockbrokers who conducted Sir Robert Harvey's speculations on the other side; they are substantially the persons who are contesting the question. It arises in this way: Sir Robert Harvey being dead, and his estate being administered in this court, and Mr. Kerrison being a bankrupt, and his estate being administered in the Court of Bankruptcy, the trustees of Mr. Kerrison's estate brings in this proof, on behalf of what I call the joint estate, against the separate estate of Sir Robert Harvey which is being administered in this court, and it is admitted, and indeed could not be disputed, that it must be administered upon the same

principles as though Sir Robert Harvey had lived, and had been made a bankrupt together with Mr. Kerrison. The real question, therefore, is, whether or not it is a case in which what is called the joint estate can prove in bankruptcy against the separate estate? Now, grosser cases of fraud I never saw—they are not only legal but moral frauds. The whole of these transactions took place on the part of Sir Robert Harvey with a view no doubt of cheating his partner; the accounts were made up in a way which was intended to deceive his partner, and probably intended to deceive, as far as he could, the clerks in the establishment also. No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit, and, therefore, one cannot doubt that Sir Robert Harvey was perfectly well aware he was committing these frauds, and committing in the hope (as one too often sees) that some successful speculation or other would once more put him in funds, and enable him to pay off these large defalcations, and set himself right once more before the world. Now, the character of the transactions can only be described as theft. As I understand the rules of bankruptcy, it is not necessary to take the matter quite so high; it is not, as I understand it, necessary for the joint estate to prove more than that, in the words of Lord Eldon, "the overdraw was made for private purposes, against the prohibition either express or implied in the partnership agreement, without the knowledge, consent, privity, or subsequent approbation of the other partner." That is all that is necessary to be proved, but if that is shown, it is *prima facie* a fraudulent appropriation within the rule. In this case, that is not only proved, but actually the intentional fraud is proved, if in any case it could be proved at all. But Lord Eldon notices that it is not necessary to go so far, for he says: "It is as much a fraud within Lord Thurlow's rule as if, according to the expression I am told I formerly used, he had stolen the property." In some few exceptional cases there are overdrawings which do not amount to actual stealing, but with those few exceptions there can be no doubt that that is the appropriate description of the transaction. That being so, and the claimants having proved all this, they carry in a claim for the amounts so appropriated, giving credit for the amounts repaid. The accounts have been investigated in my chambers for a very long period, accountants of eminence have been employed on both sides, and time has been allowed to investigate these accounts, under circumstances which I am going to mention, and the result is, as far I am concerned, that I see no necessity for taking any further accounts. Now I ought to mention how the case comes before me. There are two suits—ordinary creditors' suits for the administration of the estate of Sir Robert Harvey. In an ordinary case, the plaintiff alone would have been allowed to intervene, but the stockbrokers who are substantially the creditors of the separate estate, considering the enormous amount involved, did not wish to trust the plaintiff with the conduct of the proceedings, and on the 11th July 1873 they obtained an order giving one of them, a Mr. Read, leave to attend the proceedings, he giving an undertaking on their behalf to pay his own costs and any extra costs occasioned by his attending the proceedings. So that Mr. Read has attended

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the proceedings since that time as the representative of the stockbrokers. In strictness, that does not make him a party to the suit, but it puts him in very much the same position as a party. He gets notice of all proceedings, and of course, having liberty to attend the proceedings, he, with the leave of the court, gets the privilege of a party to the cause. What happened was this: great delay took place in my chambers in entering into evidence, and applications were made to me for extra time by Mr. Read, as the representative of the stockbrokers, independently of the plaintiffs, and beyond the time I had allowed them. In strictness, he was not entitled to any extension of time, but, looking to the magnitude of the case and to the peculiar position which he occupied, I thought it reasonable to give him further time. However, that time having expired, and the evidence being completed, I am asked, as I shall mention presently, for a further extension of time, which I do not feel disposed to grant. The matter now comes before me, and I have to decide it upon the evidence which, as regards this point, is wholly uncontradicted. I do not think that anyone can doubt that Sir Robert Harvey's estate would be liable in equity to make good the amount. If he had been alive an action might have been brought against him by his partner compelling him to restore to the partnership funds the sums he had unlawfully extracted from them. If he had lived and become bankrupt, there is no doubt that a proof might have been made against him, under the principles laid down by Lord Eldon, for the sum so appropriated. Why is the proof not to be allowed? I was told that the principle of these cases, which is stated as plainly as it can be in *Ex parte Harris* (sup.) was wholly misunderstood, and that you cannot prove for sums misappropriated out of the joint estate, unless you can show that the separate estate has been increased by the sums misappropriated. Now it appears to me that there is a little fallacy in the proposition; in the first place, what is the meaning of the separate estate being increased? A man's separate estate is increased by the money he puts into his pocket, and therefore, the moment the partner abstracts the money and puts it into his pocket for private purposes, it must increase his separate estate, so in that sense a partner who appropriates the money of the partnership to his own private purposes, does increase his separate estate, and, if that was the meaning of the proposition, it is correct. It is not because he makes the partnership liable by his wrongful act, but it is because he has appropriated the property or money of the partnership to his individual use, that the separate estate is liable. As Lord Eldon points out, that must necessarily increase his private property. It was said in argument that you must show that some of the property remained to the benefit of his private estate, and that if he had gambled away the money the moment he got it, or paid it away for some other purpose, so that the private estate did not get any benefit eventually, you could not prove. I cannot find a trace of any such doctrine. It is contrary to what Lord Eldon says, and contrary to good sense and principle, because if the man who has misappropriated the money—that is, taken it away from the firm—applies it to the payment of any debt due from him, whether it is a debt of honour or a legal debt, to the extent he so applies it he relieves his separate property. If,

when Sir Robert Harvey was called upon to pay 30,000*l.* or 40,000*l.* for stock which he had purchased, he had taken his deeds to his banker and had pledged them and raised money upon them and had paid for the stock in that way, he would have made his real estate liable to repay it in case he had become bankrupt, and to that extent he would have diminished his private or separate estate, but if, instead of doing that, he takes the money out of the bank, his private estate would in the same way be increased by the amount he so takes, because the landed estate would be unincumbered instead of being incumbered to that amount; so that, considered in that way, the private estate is increased. But I will go further—if a man steals 100,000*l.*, and appropriates it to the payment of gambling debts, that, as Lord Eldon says, increases his private estate, and it is quite immaterial that the other private estate is in exactly the same position as it was before. There is no distinction when you come to prove, though there would be if it came to a question of following the property. If you could show that the man who stole the money invested it in property, and that property could be identified, it would not be a case of proof at all, it would be a case of restoration: the property would be taken away from the private estate and put into the joint estate; the property would be followed under the well known rule of equity, but the doctrine of proof assumes that the property no longer remains in specie—that it cannot be followed or identified, and that is the reason why you can only prove and not take the property back again. As I said before, the whole foundation of the doctrine rests upon this, that in a court of equity the joint estate is, for many purposes, treated as separate estate. In the same way as a partner can be compelled, if not a bankrupt, to restore funds misappropriated by repaying the amount to the partnership account, so when the partner is bankrupt, proof can be tendered for the sum taken. That disposes of the chief argument presented to me on behalf of Mr. Read. The argument on behalf of the plaintiff was of a different character. It was said first that the drawings of Sir Robert Harvey might be attributed to the capital brought in by him. On the evidence I think he had no capital; but supposing he had capital, by the partnership articles he had no right to draw it out; and if a partner, although he has some capital to his credit, takes away money, contrary to the partnership articles, which he appropriates to his own use, the firm has a right to have it brought back again, and it is quite immaterial that the actual capital was taken. It might be material if the question of moral fraud were being discussed, whether a man took what was really his own or some other person's property; but looking at it in a legal point of view, it is an appropriation contrary to the condition expressed or implied in the partnership articles that the capital is to remain for the joint benefit of the members of the partnership. The next point taken was this: It was said that if the breach of faith has been acquiesced in by his co-partner, the proof cannot be allowed. I agree that if one partner has stolen the partnership property and the other partner knows it and consents to his retaining it, the proof cannot be admitted; it is then an ordinary debt for which no proof can be allowed. If that is the sense in which acquiescence is used, then, I say, if he has acquiesced, the proof

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is barred. Acquiescence really means a standing by with knowledge—knowledge, it is said, both of facts and law. In order, therefore, to make out acquiescence in that sense it is necessary, first of all to show knowledge, and then to show a standing by—that is, that the state of affairs was allowed to continue without remonstrance. Now, what did Mr. Kerrison know? He says that he knew nothing of these frauds. He did know that on two occasions—in 1863 and 1864—Sir Robert Harvey had drawn out some moderate amounts, but he also knew from the subsequent accounts that it was alleged and represented to him, and he believed that those sums had been repaid. It was suggested that that alone would authorise Sir Robert Harvey to overdraw any amount he thought fit to appropriate to his own use. Now, I entirely dissent from any such proposition. It is plain that you may waive partnership articles—that is, certain circumstances having occurred contrary to the partnership articles which are known to all the partners, and have been long suffered to continue with such knowledge, may authorise a court of justice to infer an actual contract, that to that extent the articles are waived or altered. But that must depend on circumstances: the mere fact that the partner has been allowed by his co-partner, contrary to the partnership articles, to overdraw his account on two different occasions, would not imply anything so absurd as that he was allowed to overdraw it to any extent and whenever he liked, *à fortiori*, when we find that soon afterwards he restored, or appeared to restore, the amount overdrawn, and no further overdrawings took place, it appears to me that it would not be a fair inference from what occurred, and therefore you cannot impute to Mr. Kerrison any licence whatever to Sir Robert Harvey to overdraw the account in the way he did; and it must be borne in mind that the element of knowledge is wanting as regards the actual overdrawings, for beyond these two he certainly did not acquiesce in them. But it is said, though he did not know anything about these frauds, still he had constructive notice that these frauds were going on. But is constructive notice sufficient? None of the authorities which have been cited to me say that it is. The words of Lord Eldon are “knowledge, consent, privity, or subsequent approbation.” Now, it was not with his knowledge, consent, or privity, because he did not know of it at the time; and the only other words which can be applied are “subsequent approbation;” but constructive notice is not subsequent approbation, for you cannot have subsequent approbation without knowledge; therefore I do not see how it would avail even if it were proved. The alleged constructive notice was of the most singular kind. There was a person of the name of Hill who was appointed manager of the bank by Sir Robert Harvey, and Mr. Kerrison knew of and consented to this appointment on the formation of the partnership, and there was a Mr. Richardson, who seems to have been next in order in the hierarchy of the bank to Mr. Hill, and there were also some other clerks, notably bill clerks. It is said that one or more of these persons knew of the frauds that Sir Robert Harvey was committing, and that, if they did know, their knowledge is to be imputed constructively to Mr. Kerrison, and he must be taken to have stood by with knowledge, and to have

acquiesced or given subsequent approbation. That is the argument that has been presented to me, and it has been said that this must be so because these clerks were agents of the banking firm, and therefore notice to them was notice to the banking firm, and notice to the firm was notice to each partner. Now, the whole of that train of reasoning is, as it appears to me, as unfounded in fact as it is in law. First of all, as to the fact. It was not proved that either Hill or Richardson knew of the frauds, but what was suggested was this: that they, being persons of experience in banking, and being in the bank with the ordinary knowledge possessed by persons in their position, must have ascertained that some of these entries were fictitious and fraudulent. In the first place it is not the habit of the court to impute knowledge in this way; it would, in fact, be imputing to them a criminal conspiracy with Sir Robert Harvey to defraud Mr. Kerrison, of which the court would require proof. I have no reason whatever for imputing to them this knowledge, and before you can impute constructive notice to the principal you must show knowledge in the agent. But, assume that they did know, what does it amount to? It amounts to this: that with that knowledge they were confederates with Sir Robert Harvey in cheating Mr. Kerrison. Will that be notice to Mr. Kerrison? It is against the very first principle on which the doctrine of constructive notice is founded, for they are the very last persons who would inform Mr. Kerrison. The theory of constructive notice is that the person who has the knowledge will inform the person whose agent he is, but where from the nature of the case it is obvious he will do no such thing, then there is no constructive notice at all. But, more than that, the doctrine of constructive notice, as applied to a partnership firm, no doubt makes a clerk, as agent of the firm, a person whose knowledge will affect the firm, as a firm, with constructive notice, and in that sense will make every partner liable to the consequences of the constructive notice as a member of the firm, but that doctrine has never been carried to this extent, that the knowledge of the agent of the firm shall be considered the knowledge of the individual partner as between himself and his co-partner; in fact, all the cases in equity with which I am acquainted have proceeded on the opposite doctrine. It has never been suggested that, as between the partners, a clerk is to be considered the agent, and the reason for it is obvious—the clerk is agent for both; as regards third persons, he gives the knowledge or notice to both; but as between the partners, why should he be supposed to communicate to one the rogueries of the other? I see no reason whatever, and, in my opinion, that argument fails. Then it is said that even supposing Mr. Kerrison did not in fact know of these frauds, and that he had no constructive notice of them, yet he was guilty of *laches* or gross negligence, and his creditors, or the depositors in the bank, are barred by that negligence from any right of proof. But what is the meaning of the accusation of gross negligence by a pickpocket against the man whose pocket he has picked, and who says, “If you had buttoned up your pocket I should not have been able to pick it so easily;” for the case is that, and it only requires to be stated to show how absurd the proposition is. If Mr. Kerrison had been solvent, and had filed a bill against Sir Robert

Harvey, who had also been solvent, and the plaintiff had asked that the defendant should restore to the bank the sums he had misappropriated, could a defence on the part of Sir Robert Harvey to this effect have been admitted: "True, I have stolen your money, but I have stolen it for six or seven years consecutively and to a very large amount, and if you had been a careful man you would have found it out long ago, and therefore I am entitled to keep your money and dismiss your action with costs." Now, applying the argument fairly to both sides, if the creditors, that is, the depositors, of the bank are to be bound by the *laches* of Mr. Kerrison, the stockbrokers, the creditors of Sir Robert Harvey, must also be bound by his conduct, and therefore, if, as between Mr. Kerrison and Sir Robert Harvey, no such defence will be admitted, it is plain that no such defence ought to be admitted as between the joint estate and the separate estate. There was one more argument which I cannot pass by. It was said that this was like the case of reputed ownership in bankruptcy—that the stockbrokers had been induced to give credit to Sir Robert Harvey by the neglect of Mr. Kerrison, for that if he had intervened sooner and broken up the bank and driven Sir Robert Harvey into bankruptcy, the stockbrokers would not have given credit to him, and they would not have lost so much. I am not sure of that. I have no means of ascertaining what the position between Sir Robert Harvey and the stockbrokers was, or to what extent they trusted him, or on what grounds they trusted him, or what they knew about his proceedings. I should have thought if they did know the extent of his speculative transactions, though it does not appear that they did, as he transacted business through several stockbrokers, they would not have trusted him at all. But I am not at liberty to indulge in any such speculations; I cannot find that there was any representation by Mr. Kerrison to the stockbrokers, or that they acted upon any representation by him, direct or indirect, that Sir Robert Harvey was solvent. All they appear to have known was that Sir Robert Harvey was carrying on an old established business at Norwich, and was reputed to be a man of property and position in the county. I cannot see any analogy between the doctrine of reputed ownership in bankruptcy and the question of taking the account between the joint and separate estates. I now pass to the arguments which were directed, not so much to induce me to expunge or refuse the proof, as to obtain further delay and further accounts. It was said that in the cases which have been cited, accounts were directed. Of course they were; in the then proceedings in bankruptcy, before the Lord Chancellor, there were no means by which the judge could do otherwise. The Lord Chancellor had no means of taking an account; he was obliged to send it back to the commissioners to take it, and the commissioners were like the judge of first instance now. They sent it to the master because they had no power to do it. But now the judge takes the account in chambers. This account has been taken in chambers and investigated for a very long period of time. Accountants have been employed, evidence has been gone into, and now the account is brought in. The applicants say: "We prove specific misappropriations of certain sums on certain days by Sir Robert Harvey; we

give him credit for all the sums which we can find he has paid in, and we ask to prove for the balance, with interest, from the time of the misappropriations." To that there is no answer on the part of the plaintiffs. They do not allege that there is any error, and although they have taken a very active and energetic part in opposing this claim—so active and energetic that it appears to me the intervention of the stockbrokers has not been required—they do not pretend that any further investigation would throw any light on the matter. But the stockbrokers who have had, as I think, an opportunity afforded to them to which they were not in strictness entitled, ask for a further opportunity of showing that some of the amounts have been paid. If they could have brought forward a single instance of an error, I should have been inclined to listen to them, but they have not been successful in doing so. Then why should I give persons not parties to the suit, who only intervene for the protection of their own interest, although they have been allowed to argue and adduce evidence, an opportunity of going over the accounts with which the plaintiffs are not dissatisfied? It would be putting them in a better position than if they had been plaintiffs, and I do not think they are entitled to be put in any such better position. Still, considering the magnitude of the claim, and their great interest in the question, I should have been inclined to give them the opportunity, if I had not thought that they had had sufficient opportunity already; but as I think they have, I shall not give them any further time. I have come to the conclusion, therefore, that I ought to allow the claim as asked; and, as regards costs, I am afraid I am bound by the general order directing the costs to be added to the sum claimed; but I have made an exception in more than one instance as regards the costs of the adjournment into court, and I intend to do so in the present instance. I shall allow the costs of the adjournment into court out of the estate, the rest of the costs to be added to the claim in the usual way. The costs of the plaintiffs of course will come out of the estate, but I shall give no costs to the representative of the stockbrokers. Under the order by which he is allowed to attend the proceedings, he is liable for additional costs occasioned by his intervening, and no doubt very considerable costs have been occasioned, but considering that I am deciding against the stockbrokers, and that they will in effect lose all further claim on the estate, I think it would be a harsh order to make them pay any further costs, and I, therefore, make no order whatever as to their costs.

Solicitors: *Sole, Turner, and Knight; Linklaters and Co.; Travers Smith and Co.; Lyne and Holman; Wm. Sturt.*

(Before Vice-Chancellor MALINS.)

Monday, July 10.

JULL v. JACOBS.(a)

Will—Construction — "Remainder" — Specific or general residue—Gift of life estate in realty and personally to wife of attesting witness—Intestacy or acceleration of remainder—Vested or contingent remainder.

CHAN. DIV.]

JULL v. JACOBS.

[CHAN. DIV.]

Testator devised and bequeathed real and personal property to his daughter L. "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age." He also by the last disposing clause in his will directed that his debts should be paid from money or promissory notes or bills which might be in his possession, and what might be due to him at the time of his decease at the bank or elsewhere. "The remainder to be equally divided to my surviving children." One of the attesting witnesses was the husband of L., who had two infant children at the testator's death.

Held, first, that the residuary gift included only the residue of the funds there specified; secondly, that the incapacity of L. to take the life estate did not create an intestacy as to either the real or the personal estate, but that the gift to her children was a remainder which was thereby accelerated.

Held, also, that it was a vested remainder.

GEORGE JULL made his will, dated the 9th Nov. 1872, which so far as material was as follows:

"This is the last will and testament of me, George Jull. . . First, I give, devise, and bequeath unto my eldest daughter Anne Maria Jull [here followed a description of the property]. I give, devise, and bequeath unto my daughter, Louisa Hephzibah Jacobs, during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age. [Here followed a description of real and personal property.] I also desire that all my just debts, funeral, and testamentary expenses to (sic) be paid by my executors, Charles Arthur Jacobs and Annie Maria Jull, from money or promissory notes or bills which may be in my possession, and what may be due to (sic) at the time of my decease, at the Bank or elsewhere. The remainder to be equally divided to (sic) my surviving children." The witnesses to the will were Charles Arthur Jacobs, who was the husband of Louisa Hephzibah Jacobs, and Annie Maria Jull. The testator died on the 3rd of Aug. 1873, leaving surviving him three children, namely, Annie Maria Jull, Mrs. Jacobs, and one son, Robert Stiles Jull, and one granddaughter, Fanny Ellen Jull, the daughter of a deceased elder son, who was, therefore, his heiress-at-law. The three children and grandchild were his sole next of kin.

Mr. and Mrs. Jacobs had two infant children.

In Nov. 1873, an administration suit was instituted by Annie Maria Jull against the other persons above named, the questions being: (1.) Whether the gift of the "remainder," after payment of the testator's debts, was a general gift of residue, or whether it was confined to the specific funds appropriated for their payment; and (2.) What was the effect of the incapacity of Mrs. Jacobs to take the life estate given to her by the will by reason of her husband being an attesting witness.

It appeared that in the original will the sentence "the remainder to be equally divided to my surviving children," began with a capital letter, and on a fresh line, but the previous line was filled up, and ended with a comma.

J. Pearson Q.C., and J. T. Humphry, for the plaintiff, on the first question submitted that the gift of the remainder applied only to the funds out of which the debts were to be paid.

Glasse, Q.C. and Collins, for the heiress-at-law, supported the same view. They cited

Lewis v. Nokes, L. Rep. W. N. 173;
In the goods of Ludlow, 1 Sw. & Tr. 29.

Higgins, Q.C. and Colt for the family of Mrs. Jacobs.

Whitehorne, for the testator's son, submitted that the gift was a general residuary gift, and cited

Attree v. Attree, 24 L. T. Rep. N. S. 121; L. T. Rep. 11 Eq. 280.

The VICE-CHANCELLOR read the clause in question, and said, I am of opinion that it is all one sentence, and the fact that it begins with a capital letter, and on a fresh line amounts to nothing. It would have been more important if the previous line had not been filled up. On the will I think that it is a gift of the remainder of that money out of which the debts are to be paid. As to the authorities, I think *Lewis v. Nokes* is entirely applicable, and that in *Attree v. Attree* there was no difficulty in coming to the conclusion that it was a general residuary gift. There is, therefore, in my opinion, an intestacy as to the testator's general residue.

The second point was then argued.

J. Pearson, Q.C. and J. T. Humphry, for the plaintiff.—The question is whether, as Louisa cannot take by reason of the will having been attested by her husband, the remainder to her children expectant on her life estate, is accelerated, or whether there is an intestacy as to that share during her lifetime. We submit there is an intestacy. It is clear that the testator never intended that the children should take during their mother's life. The same rule as to acceleration which applies to a devise of realty does not apply to personalty: (*Evestaff v. Austin*, 19 Bea. 591). This was not a gift void in its inception; it is not like a gift to a person dead at the date of the will. It is a good gift on the face of the will. [The VICE-CHANCELLOR.—The gift of the life estate was void *ab initio*. There was no will until it was attested by Mr. Jacobs, and his attestation prevented his wife taking the benefit.] By treating the remainder as not accelerated the children of Mrs. Jacobs will be in just the position in which the testator meant them to be.

Glasse, Q.C. and Collins for the heiress-at-law.—The Act says nothing about acceleration. The words are (1 Vict. c. 26, sect. 15) that in case of a gift to the husband or wife of an attesting witness such gift "shall, so far only as concerns such person attesting the execution of such will, or the wife or the husband of such person, or any person claiming under such person or wife or husband, be utterly null and void." They cited:

Lainson v. Lainson, 22 L. T. Rep. O.S. 150; 18 Bea. 1; 5 De G. M. & G., 754; and
Carrick v. Errington, 2 P. Wms. 362.

Higgins, Q.C. and Colt for the children of Mrs. Jacobs.—We contend that the remainder to the children of Mrs. Jacobs is accelerated. The authorities are clear in the case of real estate, and are collected at 1 Jarman on Wills, 3rd ed. p. 538. There is no different rule applicable to realty and personalty; the only colour for that contention is the observation of the Master of the Rolls in *Evestaff v. Austin*. [The VICE-CHANCELLOR.—You need not trouble yourself on that point.]

Whitehorne, for the testator's son, supported the argument of the plaintiff.

Glasse, Q.C. in reply.—The court must find some intention in the will that the children

should take any benefit before the mother's death in order to apply *Lainson v. Lainson*. There is no such intention apparent on the will. He cited also *Turton v. Lambard* (2 L. T. Rep. N. S. 38; 1 De G. F. & Jo. 495.)

The VICE-CHANCELLOR.—This is a point of very considerable nicety. The testator, having made his will, asked one of his daughters and his son-in-law, who were objects of his bounty, to witness it. Now the 15th section of the Wills Act provides that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, &c. (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made "such devise, legacy, &c., shall so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof, notwithstanding such devise, legacy," &c. That is, the gift is rendered void, but the will is established. Now the particular bequest in question is this. [His Lordship read the devise and bequest to Mrs. Jacobs, and continued:] The first question, therefore, is what would have been the effect of that bequest if the daughter could have taken the benefit of it. I take it to be as clear a remainder to the children of Mrs. Jacobs as could be, vested if there are children at the testator's death: contingent if there are none. Whenever the life estate ceases those entitled in remainder take it. If, under the old law there had been such a gift, and the tenant for life had forfeited his life estate, those entitled in remainder would have entered immediately. It is perfectly clear then, that, apart from the question of incapacity, Mrs. Jacobs is tenant for life, with remainder to her children if they come of age. Then, taking away her life estate, does that cause an intestacy as to the life estate, or an acceleration of the estates in remainder? It is clear that the children are postponed because of the mother's life estate, but if she does not take the life estate why should they be postponed? It is a mere accident, through ignorance on the part of the testator, and I think that, as the tenant for life cannot take, the reason for postponing the children ceases. *Lainson v. Lainson* was a case where the testator devised an estate to his son, John Lainson, for life, and from and immediately after his decease to his first and other sons in tail. By a codicil he revoked the devise of the life estate, and the question was whether there was an intestacy as to the life estate, or whether the remainder was accelerated. Lord Romilly said—"The question is, whether this creates an intestacy or an acceleration of the estate to the son of John Lainson: and I am of opinion that it is an acceleration of the estate to the son, and not an intestacy. I have looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another and that fails, from the case where the testator himself directs that it shall fail; and although the expression used is that the estate to the son of John Lainson is only to take effect from and after John Lainson's decease, I am of opinion that the meaning is from and after the determination of his

estate by death or otherwise. In deciding thus, I fulfil the intention of the testator. It is expressly stated in the will that the testator did not intend the son to take the estate in addition to the annuity (which he would do if I were to hold there was an intestacy), but in lieu of it. The result is that I must make a declaration that there is an acceleration of the estate to the eldest son of John Lainson." That case was affirmed on the broadest principles, and shows that where the life estate is determined by death, or is, from any other cause put out of the way, the remainder takes effect as if no life estate had been created. I am, therefore, of opinion that as regards the real estate, the remainder to the children of Mrs. Jacobs, is accelerated by reason of her disability to take. But then, it is said, that this rule does not apply to personalty; but Lord Romilly has decided in the case of *Evestaff v. Austin*, that the same rule applies to both realty and personalty. There is, however, another point which renders the question, as to the personalty, unimportant, namely, that the children of Mrs. Jacobs would be entitled to have the interest of it accumulated, or I should in chambers apply it for their benefit. I consider that the case of *Festing v. Allen* (12 M. & W. 279), is virtually overruled by *Broune v. Broune* (29 L. T. Rep. O.S. 258; 3 Sm. & Giff. 568). My opinion, therefore, is that the children of Mrs. Jacobs are now entitled to a vested interest in the share of their mother to be divided among them on their attaining the age of twenty-one.

Solicitors for plaintiff, *Torr, Janeway, Tagart, and Janeway, for Henderson, Salmon, and Hendersons*, Bristol.

Solicitors for defendants, *Monckton, Long, and Co.*

Wednesday, July 26.

ROPER v. ROPER. (a)

Will—Widow—Annuity in lieu of dower—Priority.

An annuity to a widow, in lieu of dower, has no priority over other annuities, where the testator leaves no real estate out of which his widow is dowable.

The rule is precisely the same, whether the testator leaves no real estate, or whether he leaves no real estate out of which his widow is dowable.

FURTHER consideration.

John Roper, the testator, by his will, dated the 3rd Feb. 1870, after bequeathing to his wife Emma Roper (the plaintiff) a legacy of 50*l.*, and making certain specific bequests, bequeathed as follows:

"I bequeath to my said wife an annuity of 200*l.* during her life, and I declare that such annuity shall be for the sole and separate use of my said wife, and that her receipt alone shall be a good discharge for the same, and shall be free from marital control and without power of anticipation, and that my said wife shall not be allowed to have the value of the said annuity in lien thereof, and I declare that the said annuity to my said wife is and shall be accepted by her in lieu, bar, and satisfaction of dower."

The testator then bequeathed certain legacies, and certain annuities to his children; and devised and bequeathed all his real estate, and the residue

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

CHAN. DIV.]

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of his personal estate unto and equally between his son John Roper and his daughter Frances Poord as tenants in common.

The testator had married the plaintiff after the passing of the Dower Act.

The testator died on the 4th Jan. 1871, possessed of certain real estate; but he left no real estate out of which his widow was dowable. The plaintiff had received payment in full of her annuity of 200*l.* up to the 4th April 1873.

On the 30th April 1873, the plaintiff filed her bill against the executors and trustees of the will, and the children of the testator, praying (amongst other things) for the administration of his real and personal estate.

There was a deficiency of assets to pay the annuities and legacies in full; and the question now arose, on further consideration, whether the widow's annuity, being given in lieu of dower, was entitled to priority over the other annuities.

Carson for the plaintiff.—The plaintiff is entitled to priority in respect of her annuity. The question is, whether (to get priority) she must be entitled to dower under the old law, or under the new law. In the present case she would be entitled to dower according to the old law, but not according to the new law, because the conveyances were made to her husband with declarations against dower. Sect. 12 of the Dower Act (3 & 4 Will. 4, c. 105) enacts that nothing in the Act shall interfere with any rule of equity "by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies." That section must apply to cases (like the present) in which she would have been entitled to dower under the old law, but not under the new. In other words wherever a legacy is given to a widow in lieu of dower, and she would have been entitled to dower under the old law, the old law of dower shall continue, so far as to give her legacy priority.

J. Pearson, Q.C. and Dixon, for the executors and trustees of the will, were not called upon. They referred to

Heath v. Dendy, 1 Russ. 543;

Acey v. Simpson, 5 Beav. 35.

Stallard for other parties.

THE VICE-CHANCELLOR said.—In this case the testator has given an annuity of 200*l.* to his wife, and has also given annuities to his children. After giving the annuity to his wife he makes the following declaration, "and I declare that the said annuity to my said wife is and shall be accepted by her in lieu, bar, and satisfaction of dower." Now the law is well settled that whenever a testator, having land out of which his widow is dowable, gives her an annuity in satisfaction of her dower, she is entitled to priority to the full extent of the annuity, although the value of the annuity greatly exceeds the value of the dower. Here the testator has declared that the annuity is to be in bar of dower. It turns out that he never had any land, out of which his wife was dowable; because, whenever he acquired land, the conveyance was made to him with a declaration against dower. He, therefore, never had any land out of which his widow was dowable. Now it was decided in 1842 in *Acey v. Simpson*, that a legacy to a widow in lieu of dower or thirds at common law or by custom, has no priority over other legacies, where the testator leaves no real estate. In that case the testator gave his widow an annuity of 100*l.* for life, and declared that the said annuity should be

accepted by her in lieu of "all dower or thirds at common law or by custom, which she might otherwise claim from or upon all or any of his real estates." It appeared that there was no real estate, out of which the widow was dowable. That is the exact case here. Mr. Pemberton and Mr. Mylne, for the plaintiff, insisted that the widow was not a purchaser, as there were no real estates, and that she ought to come in *pari passu* with the other legatees. Mr. Kindersley and Mr. Smythe, for the widow, admitted that they could not successfully maintain the contrary. The Master of the Rolls was of the same opinion and decreed accordingly. That is a decision after the passing of the Dower Act. There the testator had no real estate; here the testator had no real estate out of which the widow was dowable. To my mind it is precisely the same thing. The new law has very much deprived the widow of her right to dower. Sect. 7 of the Dower Act enacts that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land. Then comes sect. 12, which says that "nothing in this Act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies." That section may apply to cases within sect. 7, or it may apply generally. I am of opinion that it applies generally; and that where a husband has given an annuity, and declared that it shall be in satisfaction of dower, the effect is just the same as if the Dower Act had not passed. The law was settled on a reasonable footing in *Acey v. Simpson*. The widow will, therefore, rank *pari passu* with the other annuitants. I am glad to find that the conclusion to which I have come does perfect justice between the parties as the other annuitants, being the children of the testator, are an equally meritorious class. As there was no land of the testator, out of which the widow was dowable, the result is just the same as if the testator had left no land whatever. The case is governed by the decision in *Acey v. Simpson*. The annuities will be valued at the time of the death of the testator, and treated as legacies of the amount of the annuities so valued; then all the annuities will abate rateably.

Solicitors: *Duncan, Murton, Warren, and Gardner; Kingsford and Dorman.*

COMMON PLEAS DIVISION.

Feb. 5, 7, and 11, 1876.

ALDRIDGE (pet.) v. HURST (resp.). (a)

Parliamentary election petition—Amendment—Striking out—Claim to seat.

After the expiration of the twenty-one days after the return, within which, by 31 & 32 Vict. c. 125, s. 6, a Parliamentary election petition must be presented, the petition cannot be amended by striking out a paragraph which claims the seat for the petitioner.

A PETITION had been presented by Major Aldridge against the return of Mr. Hurst as member of

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

C.P. Div.]

ALDRIDGE (pet.) v. HURST (resp.).

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Parliament for the borough of Horsham, and claiming the seat for the petitioner. After the petition had been signed by the petitioner, an application was made on his behalf to Quain, J. for leave to amend the petition by striking out the paragraph which claimed the seat for the petitioner, and also certain other paragraphs relating to a scrutiny. The application was supported by an affidavit of the petitioner denying the existence of any collusion, and stating that the application was made *bonâ fide*, and was not the result of any corrupt arrangement; and that the petitioner was not apprehensive of any recriminatory charges being brought against him.

The learned judge declined to make an order permitting the amendment, but referred the matter to the court.

Feb. 5 and 7.—A. L. Smith for the petitioner.—After the expiration of the period of twenty-one days, within which, by the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), s. 6, the petition must be presented, it cannot be amended by adding any fresh matter, but it may be amended by striking out part: (*Stevens v. Tillet*, L. Rep. 6 C. P. 147; 23 L. T. Rep. N. S. 622.) The object of this application is only to save unnecessary costs, and the affidavit of the petitioner negatives all possibility of collusion, and no objection is made on behalf of the sureties. The affidavit also states that the petitioner is not apprehensive of recriminatory charges, and moreover, if the claim to the seat is abandoned, the reason for allowing recriminatory charges ceases to apply, for that reason is only to prevent improper persons getting seats in the House of Commons. There is no authority against the proposed amendment. In *Maude v. Lowley* (L. Rep. 9 C. P. 165) when the court refused to allow a municipal election petition to be amended, the amendment which it was desired to make was an addition to the petition as it already stood.

C. S. C. Bowen (*F. H. Scott* with him), for the respondent, opposed the application.—If the object is to save unnecessary costs, the petitioner can attain that object by abstaining from delivering the list of votes to be objected to, and heads of objection required by Rule 7 of the Rules of Michaelmas Term 1868. The part of the petition claiming the seat is in effect a separate petition, and the petitioner is not entitled to withdraw. He has laid himself open to recriminatory charges by claiming the seat, and the respondent may insist on his right to have an opportunity of bringing forward such charges. This was the law before the passing of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125).

Coventry case, 1 Peckwell, at p. 99;

Wareham case, 1 Wolferstan & Dew, at p. 95;

Clare County case, Wolferstan & Bristows, at p. 143.

By sect. 26 the old practice is to be observed as to cases not provided for by the Act or Rules. Formerly a petition could only be withdrawn according to the provisions of the statutes on the subject (*Rogers on Elections*, edition of 1865, p. 423), and since the jurisdiction to try petitions has been transferred to the Judges, a Judge at Chambers can have no power to waive the conditions imposed by the Legislature (31 & 32 Vict. c. 125, ss. 35, 36) and prescribed by the Rules of Michaelmas Term 1868, 45 to 49. Rule 44 does not give a judge more power than the court has. The respondent could not withdraw from the contest and

resign his seat, for personal bribery might be charged, which would disqualify him from afterwards sitting; if he resigned the petition must still proceed, and the rule is the same in the case of a petitioner claiming the seat; for by 31 & 32 Vict. c. 125, s. 53, the respondent may give evidence "in the same manner as if he had presented a petition." Before the Act cases of bribery were inquired into notwithstanding withdrawal, *Rogers on Elections*, 424 (5 & 6 Vict. c. 102, s. 1), *First Horsham case* (1 P. R. & D., 107), and the law in this respect is not altered. See the *New Windsor case* (Judgments of Election Judges, 208-210; 19 L. T. Rep. N. S. 613). In the *Taunton case*, *Waygood v. James* (L. Rep. 4 C. P. 361; 21 L. T. Rep. N. S. 202), the Judges assume throughout that the result of claiming the seat is to put in issue irrevocably the conduct of those who claim it. The decision in *Maude v. Lowley* (*ubi sup.*) is a strong authority against the proposed amendment. Lord Coleridge there says, "Mr. Tennant has also pointed out that after the expiration of the twenty-one days it would be too late for anyone else to present a fresh petition; and that to allow a petitioner to amend so as substantially to make the amended petition a fresh one would be conferring upon him a privilege which no other person could possess. That seems to me to dispose of the case." That reasoning is directly in point here, for what change could be more vital than a change in the prayer of the petition? In the *Youghal case* (1 O'M. & H. at p. 296), O'Brien, J. refused to allow an amendment, and expressed a doubt as to whether he had power to do so. Even if there is power to amend, this is not a case in which an amendment ought to be allowed.

A. L. Smith in reply.—By 31 & 32 Vict. c. 125, s. 2, the court has the same powers as if the petition were an ordinary cause. This gives power to amend. In *Pickering v. Startin* (28 L. T. Rep. N. S. 111) amendments by which certain allegations were added to a municipal election petition were allowed to be made. That case was not cited in *Maude v. Lowley* (*ubi sup.*). In *Yates v. Leach* (L. Rep. 9 C. P. 605; 43 L. J. 377, C. P.; 30 L. T. Rep. N. S. 790), Brett, J. expresses an opinion that the court has jurisdiction to strike out the name of a person who has been improperly made a respondent. The dictum of O'Brien, J. which has been referred to, is no authority against the power of amendment, for he only refused in the exercise of his discretion to allow an amendment under the circumstances of that case. It has not been suggested that there is no power to amend in any of the other cases, except *Maude v. Lowley* (*ubi sup.*). In the third Stroud Election Petition an order similar to that now asked for was made by Pigott, B. at Chambers. Sect. 35, as to withdrawal of a petition, only refers to withdrawal of the whole petition. It does not provide that the petition or any part of it shall not be withdrawn except as therein prescribed. A paragraph claiming the seat is not in effect a separate petition. The prayer is in the alternative—see the form given in Rule 5 of Michaelmas Term 1868, and the special forms in Leigh and Le Marchant's Election Law, pp. 161-166, 2nd edition. Only one security is given, which shows that it is only one petition. He also referred to

The New Windsor case, 2 Peck. 187;

The Maldon case, 2 P. R. & D. 143;

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Pearse v. Norwood, L. Rep. 4 C. P. 235; 19 L. T. Rep. N. S. 648.

GROVE, J.—We are all of opinion that the application must be refused, but as the case is one of great importance, we will give a judgment stating the reasons for our decision at a future time. The question of costs will be left to be dealt with by the Judge who tries the petition.

Feb. 11.—The judgment of the court (Grove, Archibald, and Lindley, JJ.) was delivered by

GROVE, J.—In this case, which was that of a petition against the return of Mr. Hurst for the borough of Horsham, an application was made to Quain J., to amend the petition by striking out a part of the prayer, viz., that which claimed the seat for Major Aldridge, the petitioner, and certain other allegations applying to a scrutiny, which would be dependent on this claim. The question was referred by the learned judge to this court, and an affidavit by the petitioner was read, stating, among other things, that the application was made *bona fide* and without collusion, but as our judgment does not turn on the terms of this affidavit, we need not go fully into this. On the part of the petitioner it was urged that sect. 2 of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) invests this court, subject to the provisions of the Act, with the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if such petition were an ordinary cause within its jurisdiction. It was also stated that an order such as that now asked had been made by Pigott, B. though the case appears to have been scarcely argued before that learned judge. The case of *Stevens v. Tillet* (L. Rep. 6 C. P. 147) was also cited, where this court, after the abandonment of the claim to the seat at a trial before an election judge and the subsequent election of the claimant, held that the petitioners against him might give evidence of corrupt practices by himself and his agents at the previous election, although they might have been given in evidence in support of recriminating charges at the previous trial where the now sitting member was petitioner. It was further contended that although the court might not have jurisdiction to add new matters to a petition, it might expunge on proper grounds shown. It was contended *contra* that, without going the length of saying that the court or a judge might not have jurisdiction to allow the addition or withdrawal of certain allegations in an election petition, it could not permit the withdrawal of a distinct prayer, such as that claiming the seat; that this would be analogous to, if not within, the sections of the Act and the rules relating to the withdrawal of an election petition, and that such withdrawal, if permissible at all, should be guarded by similar provisions, and not allowed by the court on mere application and affidavits, and that the respondent ought not to have his right to adduce recriminatory evidence taken from him by such an application as this. We were of opinion that the arguments for the respondent were well founded, and that the application should be refused, and as the matter pressed, the trial being near at hand, we announced our decision to that effect, and we now proceed to state the main grounds on which it proceeded. It will be observed that the second section of the Act above alluded to states that the powers there given shall be subject to the provisions of the Act, and we think it clear that the jurisdiction conferred by

the Act cannot be in all respects the same as that of the court in ordinary causes. Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public in purity of election, and in having the member seated who is duly returned by a majority of proper votes. It appears to us also that the scope of the Act is that petitions should not be mere pleadings, nor framed for the purpose of intimidating or in any way inducing the respondent to abandon his seat, still less, of course, should they be collusive, but that they should be real, well considered, and not lightly to be withdrawn either in whole or in part. (See ss. 5, 6, 8, sect. 11, sub-sects. 14, 15, 16, ss. 20, 25 to 42, and other parts of the Act.) By sect. 5 of the Act a petition may be presented by a person who voted or had a right to vote at the election, or by a person claiming to have a right to be returned or elected. By sub-sect. 13 of sect. 11 the judge is to determine, not merely whether the member whose return or election is complained of, but whether any or what other person was duly returned or elected, and sect. 53 speaks of a petition complaining of an undue return and claiming the seat for some person. These sections show that not merely may the candidate who is not returned claim the seat, or in other words, claim to have been duly elected, but that any other voter might claim the seat for a candidate who has not been returned, and claims have been so made, as in *Stevens v. Tillet* (*ubi sup.*) and other cases. This right of petitioning shows that the Act contemplated in regard to petitions not merely the rights of candidates not returned, but the rights of the constituency, in order to insure that the person really elected should be their member, and this without the cost and disturbance of a new election, as the judge's decision in favour of such claim is final: (*Taunton case*, L. Rep. 4 C. P. 361.) It appears to us that it would be an infringement of this right if a petition having been presented by one person (in this case a candidate claiming the seat), the claim to the seat could be withdrawn by the mere motion of the person presenting it after the twenty-one days, when no other petition could be presented, and thus the voters be prevented from claiming the seat for one who may be the duly elected representative, or on the other hand from showing by means of the recriminative charges, which put in issue the claim, that the claimant is not a person entitled to the seat by that election, or that he is disqualified for future elections, such withdrawal not being accompanied by the power to substitute another person as petitioner, by means of which the inquiry might be gone into at the trial. A right to have an election petition proceeded with, though one object of it is obtained, is reopened, by sect. 18 of the statute, which provides that an election petition shall be proceeded with notwithstanding the acceptance by the respondent of an office of profit under the Crown. It appears to us that the withdrawal of this portion of the prayer of the petition is *in pari materia* with, even if it is not within, the provision of the Act relative to the withdrawal of a whole petition. We see no reason why the prayer claiming the seat for some one might not form the subject of a separate petition from that which is directed against the return of the sitting member, and if so, it would be within

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the provisions of sect. 35, and the rules XLV., *et seq.*, carrying out those provisions, which provide *inter alia* for due notices to be given to the constituency, and for the substitution by leave of the judge of another person in place of the petitioner. If this be so, and these sections and rules apply to a petition simply claiming the seat for some person, we see no reason why they should not apply to such claim when the prayer including it is joined with another or other prayers, and if, in the latter case, by reason of the words "in whole or in part," not occurring in the provision of the Act as to withdrawal of petitions, applications such as the present do not fall within such provision, we see no reason why at all events the election judges may not under sect. 25 make rules for properly guarding the interest of the particular constituency and of the public in respect of such application. We, however, incline to think, although it is not necessary to decide this point in the present case, that an election petition under the Act (sect. 35) is not the less an election petition because it is joined in one document with another petition, and if so, the provisions as to withdrawal apply to the present case. By sect. 22, two candidates may be made respondents to the same petition, and this case may for the sake of convenience be tried at the same time, but "for all the purposes of this Act such petition shall be deemed a separate petition against each respondent;" this section shows that two petitions may be joined in one document and tried at one time. By sect. 26, it is provided that "so far as the rules framed under sect. 25 do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions, shall be observed as far as may be by the court and judge in the case of election petitions under this Act." It therefore becomes desirable to see what has been the mode in which election committees have dealt with cases analogous to the present. In the *Clare case* (W. & B. 143), recriminatory evidence was allowed to be given against a candidate for whom the seat was claimed, though the claim to the seat was abandoned. So also in the *Coventry case* (1 Peck. 99) and other cases cited in Mr. Rogers' *Law and Practice of Election Committees*, edit. 1863, p. 470. The *New Windsor case* (2 Peck. 193), cited in the present case by the learned counsel for the petitioner, does not appear to conflict with the other decisions, as the committee there allowed recriminatory evidence to be given against a petitioner who had abandoned his claim to the seat. The *Maldon case* (2 P. R. & D. 143) was also relied on for the petitioner. In that case there were three petitions; the second petitioner, who charged bribery and treating against the sitting members, and claimed the seat for himself, wholly withdrew his petition, and what the committee decided was to decline to proceed upon the application of a third petitioner, which alleged corrupt practices against the second petitioner, the committee having unseated the sitting members on the first petition. This decision does not appear to us substantially to conflict with the other decisions of election committees, as tribunals of this description must have some discretion as to where inquiries are to stop. The practice of committees of the House of Commons appears to us, therefore, to be strongly in favour

of not excluding recriminatory evidence by the sitting member, when the seat is claimed by the petitioner and the petitioner afterwards desires to abandon the claim, and the exclusion of such evidence appears to be the only object sought by this application, as if it were not desired to exclude this, or if it were known that no recriminatory evidence would be adduced, the alleged object, as to saving costs, could be obtained by giving the respondent notice that no evidence would be tendered in support of the claim to the seat, and that that claim would not be persisted in at the trial. The learned counsel for the petitioner fairly admitted the fact that frequently, if not universally, election petitions were presented on the last of the twenty-one days, and that if so, information was not given by them of which members of the constituency could avail themselves by presenting in due time another petition, if they found the requisite allegations and prayer in the petition presented were unsatisfactory to them. This may present a difficulty in remedying a defect if a prayer such as this joined with another prayer in one document is not within the clauses and rules as to withdrawal; but we do not see that it affords an independent argument in favour of granting this application, and it is a difficulty which may probably be lessened or removed by rules under sect. 25. It is also to be observed that, although petitions may be presented at the last moment, it is commonly known in the county or borough that such petitions are likely to be presented, and if any suspicion exists that they are sham petitions, means are taken by those who are in earnest to lodge petitions, and the entire withdrawal of collusive petitions is guarded against by the provisions of the Act to which we have alluded. In one point of view it is an argument against our allowing this prayer to be withdrawn, that if there be no power under the withdrawal clauses to substitute a person for the petitioner as to this prayer the constituency will be without means of proving either that the petitioner is the duly elected member, or to answer his allegation that he is elected, or to show that he is unfit to serve in a future Parliament, he himself having raised their issue by claiming the seat. We by no means decide that this court has no power to make amendments in petitions, provided it sees that no injurious or unjust result, or that a beneficial result will follow. In *Pickering v. Startin* (28 L. T. Rep. N. S. 111), the Court of Common Pleas allowed in the case of a municipal election petition an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maude v. Lowley* (L. Rep. 9 C. P. 165) an application for an amendment by addition of allegations as to the acts committed in other wards besides those named in the original petition was refused by this court. We do not enter into the arguments as to the question of the position of the sureties being altered, as the counsel for the petitioner agreed to make their consent to this amendment a condition in his leave to amend. We cannot discard the question of possible collusion in favour of particular individuals. The provisions giving protection against the chance of this must be of general application, and its possibility jealously watched by judges and the court. Here, if the petitioner suffers in the result, he has brought it on himself, but if, as he states in his

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affidavit, he has no cause for apprehension, he can hardly suffer any damage, as, if he gave notice to the other side of not pressing his claim, and if in consequence of particulars furnished by the respondent he had to go to expense in defending the conduct of himself or his agents, and he does this successfully, the election judge will probably decide in his favour as to the costs of such defence. If otherwise, he can hardly complain of having to pay them. That the matter may be entirely open for the discretion of the learned judge at the trial, we, in refusing this application, leave the costs of it to be adjudicated upon by the judge who tries the case.

Application refused.

Solicitors for the petitioner, *Robinson and Preston*.

Solicitors for the respondent, *Wyatt, Hoskins, and Hooper*.

Wednesday, May 3.

ROURKE v. THE WHITEMOSS COLLIERY COMPANY (LIMITED). (a)

Master and servant—Action for negligence—Servants of sub-contractor—Common employment.

W. contracted with defendants to sink a shaft in defendants' colliery, defendants supplying two enginemen to work at the mouth of the shaft; the enginemen were paid by defendants. Plaintiff was hired by W. to work at the bottom of the shaft. Plaintiff was injured through the negligence of the enginemen, and sued defendants.

Held, on motion for judgment, that the enginemen were servants of W., and engaged in a common employment with plaintiff, and were not servants of defendants so as to make defendants liable to plaintiff.

Wiggett v. Fox (11 Ex. 832; 25 L. J. 188, Ex.) and *Murray v. Currie* (L. Rep. 6 C. P. 24; 40 L. J. 26, C. P.; 23 L. T. Rep. N. S. 557) followed.

THIS was an action brought to recover damages for personal injuries sustained by the plaintiff, which it was alleged were caused by the negligence of a servant or servants of the defendants. The defendants were proprietors of a colliery, and had entered into an agreement with a person named Whittle, by which Whittle undertook to sink a shaft, which had been commenced by the defendants; the sinking was done at so much a foot, and the defendants were to supply the engine at the mouth of the shaft, and provide two enginemen. The plaintiff, who had previously been employed by the defendants, was employed by Whittle to work at the bottom of the shaft, and was paid by Whittle. The enginemen provided by the defendants used to relieve each other in the management of the engine at the mouth of the shaft every twelve hours. Before the accident by which the plaintiff was injured, one of the enginemen, named Lawrence, had been on duty for twelve hours, and ought to have been relieved by his colleague Dyson; but Dyson did not come, and Lawrence, instead of reporting his absence, remained on duty during the whole of the twelve hours when Dyson ought to have been there, and then commenced his own second spell of twelve hours, having already been twenty-four hours at work. When Lawrence had been at work about thirty hours he became so tired as to be unable to

attend properly to the engine, and in consequence an accident took place, and some heavy machinery fell down the shaft, and fell upon the plaintiff, who was at work below, causing him very severe injury.

The case was tried before Lush, J at the Liverpool Winter Assizes, 1875, when the jury assessed the damages at 300*l.*, and the verdict was entered for the plaintiff for that amount, with leave to the defendants to move. The case now came before the court on motion for judgment.

Herschell, Q.C. and McConnell, for the defendants.—The plaintiff cannot recover. The immediate cause of the accident was the misconduct of the engineman, Lawrence, in omitting to report to the overlooker when he was not relieved. Both the enginemen were under the control of Whittle, and were doing work with the same object as the plaintiff. In *Wiggett v. Fox* (11 Ex. 832; 25 L. J. 188, Ex.) it was held that the plaintiff could not recover, though the facts against the defendants were stronger than they are here, for in that case the man whose negligence caused the accident was not working with the same object as the man who was killed, and was under the control of the defendants, and not of the sub-contractor. *Alderson, B.*, in delivering the judgment of the court, says: "Here both the servants were at the time of the injury engaged in doing the common work of the contractors, the defendants, and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary to the completion of the whole, and working together for that purpose. We should not give full or reasonable effect to the principle which governs such cases (and which, as stated in *Priestley v. Fowler* (3 M. & W. 1), mainly arose from the enormous inconveniences which would ensue from holding the common employer to be liable in such circumstances) if we were not to extend it as far as the present question." *Murray v. Currie* (L. Rep. 6, C. P. 24; 40 L. J. 26, C. P.; 23 L. T. Rep. N. S. 557), is also an authority against the plaintiff's right to recover. It is true that there the man whose negligence caused the injury was paid by the stavedore, while here he was paid by the defendants, but that circumstance does not affect the application of the principle on which the court rested their decision to the present case. *Abraham v. Reynolds* (5 H. & N. 143) is distinguishable. *Pollock, C.B.* there speaks of the exemption of the master from liability to actions by servants, &c., as existing "when they form one family, in one establishment, for one common purpose." Here there was one common establishment. There is no sound distinction between the present case and *Wiggett v. Fox* (*ubi sup.*). The observations of *Archibald, J.* in *Larell v. Howell* (34 L. T. Rep. N. S. 183; L. Rep. 1 C. P. Div. 161) are in point for the defendants.

Temple, Q.C. and Gully, for the plaintiff.—The verdict was rightly entered for the plaintiff. The plaintiff was the servant and under the control of Whittle, but the enginemen were under the control of the defendants. The defendants could dismiss them, but could not dismiss the plaintiff. Therefore the plaintiff and the enginemen were in different employments, and the defendants are liable to the plaintiff for the negligence of the enginemen;

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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L. Rep. 2 Ex. 30; 38 L. J. 9, Ex.; 4 H. & C. 695;
15 L. T. Rep. N.S. 361;

In *Abraham v. Reynolds* (*ubi sup.*), *Wiggett v. Fox* was fully discussed and distinguished, and it is distinguishable from the present case, for there, as appears from the report in the Law Journal, the defendants as well as the sub-contractors had power to dismiss the plaintiff. All cases of this nature depend upon questions of mixed law and fact, and it is often dangerous to apply the principle of a particular case which has been decided to a different state of facts.

Herschell, Q.C. in reply.—In *Warburton v. The Great Western Railway Company* the plaintiff and the man whose negligence caused the injury were engaged in totally different works.

Lord COLERIDGE, C.J.—I am of opinion that the defendants are entitled to succeed, and that judgment ought to be entered for them and the verdict for the plaintiff set aside. This is a case raising a point which is often one of some difficulty. The principle is well established, but it is often difficult to say whether a particular set of facts is within one set of principles or another. As I understand the facts, they are these. The defendants were proprietors of a mine, and had been sinking a shaft, but some time before the accident took place they gave up sinking the shaft themselves, and employed a person of the name of Whittle, a contractor, to continue the work. The plaintiff undoubtedly was under Whittle; he was paid and employed by him, and was under his control. The injury was caused by the negligence of the person working the engine, and if that person was in the employment of Whittle this case is within the cases which have been referred to, and the plaintiff cannot recover. The decision in *Priestley v. Fowler*, and the principle on which that case and the others which followed it were decided, make the law clear. If, on the other hand, the person who had the management of the engine, and whose negligence caused the injury, was in the employment of the defendants, they would be liable. The position appears to be this: The engineman was engaged in doing certain necessary work, which was necessary for the common operation in which he and the plaintiff were both engaged, that of sinking the pit; this operation was carried on for the benefit of the defendants, and for certain purposes perhaps it may be said that the engineman was in the defendants' employment; but by the arrangement which had been made between Whittle and the defendants he was detailed to do the work in question, and he was the servant for that purpose of Whittle; he was the man who did the work above ground of watching the engine, and while he was so working it was a joint operation carried on by him and the plaintiff under the control of Whittle. Then, was the engineman in the employment of Whittle, so that the defendants are not responsible for his negligence? I think he was. According to the principle of *Priestley v. Fowler* and the other cases by which it has been followed, a servant when he enters into any employment tacitly agrees to take upon himself the ordinary risks incidental to that employment, and among them the risk of injury which he may suffer by the negligence of his fellow-servants. I cannot conceive any risk which is more within that definition than the risk here. A workman in the position

of the plaintiff must know that his work is carried on in combination with the work above ground. The plaintiff, I think, cannot recover according to general principles, and perhaps that is enough to decide the case, but I will add shortly that the present case appears to me to be practically undistinguishable from *Wiggett v. Fox* and *Murray v. Currie*. In both those cases in a certain sense the person whose negligence caused the injury was not in the defendants' employment, and yet the nature of the general employment made both the plaintiff and the person whose negligence caused the injury in a substantial sense to be in the employment of the defendants. There is a case, which was much pressed upon us in argument, and properly so—a case which is always cited when questions of this kind arise—*Abraham v. Reynolds*. I must admit that on the facts it is difficult to distinguish that case from some cases which have been decided otherwise, but the court did distinguish it, and the principle of the case is distinguishable. The principle on which the court held there that the plaintiff was entitled to recover was that where a person sends a servant on a message, and in performing his master's orders he is injured by the negligence of some other person's servant, this does not make a common employment. But there is this difficulty, that a person injured in the service of a contractor with the defendants under such circumstances as the present is performing a necessary part of a joint operation, and is not engaged in any independent employment. The facts of that case seem to me to be more like the facts in *Wiggett v. Fox* than the court thought they were, but the principle on which the decision proceeded is clear, and it does not govern the present case.

ARCHIBALD, J.—I am of the same opinion. The question is whether the facts of the present case bring it within the exception to the general law of master and servant, established by *Priestley v. Fowler* and within the principle of that and similar cases, which we are bound to give effect to. Here the plaintiff was in the employment of Whittle, who had entered into a contract with the defendants to sink a pit for them. The engineman, Lawrence, was assigned by the defendants to Whittle, and it was Lawrence's negligence which caused the injury which the plaintiff has suffered. The question then is, was Lawrence the servant of Whittle, or was he in the separate employment of the defendants? It seems to me that the facts of the case show that for this purpose he was the servant of Whittle, and he and the plaintiff were engaged in a common employment within the exception to which I have alluded. These cases are often difficult to decide on the facts. In *Abraham v. Reynolds* the court thought that the facts did not show a common employment. I admit the resemblance of the facts in *Abraham v. Reynolds* and in this case. But the facts here are more like those of *Murray v. Currie* and *Wiggett v. Fox* than those of *Abraham v. Reynolds*, and I think they establish that the engineman was in the employment of Whittle.

LINDLEY, J.—I am of the same opinion. When the cases are examined, we find a principle established by *Priestley v. Fowler*, and which has been gradually extended by subsequent decisions, which is applicable to the present case. The extension of this principle was avowedly made

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CHARLES AND OTHERS v. BLACKWELL AND OTHERS.

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in *Wiggitt v. Fox*, and *Murray v. Currie* is another case in which the principle has been extended. I think the present case falls within it. *Lavell v. Howell* is also an authority to the same effect. The principle of *Abraham v. Reynolds* does not conflict with the principle of *Priestley v. Fowler*. The principle on which *Abraham v. Reynolds* proceeded was that the plaintiff there was not in the employment of the defendants. The case of *Warburton v. The Great Western Railway Company* presents no difficulty, for there it is clear that there was no common employment, though it is true that the plaintiff was under the control of the defendants' station master, but only with regard to matters relating to the use of the station. It comes to this, we cannot distinguish the principle of the present case from the principle of *Priestley v. Fowler* as extended by subsequent decisions.

Rule absolute.

Solicitors for the plaintiff, *Torr, Janeway, and Co.*, for *Edwin Hughes*, Liverpool.

Solicitors for the defendants, *Mather*, for *Scott and Ellis*, Wigan.

Friday, May 5.

CHARLES AND OTHERS v. BLACKWELL AND OTHERS. (a)
Cheque—Endorsement as agent—16 & 17 Vict.
c. 59 s. 19.

An endorsement "per agent" is within 16 & 17 Vict.
c. 59 s. 19.

Plaintiffs, through their agent K., sold goods to defendants. Defendants gave K. a cheque in payment payable to plaintiffs on order. K., without defendant's authority or knowledge, endorsed the cheque in defendants' name, adding "per K., agent." The bank paid, and K. kept the money. Plaintiffs sued defendants for the money and in trover for the cheque.

Held, that the bank was justified under 16 & 17 Vict.
c. 59 s. 19 in paying the cheque, that there had been a good payment as between plaintiffs and defendants, and that plaintiffs were rightly non-suited.

THE plaintiffs sued the defendants in trover for a cheque, and also on the cheque, and for goods sold and delivered. The plaintiffs, Messrs. Charles and Company, were importers of foreign goods, and in the year 1873 they started a separate business in Japanese fancy goods, which was carried on under the name of Smith and Company. A person named Kingsford was appointed manager of this business. The invoices were headed "Smith and Company, merchants, London," and in the margin were the words "S. Kingsford, agent." The defendants, Messrs. Crosse and Blackwell, ordered goods from the firm of Smith and Company. The order was given to Kingsford, and the plaintiffs made out invoices and forwarded them to Kingsford. Kingsford did not forward these invoices, but he forwarded others at slightly increased prices to the defendants with the goods. Shortly after the defendants' order was completed they drew a cheque on the London and County Bank, payable to Messrs. Smith and Company or order, and handed it to Kingsford in payment for the goods. Kingsford endorsed the cheque "Smith and Co. per S. Kingsford, agent," and presented it at the London and County Bank, where it was paid. Kingsford got into default with the plaintiffs, and

the plaintiffs demanded payment from the defendants, and also demanded the cheque, which was refused. This action was then commenced. The trial took place at Guildhall on 26th Nov. 1875, before Lord Coleridge, C.J., who directed a nonsuit. On 12th Jan. 1876 a rule nisi was obtained on behalf of the plaintiffs for a new trial on the ground that there was evidence to go to the jury in support of the plaintiffs' case.

Murphy, Q.C. and Channell showed cause.—The nonsuit was right, for the bankers were justified by 16 & 17 Vict. c. 59, s. 19 (a) in paying the cheque. It is not necessary in order to bring an indorsement within that enactment that it should purport to be actually written by the hand of the person to whom the cheque is drawn payable. If this were necessary it is difficult to see how that section could ever apply to the indorsement of a company or corporation. The section was much discussed in *Hare v. Copland* (13 Irish C. L. Rep. 426). Although the present point did not arise there, there are expressions in the judgments which are in favour of the defendants in this case, and a case is there cited—*Cookson v. The Bank of England*—of which the judges had obtained a shorthand note, and which is a direct authority for the present contention as to the meaning of the Act. In that case *Martin, B.*, ruled at nisi prius that an indorsement per procurator, to which the indorsement here is equivalent, was within the Act. But whether the indorsement is within the Act or not, the nonsuit is right; if it is not within the Act, the only remedy which the plaintiffs would have against anyone but Kingsford would be against the bank. The plaintiffs have made Kingsford their agent, and have given him authority to receive payment in the ordinary way, that is, by the cheque. They are, therefore, estopped from disputing the validity of a payment made to Kingsford in the ordinary course of business.

Herschell, Q.C. and Lumley Smith, in support of the rule.—The object of making the cheque payable to Smith and Company, and not to Kingsford, was to prevent Kingsford obtaining the money if he had no authority to do so. The statute only applies to an indorsement purporting to be actually written by the person to whom the cheque is drawn payable. Its object was to protect bankers from the difficulty of having to decide at their own risk whether the signature of the payee of the cheque, which they would not be acquainted with, as they would with their customers' signatures, was genuine. It was not intended to protect them from having to find out whether a person indorsing a cheque for another has authority, which they would have been bound to ascertain before the Act. (See *Parsons on Bills*, vol. 1, page 120, where the cases are collected.) The cheque was given to Kingsford for the plaintiffs, and therefore the property in the cheque was

(a) 16 & 17 Vict. cap. 59, sect. 19: "Provided always that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any endorser thereof."

(a) Reports by P. B. HUTCHINS, Esq., Barrister-at-Law.

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CHARLES AND OTHERS v. BLACKWELL AND OTHERS.

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in the plaintiffs. That property is still in them, and they are entitled to recover the cheque in trover, for payment of the cheque to a person who had no authority to indorse cannot alter the property. The defendants are contending that the cheque has been duly paid, that is, they seek to ratify Kingsford's indorsement; but they cannot ratify it, for it was a forgery: *Brook v. Hook* (24 L. T. Rep. N. S. 34; L. Rep. 6 Ex. 89; 40 L. J. 50 Ex.) They also referred to

Ogden v. Bemas, 30 L. T. Rep. N. S. 683; L. Rep. 9 C. P. 513; 43 L. J. 259, C. P.; and

Hogarth v. Wherley, 32 L. T. Rep. N. S. 800; L. Rep. 10 C. P. 630; 44 L. J. 336, C. P.

BRETT, J.—I am of opinion that this rule ought to be discharged. The plaintiffs were creditors of the defendants on an order given by the defendants through Kingsford, the plaintiffs' agent. I think it must be taken that, as between the plaintiffs and the defendants, Kingsford had authority to receive a cheque drawn to the order of the plaintiffs, but that as between him and the plaintiffs he had no authority to endorse the cheque. He endorsed it without authority, and the endorsement was made per procuration. The bank paid and charged the defendants with payment of the cheque, and Kingsford, having received the money, misappropriated it. The plaintiffs sued the defendants, first in trover, because the cheque had been given back to the defendants, and demanded from them by the plaintiffs and refused, and also on the cheque, and for goods sold. The answer of the defendants is that the plaintiffs were paid. It was argued for the plaintiffs that the case must be decided on the supposition that this endorsement is not within 16 & 17 Vict. c. 59, s. 19, and that, although the defendants were authorised to give and did give the cheque to Kingsford, yet Kingsford, having no authority to endorse, his endorsement was fraudulent, and that as Kingsford had no authority to make the endorsement which he did make, the money paid on the cheque was not paid on the endorsement of Smith and Company; that the bankers who paid the cheque ought not to have done so; and that the defendants might say to them, "you ought not to have paid that cheque, and there is still money of ours, the amount of the cheque, in your hands," and that therefore, the plaintiffs may say to the defendants, "you have not paid the amount of the cheque, because your bankers have not paid your money on it." It was further urged that because the cheque was held by Kingsford for the defendants, it had been constructively in their possession, and that, the cheque being theirs, the endorsement made by Kingsford did not take the property in it out of them, and therefore they had a right to demand the cheque. On the other side it was argued that if there was a payment, which was a good payment by the defendants, whether the endorsement was within the statute 16 & 17 Vict. c. 59, s. 19, or not, it was a payment on the cheque, and therefore the plaintiffs, if they cannot sue for the money, cannot sue for the cheque. It was further argued that the case is within the statute (16 & 17 Vict. c. 59, s. 19), and the defendants cannot sue their bankers, and obviously, then, the defendants are protected from liability to the plaintiffs. Irrespectively of the statute, I am inclined to think, and should be prepared to hold, that the plaintiffs could not sue for the money, on the ground that the defendants

were justified in paying the cheque, not by the invoices, but because, as was admitted at the trial, Kingsford had authority to receive a cheque in this form. Kingsford's endorsement was fraudulent, and before the statute the bankers could not have justified their payment of the cheque. The bank would have paid wrongfully in paying to Smith and Co. on an invalid endorsement, and the defendants might have said that they would not allow their bankers to pay their money on a cheque so endorsed. I am inclined to think that the defendants might adopt the payment, and if so it seems that, as the loss took place through the act of the plaintiffs' agent, they could not insist on the defendants entering into a dispute, and perhaps a lawsuit, with their bankers. Mr. Herschell says that the property in the cheque has not passed from the plaintiffs. I do not see that there would have been any answer to that contention, and I think that the plaintiffs might before the statute 16 & 17 Vict. c. 59, s. 19 have recovered the cheque in an action of trover; but if the bankers were justified in paying the cheque by that statute, the plaintiffs could not sue the bank, nor could the defendants have sued the bank if the loss had fallen on them. Therefore, neither the plaintiffs nor the defendants would have any remedy against the bank, but there has been a good payment by the defendants to the plaintiffs, and there is no colour of value in the cheque for which trover could lie. Now as to the construction of the statute. There is some colour for the argument that as the endorsement was per procuration, and as it does not assume to be in the handwriting of the plaintiffs, it is not within the section, and that the section applies only to what seems to have been actually written by the person purporting to endorse. Yet, on the whole, I think that is too narrow a construction. The endorsement in this case is undoubtedly equivalent to an endorsement per procuration, for putting in the word "agent" and leaving out "per pro," does not alter the nature or effect of it. An endorsement per procuration is an endorsement by an agent authorised to sign; it is the endorsement of a name, not by a person whose name it is, by a person who is authorised to sign the name as agent of the person whose name it is, so as to bind that person. The question whether an endorsement per procuration is within the section depends upon whether it purports to be by the person to whom the cheque is drawn payable, and I think it is within the terms of the section, for it purports to be the endorsement of the principal, and therefore it is within the Act. Construing the first part of the section by the second part, it appears that it was intended to protect bankers where the cheque seemed on the face of it to be signed by an agent. I therefore think, on the whole, that this endorsement was within the section, and the bankers were protected, and could not have been sued. Therefore, on all grounds, the payment by the defendants was a good payment, and as between the plaintiffs and the defendants the plaintiffs are the persons who must suffer. The rule will be discharged.

LINDLEY, J.—I am of the same opinion. The question which we have to decide raises two points, one a substantial point, whether the defendants have in fact paid for the goods supplied to them by the plaintiffs, and the other, a technical point, whether the cheque can be taken to

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have been paid, so that the plaintiffs cannot recover on it. The facts may be taken to be these. The plaintiffs were carrying on business in the name of Smith and Co., and they had an agent named Kingsford, who, being a general agent, had authority to receive payment by cheques; he seems to have had a more extensive authority than the agent had in *Hogarth v. Wherley*. Kingsford, having authority to receive payment by cheque, takes the cheque. He exchanges the cheque for money, and so gets money for the goods which the plaintiffs have sold through him; the goods are paid for by the defendants to him. The plaintiffs seek to recover over again money which in substance the defendants have paid, and it is said on the plaintiffs' behalf, first that the goods have not been paid for, and secondly that the cheque has not been paid. But it seems to me that the goods have been paid for, for Kingsford has received the money for the goods, just the same as he would have received it if the cheque had never been passed. Then, looking at it as an action for the cheque, or on the cheque, if the action is on the cheque, the case seems to stand thus. The bankers have paid a cheque which was endorsed without authority, for I am not prepared to say that, because Kingsford had authority to receive cheques, he therefore had authority to endorse in this form, at least I should think that he had not for the purpose of charging his principals. Then, can an action on the cheque be sustained, having regard to the provisions of 16 and 17 Vict. c. 59, s. 19? It is said that this was not a cheque purporting to be endorsed by Smith and Co. within the meaning of that Act, because the endorsement was "Smith and Co., per S. Kingsford, agent." But notwithstanding the words "shall purport to be endorsed by the person to whom the same shall be drawn payable," I am not satisfied that the language of the Act was not intended to cover per procuration endorsements, and I can see no reason for holding that it does not cover them. Moreover, this is not the first time that this view has been adopted, for this was *Martin, B.*'s construction of the statute in *Cookson v. The Bank of England*, and in *Hare v. Copland* the court did not dissent from it (though in that case exactly the same point did not arise). Technically, then, the cheque has been paid by the bankers, and therefore it has been paid by the defendants, and to an action on the cheque this payment is an answer, and if this action is in trover for the cheque the same arguments apply. I am therefore of opinion that the nonsuit was right, and that the rule ought to be discharged.

Lord COLERIDGE, C.J.—I am of the same opinion. *Rule discharged.*

Solicitor for the plaintiffs, *Sawbridge*.

Solicitors for the defendants, *Allen and Son*.

Monday, May 23.

MACCORD v. OSBORNE. (a)

Infancy—Promise made after full age—Promise to pay "as a debt of honour."

A promise made after full age, before the passing of the Infants' Relief Act 1874 (37 & 38 Vict. c. 62), to pay a debt contracted during infancy, is not

binding unless it amount to a recognition of a legally binding debt.

Therefore, a promise to pay such a debt "as a debt of honour," is not binding.

THIS was a demurrer to a statement of claim, from which it appeared that in 1861 the father and mother of the defendant borrowed 200*l.* from the plaintiff, giving a bill of sale on their furniture to secure repayment.

In 1863 the plaintiff gave up this bill of sale, receiving an I O U, signed by the father and mother of the defendant, and a guarantee for the repayment of the money, signed by the defendant and his brother, both of whom were then under the age of twenty-one years.

After the defendant came of age he wrote upon the paper containing the guarantee, "I promise to pay the above as a debt of honour."

This writing was relied upon by the plaintiff as a ratification of the guarantee which the defendant had made during infancy. (a)

Lord, for the defendant.—This document does not make the defendant liable. To have that effect there should be in the mind of the party signing some recognition of an existing liability, but this is distinctly negatived by the use of the words "debt of honour," an expression the meaning of which is well known, and which must be taken to have been used in its popular sense. In *Rowe v. Hopwood* (19 L. T. Rep. N. S. 261; L. Rep. 4 Q. B. 1; 38 L. J. 1, Q. B.), Cockburn, C.J. says: "I entirely concur in the view adopted by the Court of Exchequer in *Harris v. Wall* (1 Ex. 122), that in order to be a ratification there must be a recognition by the debtor, after he attained his majority, of the debt as a debt binding upon him. . . . There ought to be at least on the part of the debtor an admission of an existing liability, and we ought not to strain the meaning of the words in the document signed by the debtor, so as to defeat the operation of the statute passed for his protection." There is no case exactly in point here, but the courts have in several cases expressed opinions similar to that above cited. In *Mawson v. Blane* (10 Ex. 206; 23 L. J. 342, Ex.), Parke, B. said that a ratification "is an admission that the party is liable and bound to pay the debt," and also expressed an opinion that an acknowledgment "that he considered himself bound in honour to pay it, with an assurance that it would be paid," was not sufficient.

C. S. C. Bowen, for the plaintiff.—The use of the words, "I promise to pay," shows that the defendant meant to bind himself. To bring the document within Lord Tenterden's Act, it is not necessary that it should amount to a promise to pay. It may be either a promise or a ratification: (*Harris v. Wall*, 1 Ex. 122). If this is not binding as a promise it is binding as a ratification.

Lord was not called on to reply.

BRETT, J.—I think the true construction, according to the doctrine laid down in *Rowe v. Hopwood*, is, that this is not a document on

(a) By Lord Tenterden's Act (9 Geo. 4. c. 14), s. 5, "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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which the defendant can be held liable. According to the doctrine laid down in *Rowe v. Hopwood* there must be a recognition of the debt as a debt binding on the party sought to be charged. It must amount to "I take this as a debt binding on me." Now does this document amount to that? I think it is not right to say that judges ought to affect not to know what everyone else knows. We know that among all English people the phrase "debt of honour," is used, and those who use it mean to distinguish a debt which can be enforced at law from a debt which cannot be so enforced. Unless we adopt an extreme refinement, we must say that this is not a promise to pay or a ratification of a debt which can be enforced at law. Therefore, it is not within the doctrine laid down in *Rowe v. Hopwood*, nor within the statute.

GROVE, J.—I am of the same opinion. The only rational sense in which this document can be construed is, that the defendant does not intend to promise so as to be legally bound. Mr. Bowen's argument would strike the words, "as a debt of honour," out of the document. The only meaning they can have is to qualify the promise.

DENMAN, J.—I am of the same opinion. The only construction I can put on the words, "as a debt of honour," is, that they were inserted so as not to create a legal liability.

Judgment for the defendant.

Solicitors for the plaintiff, *Freshfield and Williams*.

Solicitors for the defendant, *Crook and Smith*.

EXCHEQUER DIVISION.

Thursday, Feb. 10.

(Before BRAMWELL, AMPHLETT, and HUDDLESTON, BB.)

BROWN v. FLETCHER AND OTHERS.(a)

Agreement by daughters to pay a debt of their mother's "out of her estate at her decease"—Meaning of the word "estate"—Construction—Extrinsic evidence.

E. S., a widow, being indebted to the plaintiff in the sum of 199l., and being unable to comply with his demand for payment in full, paid 40l. on account, and entered into a written agreement with him whereby, after reciting her inability to pay the 159l., the plaintiff covenanted that in consideration of her regularly paying the interest (7l. 10s.) every year during her life (which she thereby agreed to pay) he would forego all claim to the principal sum until after her death, and would not during her life bring any action to recover the same. The defendants (the three daughters of E. S.) also signed the following memorandum at the foot of the agreement: "We, the undersigned, E. F., E. J. S. and L. J. S., daughters of above-named E. S., hereby agree to pay the said sum of 159l. to the above-named J. B., his executors or administrators, out of the estate of the said E. S. at her decease."

The only property of any kind or sort whatever, real or personal, which at the date of the agreement and thenceforth to the date of her decease, E. S. was possessed of or entitled to, was a life estate or interest in a house and premises called the Talbot Hotel, the reversion in fee of which property was vested in her daughters, the defendants, and

which hotel accordingly at her decease became the absolute property of the defendants as tenants in common in fee.

On the death of E. S. the plaintiff brought an action against the defendants on the above undertaking for the payment of the 159l., and it was

Held by the court (Bramwell, Amphlett, and Huddleston, BB., though with considerable hesitation on the part of Amphlett, B.), discharging the plaintiff's rule to set aside a nonsuit, that the plain and natural meaning of the words used in the memorandum was that, at E. S.'s death, the daughters (the defendants) would, out of what she might leave behind her available for payment of her debts, pay the plaintiff his debt, and that the words "the estate of the said E. S." did not mean or apply to her "life estate" in the Talbot Hotel.

Per Bramwell, B.—*Extrinsic circumstances not only may but must always be looked at, because an agreement can never be made intelligible unless the persons and subject matter with which the parties are dealing can be identified.*

Per Amphlett, B.—*The extrinsic circumstances in this case are not sufficient to enable the court to depart from the ordinary and plain meaning of the language of the agreement.*

This was an action by the plaintiff to recover from the defendants the sum of 159l., balance of a debt originally due from a Mrs. Elizabeth Seaward, widow, of No. 62, Nelson-square, Southwark, now deceased, and which the defendants, the three daughters of the said Elizabeth Seaward, had agreed or undertaken to pay in the manner and under the circumstances hereinafter mentioned.

The said Elizabeth Seaward being indebted to the plaintiff in a sum of money amounting to 199l., the plaintiff required payment of it, which she was unable to comply with; but she paid him 40l. on account, and entered into an agreement, in writing, with him, dated the 20th Nov. 1868, whereby, after reciting that she was indebted to the plaintiff in the sum of 159l., and was unable to pay the said sum, and it had been agreed that she should pay interest thereon at the rate of 5l. per cent. per annum, it was agreed between her and the plaintiff, and the plaintiff thereby for himself, his heirs, executors, and administrators, covenanted and agreed with the said E. Seaward, that, in consideration of 7l. 19s., one year's interest on the said sum of 159l., paid by her to the said plaintiff, his heirs, &c., on the 2nd Nov. then next, and the like sum of 7l. 19s. so paid by her to the said plaintiff, his heirs, &c., on the 2nd Nov. in every year, so long as she should live, the said plaintiff, his heirs, executors, and administrators, would forego and quit all claim and right to the said sum of 159l. until after her death. That the plaintiff, his heirs, &c., would not during the life of the said E. Seaward bring or prosecute any suit or action at law for the recovery of the said sum, so long as the said E. Seaward should regularly pay the said several sums of 7l. 19s. at the times and in manner thereinbefore mentioned. And the said E. Seaward covenanted and agreed with the plaintiff, his heirs, &c., that she would on the 2nd Nov. then next, and on the 2nd Nov. in every year, so long as she should live, well and truly pay to the plaintiff, his heirs, &c., the said several sums of 7l. 19s., as hereinbefore appointed.—(Signed) John Brown, Elizabeth Seaward.

(a) Reported by H. LANGE, Esq., Barrister-at-Law.

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The defendants, the three daughters of the said E. Seaward, at the same time signed a memorandum at the foot of the above agreement, in the following terms:

We, the undersigned, Elizabeth Fletcher, Esther Jane Seaward, and Louisa Jane Seaward, daughters of the above-named Elizabeth Seaward, hereby agree to pay the said sum of 15*l.* to the above-named John Brown, his executors or administrators, out of the estate of the said Elizabeth Seaward at her decease.

Dated this 20th Nov. 1868.

(Signed) ELIZABETH FLETCHER.
ESTHER JANE SEAWARD.
LOUISA SEAWARD.
JOHN BROWN.

At the date of the agreement Mrs. Seaward, the original debtor, was possessed of a life estate or interest in a house and premises called the Talbot Hotel, the reversion in fee of which house and premises was vested in and belonged to her said three daughters, the defendants, and which property therefore would and did accordingly, on their mother's decease, become their absolute property as tenants in common in fee. It appeared also that a few weeks before the agreement in question Mrs. Seaward had by deed on the 2nd Nov. assigned to her two daughters, the said Esther Jane Seaward and Louisa Seaward all her furniture in the house in Nelson-square, in which she was living, and which furniture constituted the whole and sole personalty of or to which she was possessed or entitled, and that at the time of the agreement with the plaintiff she was possessed of no property of any kind or sort whatever, real or personal, except the above-mentioned life estate in the Talbot Hotel. Mrs. Seaward having died, the plaintiff brought the present action against her daughters, the defendants, upon the above undertaking, and at the trial the question was as to the meaning of the words of the memorandum signed by the defendants, "out of the estate of the said E. Seaward at her decease." The defendants contended that they meant any "estate" which the deceased might leave behind her at her death available for the payment of her debts, and which might come to the defendants as her executrices or administratrixes, and that, as she left no property behind her, they were not bound. The plaintiff, on the other hand, contended that the words must be taken to mean the deceased's "estate" or life interest in the Talbot Hotel, the reversion in fee of which had come to the defendants, as above-mentioned, and that they were bound to discharge the debt out of that property.

The learned judge (Huddleston, B.) before whom the cause was tried, thought that the agreement was for him to construe, and that its meaning was that the daughters were to pay the debts out of any "estate" or property which their mother might be possessed of and which might come to them to be administered. He accordingly, therefore, directed a nonsuit to be entered, reserving leave to the plaintiff to move to set it aside if the court, drawing inferences, and looking at the surrounding circumstances, should be of opinion that the plaintiff's construction was the right one.

A rule nisi having been obtained accordingly.

Popham Pike (with whom was the Solicitor-General, Sir H. F. Giffard, Q.C.) for the defendant, Elizabeth Fletcher, showed cause.—The sole question is, was the judge at the trial, or are the court now, entitled to look at the surrounding circum-

stances in construing the meaning of the words of this agreement, "out of the estate," &c. It is contended for the defendant now, as it was contended for her by the Solicitor-General at the trial, that the words are plain and unambiguous. The word "estate" has a well-known legal meaning, and the plaintiff is not entitled to put, or to ask the court to put, any other construction upon them. It is contended for the defendant that the parties said what they meant, whereas the plaintiff says, "No; we meant something which we have not said." The case of *Dorin v. Dorin*, in the House of Lords last year (33 L. T. Rep. N. S. 181; L. Rep. 7 E. & L. App. 568) is a strong authority that the courts ought not to, and will not depart from the ordinary and *prima facie* legal meaning of the words used in a document, unless there be something on the face of the document constraining them to do so. In that case it was held that the word "children" in a will, *prima facie*, meant legitimate children, unless on ascertaining the facts some repugnancy or inconsistency would result from so interpreting it. In that case a testator gave all his property to his wife for life, with power to dispose of it "amongst our children" by will, and if he made no will then "equally between my children by her." At the date of the will he had two illegitimate children by her, whom he had always treated as his own, and he never had any others by her; but it was held that the illegitimate children were not within the power, and could not take in default of appointment.

Willis showed cause for the defendant, Mrs. Goodall (another of the daughters, who had married).—The agreement is clear upon the face of it. It is a promise by the daughters to undertake due administration of such estate as the deceased should leave, and was not intended to bind their own reversionary property. Had that been meant it would have been so expressed. (a)

W. G. Harrison (with him was *Herschell*, Q.C.) for the plaintiff, supported the rule.—The agreement must have a reasonable construction put upon it, and not one which would make it absurd and inoperative. "Estate" is not a word of art; it is an ambiguous word. In *Doe dem Norris and another v. Tucker* (3 B. & Ad. 473; 1 L. J., N. S., 161, K. B.) Lord Tenterden, C. J., in giving judgment, said: "The term 'estate' may operate only as a description of the particular lands, or may mean also the quantity of testator's interest in them. Here it appears to me that the words 'my freehold estate called Pouncetts,' are merely descriptive of the land, and not of the quantum of interest." So I say that the word "estate" here applies not to the amount of the deceased's interest in the estate, but to the estate (using the word in the way in which in common parlance it is used and understood) in which she had an interest, namely, the Talbot Hotel. It is absurd and monstrous to suppose that the plaintiff, taking the defendant's contention and construction to be right, would have barred himself from getting payment of his debt at all. Had he sued Mrs. Seaward at once he might have gotten his money. But now, if the defendants are right, he got absolutely nothing, by not pressing his debtor and signing this agreement, if it is read as "out of her personal estate." [BRAMWELL, B.—He got this:

(a) The other defendant, Mrs. Pritchard, had let judgment go by default.

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that if she had died worth 200*l.* and owing 500*l.*, then the daughters, having bound themselves to pay this debt, he might call upon them to pay him in preference to other creditors.] I have a right to look outside the document to find out the subject matter of the instrument, and, having done so, I find that that subject matter is not her *personal estate*, but the Talbot Hotel. In 2 Taylor on Evidence, 6th edit., sect. 1082, p. 1035, it is said, "It may be laid down as a general rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and quality of the subject matter of the instrument, or in other words to identify the persons and things to which the instrument refers, must of necessity be received." Reading this agreement with its recitals, and having regard to the fact that her whole and sole property at the time was her estate or interest in this hotel, it is contended that the nonsuit was wrong, and that the plaintiff is entitled to judgment.

BRAWFELL, B.—I am of opinion that this rule should be discharged; and, but for the doubt entertained by my brother Amphlett, I should have thought the case a plain one. Mr. Harrison has presented to us the point and the reasons for his argument very clearly, and I perfectly appreciate and understand them. The instrument in question is an undertaking by the defendants to pay a debt upon the death of the debtor Elizabeth Seaward, "out of the estate of Elizabeth Seaward, at her decease." Now I cannot but think that those words, as they stand by themselves, are perfectly intelligible, and that they mean that when she dies they will, out of what she leaves behind her available for the purpose of payment of her debts, pay the creditor Brown (the plaintiff.) But then it is said that that is not their true meaning in this case, and that extrinsic circumstances may be looked at to show that the natural meaning of the words is not to be applied to them. In my judgment, extrinsic circumstances not only may but must always be looked at, because an agreement can never be made intelligible unless the persons and the subject-matter with which the parties are dealing can be identified. But then, having looked at all the extrinsic circumstances, if the agreement is understood in its natural signification, it must continue to be so understood, and an unnatural meaning must not be given to it because it is possible that third persons might have had such a meaning in their minds. Now, the extrinsic circumstances here are that, at the time this agreement was entered into, Elizabeth Seaward had a life estate in a property, which property upon her decease would come to her daughters, the three defendants who made the promise, as tenants in common in fee. Another fact is that Elizabeth Seaward at that time had no other property of any sort or kind. We must assume that to be so, because we have no right to assume that the conveyance of the furniture was fraudulent. We are invited, under these circumstances, to say that the meaning of the words in question is not "out of the estate of Elizabeth Seaward at her decease," that is to say, out of what will be her estate at her decease, but out of the estate or property of her daughters in a house in which she had an interest for her life, and which, at her decease, will come to and belong to them. But why should we do so? Although she had no property at the time this

agreement was entered into, it was perfectly possible that she might at the date of her death have had other property. If it had been stated in the agreement that she had no personal estate, and never would have any—a very improbable thing, no doubt, to be stated—or if it had been stated that she had a life estate in the Talbot, which property would come to the daughters at her decease, then such a construction as we are desired to put upon it might have been put upon this agreement. Thus, if A. and B. agree, A. to sell his property to B. for 50*l.*, and B. to buy it; that would undoubtedly mean the property of A. But if there had been a long recital that A. had an estate for life in a certain property by will, and that was all, then the natural construction of the agreement would be that it was not the property of A. himself, but the property of his successors. So, in like manner in this case, these people were using incorrect language with respect to the subject matter. An insuperable difficulty in the way of Mr. Harrison's argument is that the plaintiff did not know that Elizabeth Seaward had no estate other than the Talbot, and certainly did not know that she never would have any personal estate. If then that extrinsic circumstance is to be brought into the consideration and interpretation of this document, according to the way in which things have turned out it would equally have had to be done if the Talbot had been burned down, and had not been worth 5*l.* when it came to the daughters; but the woman herself had become possessed of an estate of 1000*l.*, out of which this debt might have been paid. That, I think, is an unanswerable argument and a difficulty in Mr. Harrison's way which he cannot get over. But then, it is said, "What is the use of this agreement? If it meant that the plaintiff was to be paid out of the personal estate of Mrs. Seaward, supposing she should have any, what did the plaintiff get by it?" To my mind the plaintiff got this by it: he got an undertaking by the defendants (the daughters) that if the personal estate was large enough to pay him in full, he should be paid in full; in preference to other creditors who might compete with him, and who might either get a preferential payment or come in on an administration suit. Then it is said that that would be an agreement which it was not competent for them to make. I admit that they were not able to bind other creditors or the assets, or to bind other executors, if there were any other than the daughters. I agree that they entered into a contract which possibly they might not be able to perform. But what then? The law does not prohibit that; but it would enforce, perhaps, the payment of such damages as might be proved to have been occasioned. Therefore, supposing Mrs. Seaward to have died worth 1000*l.*, the allegation against the daughters would have been, that they were executrixes, that their testatrix had not paid the plaintiff, and as they had undertaken that they would pay him out of the assets, they must make his loss good. It seems to me, therefore, that, if it is looked at in that technical way, there was something to be gotten by the agreement. But does it not come to this: that the plaintiff may have thought and said "I know that the daughters will succeed the mother, and that what she leaves behind in the way of personal property will practically come into their possession. I do not want to trouble her

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during her life for payment of this debt, provided she pays me interest upon it as long as she lives. I will let the debt go, and trust to get paid out of the personal estate; but mind, I must be preferred, and you, the daughters, must not let anybody be put before me, and I must get my interest in the meantime." I see no difficulty or improbability in that. If I had my own unassisted judgment alone to act on in the matter, I should say that it was impossible for us to construe this document otherwise than according to the plain natural meaning of the words, namely, that the debt should be paid out of the property of the woman herself, at her decease. I am of opinion, therefore, that my brother Huddleston was quite right; and whether it is that I am very much in the right or wrong I do not know, but I really cannot personally appreciate the contrary argument, and cannot see any difficulty in the case. This rule, therefore, in my judgment, must be discharged.

AMPHLETT, B.—I confess that I have felt considerable difficulty in this case, and although it is not altogether removed, yet it is not sufficiently strong in my mind to induce me to differ from the conclusions arrived at by my learned brothers Bramwell and Huddleston, because, undoubtedly, the plain meaning of the language as it stands alone admits of no doubt. The difficulty which I have had in my mind all the way through is, that, notwithstanding the very ingenious explanations which have been given, this agreement, taken in its plain and literal language, appears to me to be entirely useless, and a mere piece of waste paper; and, moreover, those ingenious explanations are, I think, such as are not at all likely to have occurred to the minds of those who framed this document. My reason for saying that is that I do not see of what use that agreement in this case is, and for this reason, that an agreement by third parties to pay this debt out of the estate of Elizabeth Seaward at her decease, was not a contract that they would pay the money at all events, or an absolute covenant to pay it, whether she left any estate or not. It may be said that the agreement was meant to prevent the defendants from setting up their rights as executors to pay all the debts, and in order to enable them to prefer the plaintiff to other creditors. Although I am not free from doubt as to whether it would have that effect, I have very little doubt that it never occurred to the persons who prepared this agreement. But then there was no evidence that the plaintiff had any notice at all of these extrinsic circumstances, on which we are asked to rely, and there was no evidence which there might have been expected to be (though I suppose from the first the only question was whether the estate of Elizabeth Seaward meant the estate of which she was tenant for life), that this Talbot Hotel, even in popular language, was ever spoken of, or known, as Elizabeth Seaward's "house" or "estate." Her tenancy for life is stated and spoken of as the "estate," but there is no evidence in this case of any such popular interpretation or name being given to the property itself. Under all the circumstances, therefore, although I have a strong opinion in my own mind upon the point as to what the parties intended, I do not think, upon the evidence as it stands, that the extrinsic circumstances are sufficient to enable us to depart from the ordinary and plain meaning of the language of this agree-

ment, and therefore the plaintiff's rule must be discharged.

HUDDLESTON, B.—I am of the same opinion now as I was as at the trial. I then thought that the construction which my learned brothers have put upon this document was the right one. If I am to look at the agreement only I have no doubt about it. Then if I am to look at the extrinsic circumstances, one circumstance was the existence of a tenancy for life only. What I believe to have been intended between the parties was this: The plaintiff having applied to get his money, gets 40l. down at the time, and this agreement; and I have no doubt he said "I will not worry you for payment during your life time, but how am I to get my money after your death?" Well, it seems to me that the meaning of the parties is carried out by the very words of the agreement, and that the words "out of the estate of Elizabeth Seaward," come to this: "We will pay you out of the very first moneys arising out of Elizabeth Seaward's estate, but we do not intend to pay you out of our own moneys." *Rule discharged.*

Solicitor for the plaintiff, John Scott, jun.

Solicitors for the defendant Fletcher, Pike and Son.

Solicitors for the defendant Goodall, Lewis and Lewis.

Feb. 19 and 26.

(Before BRAMWELL, AMPHLETT, and HUDDLESTON, BB.)

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Debtor and creditor—Bill of sale—Assignment of all debtor's property "now or hereafter upon his premises at H. and elsewhere"—Power in default of payment to enter debtor's premises where any of his goods are deposited, and to seize same—After-acquired property—Assignment of debtor's goods seized "elsewhere" than on his premises—Measure of damage in trespass for such seizure—Value of goods seized—Special damage.

The plaintiff, a contractor for carrying the mails from Halstead, in Essex, to Haverhill, in Suffolk, and back, being indebted in the sum of 30l. to the defendant, executed in Oct. 1871 a bill of sale as a security for the debt, whereby he granted to the defendant "all and every the household furniture, plate, linen, china, books, live and dead stock, horses, and other cattle, carts and carriages, corn and hay, and all other the goods, chattels, personal estate and effects, whatsoever and wheresoever, of him the said plaintiff, and which now or at any time hereafter, may be in, about, or upon the dwelling house and premises of the said plaintiff, at Halstead aforesaid, or elsewhere, with a proviso making void the said indenture on payment by the plaintiff of the principal and interest on a day therein mentioned. And it was provided that in default of payment of the said principal and interest at the time therein mentioned, the said defendant should, and might, enter upon the messuage and premises of the said plaintiff, where any of his goods, chattels, and personal estate, were deposited, and take possession of the same, and for that purpose, if necessary, to break open any doors or other obstructions, and sell

(a) Reported by H. LEIGH, Esq., Barrister-at-Law.

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and dispose of the said goods and effects, and receive the money arising from the sale thereof, and apply the same in manner in the said bill of sale mentioned.

On the 18th May 1875, the plaintiff drove the mail cart from Halstead to Haverhill, as usual, and put up his horse and cart at the Bull Inn stables there, where also was standing at the time a second horse belonging to him, two horses being necessary for working the mail. He then went away on business, and during his absence the defendant came to the stables and seized and carried away the plaintiff's two horses, and afterwards sold them, and applied the proceeds in payment of the sum of 13*l.* 9*s.* 4*d.*, balance of the plaintiff's debt of 30*l.* which then remained due under the bill of sale.

In an action of trespass by the plaintiff against the defendant for so seizing his horses, in which the plaintiff claimed damages by reason of such seizure,

The court (Bramwell, Amphlett, and Huddleston, BB.), made absolute a rule to enter the verdict for the plaintiff for 30*l.*, the value as found by the jury, of the horses seized, on the ground that there was not in the bill of sale any assignment of future property nor any assignment of property "elsewhere" than on the plaintiff's premises.

Held, also, that the plaintiff was not entitled to recover anything in addition to the value of the horses, as special damage resulting from the loss of them; and that the defendant was not entitled to make any deduction on account of the balance of the debt remaining due to him from the plaintiff on the security of the bill of sale, but must recover that, if at all, by a proper proceeding against the plaintiff.

Holroyd v. Marshall (10 H. L. Cas. 191; 7 L. T. Rep. N. S. 172), and Belding and another v. Read (13 L. T. Rep. N. S. 66; 34 L. J. 212, Ex.; 3 H. & C. 955), discussed and considered.

THE plaintiff brought trespass against the defendant for seizing two horses of the plaintiff, whereby the plaintiff was prevented from carrying on his business of a mail contractor, and was otherwise injured, &c., and he claimed 200*l.*

The defendant pleaded, first, Not guilty; secondly, that the horses were not the plaintiff's as alleged; thirdly, leave and licence; fourthly, by way of equitable defence, a justification of the seizure under a bill of sale; that before the happening of the acts complained of, the defendant made and executed and delivered to the plaintiff an indenture under the hand and seal of the defendant.

The plea here set out *totidem verbis*, a bill of sale, dated the 17th Oct. 1871, and made between Isaac Greenbirt, the plaintiff, a jeweller, of Halstead, Essex, of the one part, and Simon Smeë, the defendant, a nurseryman, of the same place, of the other part, the material parts of which were as follows: After reciting the agreement for a loan of 30*l.* by the defendant to the plaintiff, it is witnessed that in consideration of a sum of 30*l.* lent and paid by the said S. Smeë to the said Isaac Greenbirt, the said I. Greenbirt doth grant, bargain, and sell unto the said defendant, Simon Smeë, his executors, &c., all and every the household furniture, plate, linen, china, books, live and dead stock, horses, and other cattle, carts, and carriages, corn, hay, and all other the goods, chattels, personal estate and effects

whatsoever and wheresoever, of him, the said Isaac Greenbirt, and which now or at any time hereafter may be in, about or upon, the dwelling-house and premises of him, the said Isaac Greenbirt, at Halstead aforesaid and elsewhere, and all the estate, &c., to hold unto him, the said Simon Smeë, his executors, &c. Then came a proviso making void the said indenture on payment by the said I. Greenbirt, his executors, &c., to the said S. Smeë, his executors, &c., of the sum of 30*l.*, with interest at 5 per cent., on the 17th Dec. then next. And a covenant by the said I. Greenbirt to pay the same at the time aforesaid. "Provided, nevertheless, and it is hereby expressly declared that in case default shall be made in payment of the aforesaid sum of money and interest at the time hereinbefore mentioned, the said Simon Smeë, his executors, &c., shall and may enter into possession of the messuage and premises of him the said I. Greenbirt, where any of his goods, chattels, and personal estate are deposited, and take possession of the same, and for that purpose, if necessary, to break open any doors or other obstructions, and sell and dispose of the said goods and effects, and receive the moneys arising from the sale thereof, and apply the same in manner hereinmentioned."

Averments: That the said I. Greenbirt and S. Smeë, in the said indenture mentioned, are the plaintiff and defendant respectively; that the said I. Greenbirt did not pay to the defendant the 30*l.* with interest on the 17th Dec. then next, but made default in payment thereof within the meaning of the said indenture, and the defendant thereupon took possession of the said horses in the declaration mentioned, and sold and disposed of the same, and received the money arising from the sale thereof, and applied the same in the manner directed by the said indenture, as he lawfully might, pursuant thereto, which are the alleged trespasses. Issue taken and joined on all the said pleas.

At the trial before Brett, J., at the Summer Assizes, 1875, for Essex, at Chelmsford, the following appeared to be the facts of the case:

The plaintiff for many years previously to, and at the date of, the transaction in question was a contractor for carrying the mails from Halstead, in Essex, to Haverhill, in the county of Suffolk, and back, for which purpose he necessarily kept two horses to work the mail cart. Having borrowed 30*l.* of the defendant in Oct. 1871, he gave the defendant the bill of sale, mentioned in the pleadings, as a security, and in May 1875, the date of the seizure in question, a sum of 13*l.* 9*s.* 4*d.* remained still due and owing from the plaintiff to the defendant on that security.

On the 18th May 1875, the plaintiff drove the mail cart from Halstead to Haverhill, in due course, and, having left the mail bags at the post office, he put up his horse and mail cart as usual at the stables of the Bull Inn, at Haverhill, where also his second horse was at the same time standing, it being his custom to keep one of the two horses always there to be ready to work the return mail back to Halstead. He then proceeded to Newmarket upon some private business of his own, and upon returning to Haverhill he discovered that the defendant had, in the interval, seized and taken away both his horses and the mail cart and harness, &c., and the horses were subsequently sold by the defendant, and the proceeds of the sale applied by him in payment of the

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balance of the defendant's debt. By this proceeding the plaintiff was put to serious inconvenience and pecuniary loss. His horses being taken from him, he had to hire other horses to enable him to fulfil his contract with the post office, which contract he subsequently lost in consequence of and suffered other damage resulting from the defendant's act.

At the trial the verdict was entered for the defendant, leave being reserved to enter it for the plaintiff for the sum of 30*l.*, the amount at which the jury assessed the value of the two horses, and such additional sum or sums as the court might think fit by way of further damages, the court having power to draw inferences of fact.

A rule nisi having been obtained accordingly by *Murphy*, Q. C., on the part of the plaintiff,

Moorson and Lumley Smith (with whom was *Philbrick*, Q. C.), showed cause against it on behalf of the defendant.—The horses were not in the possession of the plaintiff, nor on premises belonging to him when the defendant seized them; but such seizure was fully justified by the words of the bill of sale. The word "elsewhere" means what it appears to mean, not merely on the plaintiff's premises, but wherever his property might be. The power must be read together with the grant. [*AMPHLETT*, B., referred to *Holroyd v. Marshall*, in the House of Lords (7 L. T. Rep. N. S. 172; 10 H. of L. Cas. 191; 33 L. J. 193, Chan.)] The present is a stronger case. A beneficial interest passed to the mortgagee the moment the mortgagor became possessed of the property:

Belding and another v. Read (in this court), 18 L. T. Rep. N. S. 66; 34 L. J. 212, Ex.; 3 H. & C. 955; *Cayre v. Everts*, 10 Ex. 294; 23 L. J. 273, Ex.; *Carr v. Allatt and Another*, 27 L. J. 385;

are all cases in favour of the defendant. [*BRAMWELL*, B.—If *Holroyd v. Marshall* is to be taken to be an authority, I am afraid that *Belding v. Read* is not one.] Until the defendant entered into possession of these goods he had only an equitable title to them, such a title as entitled him to demand and to have them, and when he got them, then, equitably as between himself and the plaintiff, he was entitled to hold them. No demand was necessary under the bill of sale. The grant was a good grant, and the licence to seize on the plaintiff's own premises does not cut down the defendant's power, or make any difference, for of course he could not give the defendant a licence to enter upon a third person's premises. Then, as to damages. The two cases of

Bodley v. Reynolds, 8 Q. B. 779; 15 L. J., N. S., 219, Q. B.; and

France v. Gaudet, L. Rep. 6 Q. B. 199; 40 L. J. 121, Q. B.;

which are relied on by the plaintiff as entitling him to special damage, we contend, on the part of the defendant, do not do so. The damages to which, if any, the plaintiff is alone entitled, ought to be the value of the horses seized, less our expenses.

Brierly v. Kendal and others, 7 Q. B. 937; 21 L. J. 161, Q. B.; and

Jones v. Wilson (in error), 8 L. T. Rep. N. S. 779; 32 L. J. 382, Q. B.; 4 B. & S. 455;

support this view, and may be cited in opposition to the above mentioned two cases, on which the plaintiff will rely.

Bray (with whom were *Murphy*, Q. C. and *C. E. Jones*) for the plaintiff, supported the rule, and in calling attention to the words of the bill of sale,

argued that the court would not construe it so as to make the plaintiff assign away everything that he might ever have anywhere. If the deed is ambiguous the court will rather limit than extend it. If it was to be "everywhere," why put in "in or upon the premises"? It would be surplusage. There was here no authority to seize these horses. [He referred to *Holroyd v. Marshall* and read portions of the judgments of Lords Westbury, Wensleydale, and Chelmsford, in that case in the House of Lords (*ubi sup.*)] It is submitted that *Belding v. Read* (*ubi sup.*) is conclusive, and that to decide this case in favour of the defendant would be to overrule that case. There was a seizure and sale there, but it was wrongful, and I submit that a wrongful seizure, as it was in the present case, cannot be a *novus actus*, and avail the defendant here. A rightful seizure may be, or a wrongful one if acquiesced in. The words in the bill of sale in *Belding v. Read* are identical with the present one, with the slight immaterial variance that there a demand was necessary, which it was not in the present case. He cited also *France v. Gaudet* (*ubi sup.*) on the question of damages.

BRAMWELL, B.—In this case I am going to deliver judgment, not only for myself, but also for my brother Amphlett, who was obliged to go into the other court just now, but who, having heard the greater portion of the argument, and talked the matter over with my brother Huddleston and myself, expressed to us his opinion upon the case. And first as to the question of amount. It is clear to my mind that if this was a trespass the defendant was not entitled to make a deduction. It has been suggested that he was entitled to make a deduction to the extent of the balance of the debt remaining due to him from the plaintiff; but I think that must be recovered by him, if at all, by a proper proceeding against the plaintiff, and that he is not entitled to make any abatement here on that score. Neither do I think that the plaintiff is entitled to add anything to the value of the property. I quite agree with Mr. Murphy that this is not like the case of damages in an action on contract. This is a tort, and a man who commits a tort commits it at his peril. But in the present case the damages do not follow solely from the tort committed, but from the tort committed and from the plaintiff not having money enough in his pocket to buy a fresh horse. I quite agree that in such a case as this the plaintiff is not limited to the value of the property taken. Suppose, for instance, a man has changed a 10*l.* note into ten pounds worth of silver, with which to pay the wages of his workmen, and some person claims a right to take the ten pounds worth of silver from him; surely a 10*l.* note would not be a fair compensation, because the man must again undergo the trouble of changing the note into silver. It would, I think, be open to a jury to say, "It would have taken the plaintiff here an hour, or a day, or a week to get a fresh horse. Therefore, we put a higher value on the horse in damages than the plaintiff could have got for it if he had sold it." That, I think, is reasonable enough. But what the plaintiff asks for here is special damage, not as a portion of the value of the articles taken, but as a special damage resulting from the loss of them. It seems to me that in that view it is not recoverable. I think, therefore, that the verdict must be entered for the plaintiff for the

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amount which the jury found to be the value of the property taken—namely, 30*l.*, without any abatement. This bill of sale is confessedly an ill-drawn document. In the beginning of the operative part the grantor, the plaintiff, grants, bargains, and sells “all and every the household furniture, &c., and all other the goods, chattels, personal estate, and effects whatsoever and wheresoever of him the said Isaac Greenbirt.” So far that clearly would include present property only. It speaks of his then present property, not of what it will or may be hereafter, and then (and really this is not a technical way of looking at it—what follows is grammatically only a further description of the property which has been already assigned) it goes on, “and which now or at any time hereafter may be in, about, or upon the dwelling house and premises of him the said Isaac Greenbirt, at Halstead aforesaid.” That is a qualification, as it were, of the generality of the gift, and amounts to this, “I give or assign to you all my now property, but upon condition that it now is or at some future time shall be in my possession in or about these premises, and as to any of my now property which is not now and never will be there, that is not to be yours.” There is not a word of future property so far; there is a word of future time, but that future time is in relation to the present property being then or thereafter in or upon “the dwelling house and premises of him, the said Isaac Greenbirt, at Halstead aforesaid.” Then comes these words, “or elsewhere.” How does that make the grant extend to future property? I have great difficulty in seeing that it does so. Then, supposing that future property was intended to be and was included, it is said that it is future property which is to be “upon the dwelling house and premises of him, the said Isaac Greenbirt, at Halstead aforesaid or elsewhere,” that is to say, upon his premises either there or elsewhere; and in confirmation of that the power of seizure is referred to, which is that, in case default shall be made, then the grantee of the bill of sale “shall and may enter into possession of the messuage and premises of him, the said Isaac Greenbirt, where any of his goods and chattels and personal estate are deposited, and take possession of the same, and for that purpose, if necessary, break open any doors or other obstructions, and sell and dispose of the said goods and effects.” Now it is said, on the part of the plaintiff, that that shows that the sole power of seizure was a power of seizing goods on the plaintiff's premises only. It was argued on the part of the defendant, in answer to that, that the power to break and enter is confined to the plaintiff's premises, because the plaintiff could not give a power to break and enter the premises of anybody else; but that the power to seize is to seize the plaintiff's goods generally. But really that is not so, because the power given is to “enter into possession of the messuage and premises of him, the said Isaac Greenbirt, where any of his goods, chattels, and personal estate are deposited, and take possession of the same.” The same what? Why, the goods, chattels, and personal estate which are there deposited, “and for that purpose, if necessary, break open any doors or other obstructions, and sell and dispose of the said goods and effects.” It is manifest, therefore, that the power given is an express power to seize goods upon the plaintiff's premises, if it extends to future

acquired property, and consequently a strong corroboration of the construction for which Mr. Bray contended, that this is an assignment of such future goods of the plaintiff as are on his premises “at Halstead or elsewhere.” Upon these grounds it seems to me that the plaintiff is entitled to our judgment. If it was clear that all future goods, wherever they might be, were assigned, though the express power to seize goods was limited to the goods on the premises of the plaintiff, I should have very considerable doubt whether there was not an ample power to seize goods “elsewhere.” I should doubt whether the maxim “*Expressum facit cessare tacitum*” applies. If there had been words purporting to assign future property wherever it was, I should doubt very much whether any power to seize would have been necessary to be given; and when I say I should doubt it, I say so upon the authority of a passage in the judgment of Lord Chelmsford in *Holroyd v. Marshall* (at page 216 of 10 H. of L. Cas.), which seems to show that where there is an assignment of future property, no other power to seize being expressly given, it follows, as a consequence from the assignment, that the grantee of the power has a right to enter and seize, and when he does enter and seize there is a *declaratio procedens* and a *novus actus interveniens* sufficient to give him a right to the property. However, I express no decided opinion upon that point; it may be that when such a case as the present has to be considered, it will be found that it is not governed by *Holroyd v. Marshall* (*ubi sup.*), but that it is rather governed by the opinions indicated in the case of *Belding v. Reid* (*ubi sup.*). But, upon the ground that I cannot see here any assignment of future property, nor any assignment of property “elsewhere” than on the plaintiff's premises, it seems to me that the plaintiff is entitled to judgment for the value of the property seized, as found by the jury, and that this rule should accordingly be made absolute to enter the verdict for him for that amount, and in this judgment my brother Amphlett, as I have before mentioned, fully concurs.

HUDDLESTON, B.—I agree with my learned brethren, that this verdict, which was entered for the defendant, should be set aside, and a verdict entered for the plaintiff. The plaintiff brings this action against the defendant for seizing his horses, and the defendant says, “I was authorised to seize them under a bill of sale which contains certain words. Those words, I think, do give the defendant power to seize any goods in existence at the date of the deed, wherever they may be; but they only give him the power to seize future acquired goods which are in and upon the house and premises of the plaintiff at Halstead or elsewhere, that is to say, only when they are in and upon the plaintiff's house and premises. That seems to be the reasonable construction of the whole of the words of this bill of sale as pointed out by my brother Bramwell. I think also that the verdict must be entered for 30*l.*, that the defendant cannot be allowed to set off the difference between the sum actually lent and the money paid under the bill of sale, and that the true measure of damages is the value of the property seized. Mr. Murphy has urged that he is entitled to some sum for special damages, and that there is a distinction to be drawn between actions of tort and actions of contract. I agree with him there. It

[BANK.]

Ex parte CALDECOTT; Re MAPLEBACK.

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is pointed out in a work of great authority on this subject, that there may be actions of tort with reference to injuries to property, persons, or character; and that, where the action is with reference to injuries to property when accompanied by certain circumstances of aggravation calculated to inflict great injury upon a man's character and reputation, and especially when they take place under a fancied right, they are only to be visited with damages proportioned to the actual pecuniary loss sustained. Mr. Murphy says: "Here is a pecuniary loss sustained which I have a right to claim in the way of special damage." I rather think that there we must look to see whether that is not of too remote a nature to be allowed. There is a case upon this subject referred to in Mayne on Damages (2nd edit., by Lumley Smith), at page 309, which is almost applicable to this, where it is said: "Special damage resulting from the immediate loss or injury may also be allowed for if not of too remote a nature. In an action for injury to the plaintiff's horse by a collision, it was held that he might recover the keep of the horse at the farrier's while it was being cured, the farrier's bill, and the difference between the value of the horse before and after the accident. But he could not recover the hire of another horse which the plaintiff had been obliged to have while his own was laid up," and the learned author refers to the case of *Hughes v. Quentin* (8 Q. & P. 703). That seems to be almost analogous to the present case. I think, therefore, that the sum paid for the hire of the horse was too remote to be recovered in the shape of special damage, and that the verdict ought to be entered for the amount, as found by the jury, of the value of the horses that were seized, namely, 30*l*.

*Rule absolute, to enter the verdict for the plaintiff for 30*l*., with costs.*

Solicitor for plaintiff, Doyle, agent for Jones, Colchester.

Solicitors for the defendant, Sharpe, Parkers, Pritchard, and Sharpe.

COURT OF BANKRUPTCY.

Monday, August 7.

(Before the CHIEF JUDGE.)

Ex parte CALDECOTT; Re MAPLEBACK. (a)

Bill of sale—Consideration for—Past debt—Compounding a felony—Act of bankruptcy—Adjudication.

*In Jan. 1875, A. gave to B. a bill of sale over all his property as security for a past debt of 100*l*., and also for a sum of 100*l*. then advanced by B. to enable A. to meet a bill to which he had forged B.'s name.*

In Feb. 1875, B. took possession under his bill of sale, and sold the property. In the following March A. was adjudicated a bankrupt, the alleged act of bankruptcy being the giving of the bill of sale.

Held, on appeal, that the bill of sale, being given in consideration of a past debt, and with the intention of compounding a felony, was utterly void, and an act of bankruptcy.

This was an appeal from the decision of the Judge

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

of the County Court of Hampshire, holden at Southampton.

Prior to Jan. 1875, James Mapleback, a farmer, of Bramshill, in the county of Southampton, was indebted to Henry Butt, a farmer, of Caversham, Oxon, in the sum of 100*l*. for money lent and goods supplied to him during the years 1873 and 1874.

On the 16th Jan. 1875, Henry Butt received the following letter from James Mapleback:

I wanted to have seen you again to-day, but could not find you. I have placed myself entirely in your power to get me sent to prison, but I hope for the sake of my wife and family you will not do it for it will ruin them for life as well as me. You know I am dreadfully worried for money. I owed 100*l*. at the bank and they wanted security and I put your name to a bill with mine; the bill was due this week and I cannot meet it and the manager is going to write to you about it to-night. But pray don't let him know but what you signed the bill or they will transport me and then what will become of my family? I know it was a very wrong thing of me to do but I did not know what to do. . . . If you will do this for me I shall never know how to make amends to you. If you will pay the money I will give you a bill of sale on all I have got for what I owe you. . . .

On the 20th Jan. 1875, a meeting took place between H. Butt and Mapleback at the office of Butt's solicitor, with reference to this letter, and it was then arranged that Mapleback should give a bill of sale over all his property to secure the 100*l*. previously due, and 100*l*. then to be advanced by H. Butt for the purpose of meeting a bill for 100*l*. due to the bank, and to which Mapleback had forged H. Butt's name, Mapleback assuring Butt that such advance would enable him to carry on his business, and that he would be able to repay him shortly. The bill of sale was accordingly executed on the same day, and the 100*l*. were thereupon paid into the bank to meet the aforesaid bill. The bill of sale was duly registered.

On the 10th Feb. H. Butt, hearing that Mapleback had absconded, took possession under his bill of sale, and sold the property comprised therein, and received 170*l*. as the net proceeds of the sale.

On the 8th March a bankruptcy petition was presented against Mapleback, the alleged act of bankruptcy being the execution of the bill of sale, and on the 15th March he was adjudicated a bankrupt, and J. Caldecott was appointed trustee, with a committee of inspection.

In March 1876, the trustee applied to the court for an order declaring the bill of sale void, and that H. Butt should pay over to him the proceeds of the sale, and on the 4th July the County Court judge made an order declaring the bill of sale valid, and annulled the previous adjudication, and directed the trustee to pay all the costs. Against this order the trustee appealed.

De Gex, Q.C. and Rolland, for the appellant, contended that the bill of sale was void as an act of bankruptcy, being given in consideration of a past debt, and also with the object of compounding a felony. They cited:

Wallace v. Hardacre, 1 Camp. 45;

Williams v. Bayley, L. Rep. 6 E. & I. App. 200; 14

L. T. Rep. N. S. 802;

Ex parte Hibernian Joint Stock Bank, 14 Ir. Ch. Rep. (1863) 116;

Collins v. Blantern, 2 Wil. 341.

F. O. Crump, for the respondent, argued *contra*,

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that the bill of sale was not given in condonation of a felony, but as security partly for a past debt and partly for a substantial fresh advance given with the *bonâ fide* intention of enabling the debtor to carry on his business, and without any knowledge of his being in utterly insolvent circumstances. He referred to,

Williams v. Bayley (sup.);
Wallace v. Hardacre (sup.);
Ex parte King; *re Davies*, 11 W. N. (1876) 238.

The CHIEF JUDGE.—I always consider it right to hear in an appeal case whatever may be addressed to the court, in order to see if there be anything in it that will in any way justify the appeal. But a case so plain as this has never been presented to me. I thought it was the duty of every citizen of these realms if a crime were committed against him to prosecute the offender. That is a *primâ facie* duty. I thought it was unlawful for him to sell that duty, or to make any bargain about it. In this case it has been most abundantly established that that has been done, and I repeat that to sell that duty is unlawful and an offence against public policy. Upon that ground the bargain here made is one not having the slightest portion of validity in it, and the bill of sale upon that ground is utterly void. The man who committed the forgery wrote to the person whom he had made his victim, saying, "If you go and pay this debt which I have contracted in your name wrongfully, I will give you security for it." A more vicious transaction can scarcely be suggested. The respondent, I dare say very good naturedly, paid the 100*l.* to the creditor. If he had not paid it a prosecution might have taken place, or it might not, but the crime had been committed. The duty to prosecute fell upon the respondent. He neglected that duty, and advanced 100*l.* to the bankrupt, that is to say, he paid a debt of the bankrupt, but making him no advance that could be called an equivalent, nothing that enabled him to carry on his business, but what he paid was a debt previously contracted by the debtor as well as his own debt which had also been previously contracted, and then he took this bill of sale, which, as an instrument, was utterly invalid from its beginning. If that were not enough to dispose of the case, it was a clear act of bankruptcy, because without any reason, except to avoid the consequences of his own act, the debtor agreed to give a bill of sale comprising the whole of his estate and effects in order to satisfy a previously existing debt. Anything more plainly fraudulent according to the Statute of Elizabeth or according to the Bankruptcy Statute cannot be conceived. How the conclusion of the court below was arrived at I am at a loss to guess, unless it were suggested with success before the judge of the County Court that the respondent did not know the consequences of the offence that had been committed, and had no intention to screen the debtor from the prosecution that might have taken place. But it is as much an offence against the policy of the law as it is opposed to the plain practice of the court; and although the evidence before the County Court judge might have been insufficient to prove that an act of bankruptcy had been committed, at least the bankruptcy existed. The formalities prescribed by the rules must have been gone through. A sealed copy of the petition must have been served; and then it would have

been for the creditors to pursue the proper remedy. But that an adjudication of bankruptcy arrived at under the circumstances should be annulled is directly at variance with the usual course of proceedings in bankruptcy. That the court has power to annul no one can question, but even if the first ground had not been sufficient to sustain the adjudication the ordinary law and practice in bankruptcy shows beyond all question that the adjudication was right. I consider the decision of the court below altogether wrong. The order for the trustee to pay the costs is also wrong. The respondent must refund the money. The order appealed against must be discharged, and a proper order must be substituted for it. The respondent must pay the costs in the court below and of this appeal.

Ordered accordingly.

Solicitors for the appellant, *Palmer, Bull, and Fry*, Agents for *S. Chandler*, Basingstoke.

Solicitor for the respondent, *J. Lott*, Agent for *H. W. H. Bayley*, Basingstoke.

Monday, Aug. 7.

Re BRYANT.(a)

The Bankruptcy Rules, 1870, r. 179—*Application to commit—Three days' notice of—Practice.*

In applications to commit for contempt of court under rule 179 of the Bankruptcy Rules, 1870, the court, although it may, upon good cause shown, dispense with the manner of service prescribed by the rule, will in no case dispense with the three days' notice which the rule requires to be given to the person sought to be committed.

THIS was an *ex parte* application on behalf of the receiver in the above matter for leave to serve a short notice of motion under the 179th rule for the next day.

Finlay Knight, in support of the motion, urged the urgency of the case, and contended that the court had jurisdiction to make the order.

The CHIEF JUDGE.—The rule says that the notice there required shall be served personally unless the court shall "upon good cause shown" direct such service to be made "in some other manner." It says nothing about dispensing with the time limited for the service of the notice. In cases affecting the liberty of the subject the court is most careful to see that all the requirements of the rules have been strictly complied with. I cannot therefore change the time fixed by this rule. It would be against all principle if I did so.

Motion refused accordingly.

Solicitors, *Harper, Broad, and Battcock.*

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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House of Lords.*March 30 and 31, April 4 and 7.*

(Before The LORD CHANCELLOR (CAIRNS), LORDS CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE).

EDWARDS v. WARDEN (a).

ON APPEAL FROM THE COURT OF CHANCERY IN ENGLAND.

*Bombay Civil Fund—Annuity—Statute of Limitations—Trustees—Laches—Interest.**F. was a member of the Bombay Civil Fund.**While he was a member resolutions came into operation conferring benefits upon the widows of such annuitants on the fund as should pay a certain percentage on their annuities. Shortly afterwards he retired on an annuity, and a few weeks after his retirement the resolutions were suspended, and remained suspended till after his death.**Held (affirming the judgment of the court below), that as he had never paid or tendered the percentage, his widow could not claim any benefit under the resolutions.**One of the regulations of the fund provided that the widow of every member should receive a pension not exceeding 300*l.* a year; but if she had private property exceeding 200*l.* a year her pension should be reduced in proportion, so that her whole income should not exceed 500*l.* a year.**F. died in 1834. In 1843 his widow claimed a pension from the fund, on the ground that her income had fallen below 500*l.* a year, but was refused. In 1867 her representative filed a bill against the trustees of the fund, claiming the amount of the pension from 1843 till the death of Mrs. F. in 1863.**Held (reversing the judgment of the court below) that the Statute of Limitations did not apply to bar the claim; for though the widow was not a cestui que trust of any specific sum, yet the trustees held the fund in trust for all the persons entitled to receive benefit from it; but that, as the delay in asserting the claim was due to the laches of Mrs. F. and her representatives, interest on the amount should not be given.**THIS was an appeal from a decree of the Lords Justices, reported in 30 L. T. Rep. N. S. 540, and L. Rep. 9 Chan. 495, reversing a decree of Bacon, V.C.**The bill was filed by a Mr. Edwards and his wife against the trustees of the Bombay Civil Fund, to enforce the payment of an annuity which they asserted was due to the late mother of Mrs. Edwards, who was the widow of a Mr. Flower, a Bombay Civil Servant.**Mr. Flower became a member of the fund in 1804, and in May 1830 he retired upon an annuity. In Jan. 1830 certain resolutions, passed at a general meeting of subscribers, known as "Farish's resolutions," came into force, to the effect that the widows of such annuitants as should pay a percentage on their annuities should be entitled to pensions, irrespective of any private property they might possess. By the original regulations a widow was only entitled to such a pension as would make her income up to 500*l.* a year, and no pension was to exceed 300*l.* In June 1830 "Farish's resolutions" were suspended,**and did not come into operation again till after the death of Mr. Flower, which occurred in 1834. He never made or tendered any payment in accordance with the terms of the resolutions.**By his will Mr. Flower left to his daughter a sum of 6000*l.*, and directed that the income should be paid to her mother till she came of age. She came of age on 15th Oct. 1842, and thereupon Mrs. Flower's own income was reduced to 422*l.* 2*s.* 2*d.*, and she applied to the trustees of the fund for an annuity of 77*l.* 17*s.* 10*d.* to make it up to 500*l.* They refused her application, on the ground that the joint income of the mother and daughter exceeded 500*l.***Mrs. Flower had previously applied for a pension under the resolutions. She died on 23rd Dec. 1863.**The plaintiffs, by their bill, claimed in the first place the arrears of an annuity under "Farish's resolutions," on the ground that the suspension of these resolutions up to the date of Mr. Flower's death operated as a waiver of the condition as to the payment of the percentage on his annuity; or, secondly, the annuity of 77*l.* 17*s.* 10*d.* from 15th Oct. 1842 till Dec. 23rd 1863.**Bacon, V.C., decided in favour of the larger claim, but his decision was reversed by the Lords Justices, who also held that the relation of trustee and cestui que trust did not exist between the trustees of the fund and Mrs. Flower, and that consequently the Statute of Limitations applied, and that the plaintiff could only recover the arrears of the annuity of 77*l.* 17*s.* 10*d.* from 30th July 1861 to 23rd Dec. 1863, with interest from 30th July 1867, the date of the filing of the bill.**This appeal was then brought to the House of Lords.**Miller, Q.C. and J. Beaumont, appeared for the appellants.**Cotton, Q.C., Kekewich, and Hornell, for the respondents.**At the conclusion of the arguments their Lordships gave judgment as follows:**The LORD CHANCELLOR (Cairns).—My Lords, this case has been argued at very great length before your Lordships; but with regard to the larger part of the claim of the appellants, I mean that which depends upon these resolutions which have been termed "Mr. Farish's Resolutions," the case appears to me really to lie in a very small compass, add to be perfectly free from any ambiguity or doubt. Your Lordships will observe that the seventh resolution provided "for this advantage" (that is to say the advantage of payments to widows and children irrespective of the possession of property), "it would only be just that subscriptions should be paid by members accepting the annuity" (that is to say by members retiring from the service and coming home to England upon an annuity), "as well as by those in the service, in order to their securing the privilege in question to their families." Of course those only to whom it was an object to secure this reversionary interest would pay the premium, those who did not desire it would not subscribe after they took the annuity. The resolution contemplates that the offer which was to be made was one which might be accepted or might be declined. It might suit persons retiring from the service and receiving their annuity to make no further payment and take no further interest in the fund, to live upon*

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their annuity, and to trust to their family being provided for sufficiently from some other source. Or on the other hand they might prefer to continue to make out of their annuity, or in respect of it, these payments, in order to secure the reversionary benefits for their families. And then your Lordships will observe the further resolutions: "That the pensions now granted to widows and children who do not possess property to the amount specified in the regulations be henceforth granted in all cases to the widows and children of members of the new annuity and charitable funds. Secondly, that to entitle a member to the benefit of the foregoing resolution in behalf of his family after he shall have accepted the annuity he shall subscribe to the charitable fund one per cent. per annum on his annuity, or one per cent at the time of acceptance upon the total value of his annuity, as laid down in the tables furnished us by the Court of Directors." Those being the terms of Mr. Farish's resolutions, and that being the proposal which those resolutions made, I may, without going in detail through the minute history of what took place, remind your lordships that the resolutions were suspended with regard to any operation until the assent of the East India Company should be procured. That assent was obtained, and was communicated to the members of this fund on 5th Jan. 1830. Now Mr. Flower, the husband of the mother of the appellant, left India for England on furlough on 27th Dec. 1829. Leaving on furlough, of course he still continued at that time a member of the service, and a member of this fund; but on 1st May 1830, he retired from the service, and he ceased to be a member of this fund, taking his annuity, which he was entitled to under the regulations of the fund, for the remainder of his life. Therefore his position was this: On the notification of Jan. 5th 1830, it may be assumed that Mr. Farish's resolutions would come into operation, and if so, while they were in operation, on 1st May 1830, Mr. Flower retired from the service. From these resolutions, having regard to the term of them which I have read, it is of course evident that something was to be done by Mr. Flower before it could be predicated of him that he was anxious or desirous to accede to the terms offered by the resolutions. Up to the time of his retirement from the service nothing whatever was done, no intimation whatever was given by him as to whether he would desire to accept or not to accept the advantages of the resolutions. On 8th June 1830, after Mr. Flower retired from the service, the resolutions were again suspended, and on 11th Feb. 1834, the resolutions still continuing suspended, Mr. Flower died. Let us observe exactly what was his position at the time of his death. Up to his retirement from the service, on 1st May, 1830, he had done nothing to indicate his acceptance of the terms held out by the resolutions. From 1st May 1830, until his death, it appears, and it must be assumed, that he did nothing whatever in the way of expressing any desire to accept those proposals. During that time he must be looked at under one of two different aspects: either he was a person assenting to the suspension of Mr. Farish's resolutions, or he was not. It is quite true that he was not a member of the fund, and therefore was not an active party in coming to a determination as to

whether the resolutions should be suspended or not; but he must be taken to have assented, or not to have assented to that suspension. If he assented he was then just as if he had continued a member of the fund, and *quoad* him the resolutions had no operation. If, on the other hand, he did not assent, if he held the view that those resolutions having been in operation when he retired from the service, no suspension of them could afterwards operate to his disadvantage, but that he was entitled to proceed as if *quoad* him they never had been suspended at all, still his duty and obligation was to manifest in some way that he was a person who desired to accept of the terms of the resolutions. It was for him to come and tender the payments which had to be made under them, it was for him to say that he did not assent to their suspension, but would insist upon treating them as if they still continued in operation for his benefit. But he did nothing, and from the first to the last, from the date of his retirement to the date of his death, it is absolutely impossible for any person to say whether he desired or did not desire to come under the offer made to him in the resolutions. He died without having in any way accepted the benefits or taken upon himself the burden of the terms contained in those resolutions. That is the whole of the case in regard to Mr. Farish's resolutions. How, or by what ingenuity or argument it could be contended, under these circumstances, that immediately after Mr. Flower's death, and still more, twenty years after his death, any person representing him could come forward, and then seek to make an election which he never made, to make an election after the event has happened, and after it is known what is the exact amount of benefit which will be derived, I myself am entirely at a loss to understand. And I entirely agree with and submit to your Lordships, that you should agree with the decision of the Lords Justices in this respect. I do not dwell upon the application which was made by Mrs. Flower after her husband's death to have the benefit of the resolutions. Even supposing that she made the claim in the clearest way, it was a claim which, in my opinion, she was not entitled to make; and no language in which she made it, and no language in which her claim was spoken of in answer to her application could, as it seems to me, in any way give her the right to insist upon the benefit of the resolutions. Therefore, so far as the decree of the Lords Justices has proceeded upon the footing of refusing this larger claim made by the appellants, I think your Lordships will be disposed to say that that decree is entirely right. But then arises another question. Mr. Flower left an only daughter who is, as I have said, the appellant at your Lordships' bar. This daughter came of age on 15th Oct. 1842; a provision had been made for her by Mr. Flower's will to the extent of 6000*l.*, and during her minority the income of that sum was to be paid to Mrs. Flower, she maintaining and educating the daughter. When the daughter came of age in 1842, or after she came of age in 1843, Mrs. Flower wrote to the trustees of the fund a letter, and stated to them that by reason of the circumstance that her daughter had come of age, and that therefore the income of the 6000*l.* would no longer be paid to the mother, her income had become reduced below 500*l.* by the sum

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of 77l. 17s. 10d., and she asked to be admitted an annuitant upon the fund as a widow whose income was under 500l., and who was entitled to the sum necessary to make her income up to 500l., that is to say that she should have assigned to her an annuity of 77l. 17s. 10d. I need not go in detail through the correspondence. The trustees of the fund said that a provision having been made for the daughter by the will, the property provided for the daughter and the property provided for the mother must be looked at together under the regulations of the fund, and that the income, therefore, of the widow could not be held to fall below 500l. That has been held by the Lords Justices, and it appears to me rightly held (and there is no cross appeal by the trustees of the fund against that holding) to have been an error in point of law as regards the construction of the rules and regulations of the fund. The Lords Justices have held that where the question arises upon a provision made for the widow alone, when the daughter does not seek to come upon the fund, the property provided for the daughter is not to be added to that provided for the widow, and that therefore the income of the widow, so far as it fell below 500l., ought to have been eked out by an annuity to be allowed to her. I think your Lordships will be of opinion that the widow was entitled to an allowance in that respect from the fund. But there arises the question, that having occurred in 1843, and the widow Mrs. Flower having died in 1863, and we being now in the year 1876, for how long is this supplementary annuity to be paid to the present appellants? That raises the question of the applicability of the Statute of Limitations, and the further question of whether the right of the widow is in the nature of a trust for her benefit. The Lords Justices have held that from the constitution of this fund there is nothing in the nature of a trust for a widow in the condition of Mrs. Flower. As I understand it, they have held that by the constitution of this fund there was a contract among the members of the fund, that is to say, the members of the service, and that under that contract provisions accrued to the benefit of the widows and the children, but that the widows and children themselves were not *cestui que trusts*. I so understand the decision. That raises the question of the proper construction of the trust fund. The persons who hold the trust are undoubtedly trustees, they are so styled, and the money is clearly not their own: they are to invest it and use it for the purpose of the regulations. The holders of the fund not being themselves entitled to the fund, for whom are they trustees? I turn to the regulations of the fund, and without going through them at length, I find that under the 5th article the 4th section provides, "The provident branch of the fund shall be applicable to the payment of all demands arising from the three first objects of the institution." The three first objects are, first a provision "for members obliged by ill-health to leave India;" secondly, "to provide for such members as by unavoidable accident or misfortune are compelled to renounce the service;" and thirdly, "to provide for the widows and children of members dying without having been able to make an adequate provision for their families." Those are the three first, and they are all *in pari materia*, the provision for the members being spoken of just in the same way as

the provision for the widows. The provident branch, therefore, is to be applicable to the payment of all demands arising from these, the three first objects of the institution, as likewise the payment of all extra charges of management, &c., and we find "the widow of every member of the new annuity and provident fund dying shall be entitled to receive from the fund an allowance or pension not exceeding 300l." in the one case, and according to the property which she possesses. I took the liberty of saying, during the argument, that I think there is no doubt or question that this is not a document which in any way affects to be couched in legal phraseology: it is a document in popular language, laying down the rules for the management of this fund in the hands of trustees in words which would be understood by persons unversed in law, and accustomed to transact ordinary business; but it seems to me that the words I have read, when presented to the mind of a lawyer, have no meaning unless they mean this: that the trustees shall hold this trust fund for the purpose of satisfying—not only to members of the fund, but to the widows of members—every claim which, according to the proper construction of the rules, those persons are entitled to make against the fund. If that be so, it appears to me to be nothing but a declaration that the fund shall be held upon these trusts, and that the persons to whose benefit these trusts enure must be the *cestui que trusts* of the fund. It is quite true that no widow can say she is a *cestui que trust* of any specific sum of money, of any specific rupee of the whole of this fund, unless or until it is set apart to answer her annuity. But notwithstanding that she appears to me clearly to be in the position of a *cestui que trust*, and entitled to say, according to the proper construction of these rules, "I ought to have an annuity provided for me, and I stand as a *cestui que trust*, entitled to insist upon the provision of that annuity." If that be so, in 1843, when Mrs. Flower informed the trustees of the fund that her property had fallen under 500l. a year, she appears to me to have been entitled to have her 500l. a year made up from the fund, and to have been certainly from that time a *cestui que trust* to that extent. With regard to the precise sum that she was entitled to have made good, the claim she made was, as I have said, a claim to an additional annuity of 77l. 17s. 10d. The Lords Justices, confining her claim by the Statute of Limitations, have held that to be the sum, and no cross-appeal on this point has been presented by the trustees; and it has very properly not been presented, because the difference between this sum and the sum to which upon a more rigid examination of her claim she might have been held entitled, is obviously extremely minute. Therefore, I think your Lordships will take it that she is entitled to this annuity of 77l. 17s. 10d., and if your Lordships concur with me in saying that the Statute of Limitations cannot apply to a claim of this kind, she is entitled to it from the time her daughter came of age, namely, the 15th Oct. 1842. Up to that time she herself has decided that she had no claim against the fund by reason of the property she was enjoying. But then, it is said, if your Lordships hold that you, should also give to those who represent Mrs. Flower interest upon each payment of this annuity as it became due; I cannot take that view. The Lords Justices, award-

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ing to the appellant the annuity for the time not excluded by their view of the Statute of Limitations, have given interest upon the sum from the filing of the bill. I cannot myself understand upon what principle that has proceeded, but looking at the question from the beginning, from the year 1843, it appears to me that, although this lady is a *cestui que trust* of the fund, yet as no sum had in point of fact been set apart to answer her annuity, she cannot say that any part of the trust fund has been hers during all that time, or that it has been bearing interest, or making profit for her benefit. She in this respect is quite as much answerable for any delay that has taken place as the trustees of the fund are. They no doubt were under the impression, and the *bonâ fide* impression, that when she made her claim for this small annuity she was not entitled to succeed, and they told her so. She might have brought the matter at that time to issue, or she might have applied yearly for her annuity, and then they perhaps might have been in some default for not having yearly paid it to her. But as it is, she is not less chargeable for the delay that has taken place than the trustees are. In my opinion she is not excluded by the Statute of Limitations, but, on the other hand, she is clearly not by contract or by trust, and certainly not by her conduct, entitled to interest upon the arrears of the annuity from year to year. In my opinion she is entitled to the annuity from the date I have mentioned up to the time of her death, 23rd Dec. 1863, and to nothing more. What I have said, if it is concurred in by your Lordships, will lead to an alteration in the decree of the Lords Justices, and to awarding to the appellant a larger sum than she has received, or could receive under that decree. Something was said at your Lordships' Bar with regard to the costs of the suit, and the manner in which they were dealt with by the Vice-Chancellor. He acceded to the entire claim of the appellant, the larger claim under Mr. Farish's resolutions, and I think he gave her the costs of the litigation, either out of the fund or to be paid by the defendants. The Lords Justices dismissed so much of the Bill as made a claim under Mr. Farish's resolutions; and it appears to me that now in substituting, as your Lordships' will do, what ought to have been the original decrees to be made upon the claim of the appellants, the proper course to be taken will be this: to retain that part of the decree of the Lords Justices which dismissed a portion of the Bill, but to give the plaintiff in the original suit relief upon the footing I have mentioned, namely, payment of the annuity of 77l. 17s. 10d., up to the death of Mrs. Flower; and in my opinion the appellants are entitled (relief having been refused to them by the Lords Justices) to their costs of the suit originally; but, on the other hand, the part of the Bill which is dismissed ought, I should submit to your Lordships, to be dismissed with costs. That will be the form of the decree which I should recommend to your Lordships to make, reversing so far, therefore, the decision of the Lords Justices.

LORD CHELMSFORD.—My Lords, the principal question to be determined is whether Mrs. Flower had before her death become entitled to the privilege of a widow upon the Bombay Civil Fund, according to the rules and regulations for the management of the fund agreed upon on 1st May 1825, as modified by the resolution of the

general meeting of 8th May 1826. By the original rules and regulations of the fund, as established in 1804, the widow of every member of the fund was to be entitled during widowhood to such annuity as, together with any other provision she might have, would make up her total income to 300l. By the rules and regulations of 1825 the subscription to the fund, which before had been voluntary, was made obligatory on all the Civil Servants, who, from 1st May 1825, were to contribute four per cent. of their salaries and emoluments to the annuity branch of the fund, and one per cent. for the purposes of the provident branch, the subscriptions to the latter fund being liable to be increased according to the demands of that branch of the institution. By the same rules the benefit to the widow of a member was to be an allowance or pension of 300l. per annum, but with a reduction in respect of any property exceeding 200l. per annum she might possess at the death of her husband, so as her income should not in any case exceed 500l. a year. By subsequent resolutions of a general meeting on 8th May 1826, known as "Farish's resolutions," it was resolved that the pension to widows not possessing property to the amount specified in the regulations should be granted to them without reference to property; and that to entitle a member to the benefit of the foregoing resolution after having accepted an annuity, he should subscribe to the charitable fund one per cent. on his annuity. At this meeting a resolution was carried to suspend the operation of the above-resolutions, and two others, until the decision of the court of directors should be received in favour of certain propositions submitted to them. The assent of the directors was not received till 17th Sept. 1829, and was not communicated to the subscribers until a general meeting held on 5th Jan. 1830. At this meeting it was resolved that the subscriptions to the provident fund should be levied at the rate of two per cent. from 1st Jan. 1830; and in June 1830 the proposition as to admitting widows to the full benefit of the fund without reference to property was again suspended. Mr. Flower had come in as a member of the fund under the rules and regulations of May 1825. He paid all the subscriptions required of him till he left India in December 1829. He had been offered an annuity of 1000l. by the secretary of the fund before he left India. He accepted it after he had left, and ceased to be a Civil Servant, and became an annuitant from 1st May 1830. He never paid, or offered to pay, or even expressed his intention of paying, two per cent. to the fund upon the footing of the resolution of 1st Jan. 1830, or one per cent. upon that of 8th May 1826. He died in 1836, and his widow's right to a pension accrued from that date. Under the original rules of the fund, Mr. Flower, on leaving India, was not required to continue his contributions to secure for his widow the benefits of the fund; consequently Mrs. Flower was entitled at least to a pension of 300l., with the deduction of any property she possessed above 200l. per annum. But the appellants, as her personal representatives, claim in her right, under Farish's resolutions, an annuity of 300l. per annum absolutely, without reference to her own property. It is admitted that Mr. Flower, after he became an annuitant, never in any way expressed his intention to become a subscriber to the fund; but the appellant says that it was not necessary that he should do so, for the trustees

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were bound to assume his assent. But surely it cannot properly be taken for granted that an annuitant will as a matter of course subscribe to the fund. Many reasons might be suggested for his declining to do so, which render it necessary that he should in some way signify his intention to become a subscriber before he can be made one. It was further said that Mr. Flower had no opportunity of paying the increased subscriptions; that he retired while Farish's resolutions were in force; and that no alteration of them could prejudice or affect his rights. There might be some doubt whether Farish's resolutions were in force until the assent of the directors to the propositions submitted to them was communicated to the meeting on 5th Jan. 1830, but Mr. Flower becoming an annuitant on 1st May 1830, was entitled to the benefit of them on payment of 1 per cent. on his annuity, under the regulations of 8th May 1826, and it may be that he could not afterwards be deprived of that right by the members imposing upon the annuitants a payment of 2 per cent. But this is really immaterial, because he never offered, and, as far as appears, never intended to pay even the 1 per cent. It can hardly be believed that he did not keep himself informed of what was going on with regard to a fund in which his family was so much interested; but at the time of his death what had he done to give his widow a right to any pension but that to which he had entitled her when he left the service? I am utterly at a loss to understand the argument that Mrs. Flower might have entitled herself to the pension claimed for her by the appellants, if she had not been ignorant of her rights. What with the fullest knowledge could she have done to have gained for herself the pension which her husband had refused or neglected to qualify her to receive? The learned counsel for the appellants referred to the proceedings of two meetings of 28th Nov. 1837, and 3rd Nov. 1840, where it was agreed that widows who came on the fund subsequently to 1st Jan. 1830, were to be entitled to annuities upon certain terms. But upon what widows was this benefit conferred? Expressly on those by whose husbands the "enhanced subscription" was paid. This "enhanced subscription" can only mean the 2 per cent. which at the meeting of 5th Jan. 1830, was to be levied from that date, which accounts for the privilege of entitling themselves to annuities being confined to widows who came on the fund afterwards. So the above privilege, when extended to widows whose husbands were alive and in the service on 1st Jan. 1830, by the rules and regulations of 1840, is accompanied with a proviso that the enhanced rate of subscription had been paid by the husbands. Mrs. Flowers, therefore, could not have availed herself of the benefit conferred upon widows by these rules, even had she not been in ignorance (as it is alleged she was) of their existence. The provisions not extending to her claim, it could only, according to the 4th section, of the rules and regulations of 1840, be considered under the regulations which were in force on 30th April 1825, being the footing upon which the Lord Justices have founded their decree. But allowing them to be right as to the regulations under which Mrs. Flower became entitled to her pension, were they correct in estimating its amount, and in holding that the Statute of Limitations applied, and prevented the appellants recovering

more than the arrears for six years before the filing of her bill? They were of opinion that the claim of Mrs. Flower ought to be allowed only from the time of her first application to the fund on March 13th 1843, and to the extent stated by herself upon the reduction of her income to the amount of 422l. 2s. 2d., and to this part of the decree there can be no valid objection. But upon the question as to the Statute of Limitations, the appellants contend that the managers of the fund are trustees, and therefore that the statute does not apply. The Lords Justices held that there was no relation of trustee and *cestui que trust* between any person or persons and Mrs. Flower or her representative. They say, "the managers, it is true, are called trustees, but they are trustees (so far as they are trustees at all) for the association, not for persons having claims against the property of the association." But, with great respect, I cannot concur in this view. The whole property of the fund, by the rules and regulations of 1825, is vested in the committee of managers, as trustees. Trustees for whom? Clearly for those who are the objects of the fund. The *cestui que trusts* are not, as the Lords Justices say, the association, but every person who has acquired a right to have a certain portion of the fund appropriated to him or her by the trustees. That there has been unaccountable delay in asserting the claim cannot be denied, and a question arises from what time this delay must be taken to have prejudiced the right to which Mrs. Flower became entitled on the death of her husband. From his death in 1834 she took no step in assertion of her claim till 13th March 1843. If it be said (as it was in argument) that the trustees were bound to take notice of her right, I cannot assent to this. It is clear to my mind that the trustees are not bound to move until they are put in motion by the person claiming the benefit of the provident fund. By sect. 4 of Article 13 of the Rules and Regulations of 1825, "in all cases of application to the fund for assistance to the family of a deceased subscriber, an authenticated will of the deceased, or, if he shall have died intestate, a full and authentic statement of any property left by him, and of the legal claimants thereto, must be submitted for the information of the managers and trustees." How was it possible for the managers to assign the proper amount of annuity without obtaining from Mrs. Flower all the requisite particulars? As she had not placed the managers in a position to determine what her annuity ought to be, and could not possibly have one assigned to her till she did so, her delay from her husband's death till March 13th 1843, must operate against her claim, as, during that interval, the managers could not be trustees for her of an annuity which had never been, and could not be, assigned. I think the appellants are entitled to Mrs. Flower's annuity from 15th Oct. 1842, the time of the daughter's coming of age, down to her death, and that the amount of that annuity ought to be 77l. 17s. 10d. I agree to the disposal of the case in the manner proposed by my noble and learned friend.

Lords HATHERLEY, O'HAGAN, and SELBORNE concurred. On the question of interest the latter referred to *Taylor v. Taylor* (8 Hare, 120), and *Torre v. Browns* (5 H. L. Cas. 555).

Decree appealed from affirmed with a variation.

Solicitor for the appellants, W. A. Day; for the respondents, Freshfields and Williams.

May 11, 12, 18, and 19; June 1.

(Before the LORD CHANCELLOR (Cairns), Lords
HATHERLEY and SELBORNE.)

GOODWIN v. ROBERTS AND OTHERS. (a)

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Foreign loan—Scrip—Negotiability—Bonâ fide holder for value.

A foreign government, being about to raise a loan in England, issued, through their agents, scrip, for which, as appeared on the face of the document, the bearer was to receive a bond upon the payment of the whole of the instalments. By the usage of merchants such scrip was treated as negotiable, and transferable by mere delivery.

Held (affirming the judgment of the Court below), that the scrip could not be distinguished from the bonds, and was a negotiable instrument, transferable by delivery to a bonâ fide holder for value.

THIS was an appeal from a judgment of the Exchequer Chamber (Cockburn, C.J., Mellor, Lush, Brett, and Lindley, JJ.), reported in L. Rep. 10 Ex. 337; 33 L. T. Rep. N. S. 272, affirming a judgment of the Court of Exchequer (Bramwell and Cleasby, BB.) reported in L. Rep. 10 Ex. 76; 32 L. T. Rep. N. S. 199, in favour of the defendants on a special case.

The plaintiff had purchased some Austrian and Russian scrip on the Stock Exchange, in the usual manner, through his broker, one Clayton, and had left it in Clayton's possession.

Clayton deposited it with the defendants as security for an advance made to himself, and afterwards absconded. The defendants were not aware that Clayton only held the scrip, as the plaintiff's broker, but took it *bonâ fide* for value. All instalments on the scrip were fully paid up.

The special case is set out at length in the report of the case in 32 L. T. Rep. N. S. 199, when before the Court of Exchequer. This action was brought by the plaintiff to recover the value of the scrip from the defendants, who had sold it to reimburse themselves for their advance to Clayton.

Benjamin, Q.C. and *Anstie*, for the appellant, argued that the judgment of the court below went on the ground of mercantile usage, which could not create a new class of negotiable instruments, though it might qualify them: (*Dixon v. Bovill*, 3 Macq. 1.) The case of *Gorgier v. Mievill* (3 B. & C., 45), which will be relied on by the other side, is distinguishable, as that was the case of a bond, while this is an undertaking to give a bond; see also *Crouch v. The Credit Foncier* (L. Rep. 8 Q. B. 371; 29 L. T. Rep. N. S. 259). Rothschild was the agent of both parties, and this document is a promise by him to hand over the bonds when he has obtained them from the foreign government; it is not a contract to pay money. A paper containing a promise to give a negotiable instrument cannot be itself negotiable; see *Partridge v. Bank of England* (9 Q. B. 396).

J. Brown, Q.C. for the respondent, maintained that there was no distinction between the scrip and a bond, and the admitted negotiability of these instruments must be recognised as part of the law merchant; the appellant would have no claim against Rothschild or the foreign Government, they would only recognise the respondents. He cited:

Re Agra and Masterman's Bank, L. Rep. 2 Chan. 391;

Re Imperial Land Co. of Marseilles, L. Rep. 11 Eq. 478;

Miller v. Race, 1 Sm. L. C. 526;

Lickbarrow v. Masor, 1 Sim. L. C. 756;

Re General Estates Co., L. Rep. 3 Chan. 758.

C. H. Roberts, on the same side, contended that the scrip and the bonds were equally the representatives of money advanced. Scrip certificates were expressly recognised by the Stamp Act of 1870 (33 & 34 Vict. c. 97, s. 101); they are, in fact, provisional bonds, and therefore negotiable on the authority of *Gorgier v. Mievill* (*ubi sup.*). See also *Heseltine v. Siggers* (1 Ex. 856). In the cases referred to by the appellant the instruments were not on their face assignable; but, as to bills of lading, see *Rodger v. Comptoir d'Escompte de Paris* (L. Rep. 2 P. C. 393; 21 L. T. Rep. N. S. 33). By general mercantile usage scrip certificates represent money, and are therefore negotiable. See

Breverton's case, Dyer 30, b.;

Co. Litt. 232, b.;

Story on Promissory Notes, C. IV., s. 130;

Attorney-General v. Bowens, 4 M. & W. 171;

Tassell v. Lewis, 1 Raym. 743;

Anon., 1 Saik. 126;

Walmsley v. Child, 1 Ves. Sen. 342.

The course of trade has been the test in all cases, and the law merchant can be from time to time added to, by the judicial adoption of mercantile usage, as has been done in many cases in this country and America. At any rate, the appellant, who obtained the scrip in this way, is estopped from denying the usage as against the respondents.

Anstie, in reply.

June 1st.—Their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Cairns) [after going through the facts, as set out in the special case, his Lordship continued].—The question argued in the courts below was the negotiability of a scrip for a foreign loan; but there appears to me to be a prior consideration as to the appellant's title, which would alone be sufficient to dispose of his claim. He bought in the market certain scrip, which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, so that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of the terms from the foreign Government. The appellant might have kept this scrip in his own possession, and if he had done so no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and although it is stated that it remained in the broker's hands for disposal, or to be exchanged for the bonds when issued, as the appellant might direct, those into whose hands the scrip might come would know nothing of his title nor of any private instructions which he might have given to his agent. The scrip itself would be a representation to anyone taking it—a representation to which the appellant must be taken to have been a party—that if it were taken in good faith and for value the person taking it would stand to all intents and purposes in the place of the previous holder. Let us assume for a moment that the instrument was not negotiable, that no right of action was transferred by delivery, and that no claim could be made by the

(a) Reported by C. B. MALDEN, Esq., Barrister-at-Law.

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holder in his own name against the foreign Government; still the appellant is in the position of a person who has made a representation on the face of the scrip that it would pass with a good title to anyone at least who takes it in good faith and for value; and of one who has put it in the power of his agent to hand over the scrip to persons who have been induced to alter their position on the faith of the representations so made. I am of opinion that on doctrines well established by many authorities, of which *Pickard v. Sears* (6 A. & E. 469) may be taken as an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired. I must, however, add that I have no hesitation in expressing my concurrence in what I understand to have been the *ratio decidendi* in the courts below. It was well established by *Gorgier v. Mievville* (*ubi sup.*), an authority which has never been impugned, and which was not disputed at the Bar, that if this action had been brought for the bonds of this foreign debt payable to bearer, and if there had been evidence of the usage of trade as to the negotiability of such bonds, similar to the evidence in *Gorgier v. Mievville*, or similar to the statements in the special case now before your Lordships, the negotiability of the instruments would have been established. It was contended that this scrip was at most an undertaking to give a bond, and not a security for money; but, in my opinion, it is impossible to maintain such a distinction. The whole sum of 100L. had been actually advanced, the loan carried interest from the previous 1st Dec., nothing remained to be done by the holder of the scrip, and if any such holder had been asked what security he had for the advance which he had made, he would unhesitatingly have pointed to the scrip. Under these circumstances I cannot regard the scrip as in any way different from a bond, and as the statement in the case carries the custom as to negotiability of scrip quite as high as the evidence in support of the negotiability of bonds in *Gorgier v. Mievville*, I am clearly of opinion that your Lordships ought to hold that this scrip is negotiable, and that any person taking it in good faith obtained a title to it, independent of that of the person from whom he took it. I need go no further into a consideration of the authorities referred to in the Court of Exchequer Chamber, and in the arguments before your Lordships, and I therefore move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY.—I concur in recommending your Lordships to come to the conclusion which has been pointed out by the noble and learned Lord on the woolsack. The question is really determined by the consideration of three paragraphs in the special case, and a consideration of what has been already held by the courts of law for more than fifty years—since the decision in the case of *Gorgier v. Mievville* (*ubi sup.*)—there having been no decision to the contrary, I believe, from that time to the present. The special case first describes what the scrip is, and then states that it is paid up, and is thereupon scrip which, upon its mere production to the Russian Government, entitles the holder, without more, to obtain a bond for the specified sum, as well as entitling him to interest upon that money which has already been paid in respect of the scrip. It says, in paragraph 7, that

"in the month of February 1874 the plaintiff purchased and paid for 200L. of the said Russian scrip, on which the instalments were fully paid-up in advance, representing the right to receive bonds of the Russian Government to the like amount, and also 300L. of the said Hungarian scrip, on which the instalments were fully paid-up in advance, representing the right to receive Hungarian bonds to the like amount." Paragraph 8 says, "The plaintiff had employed one Herbert Clayton, a stockbroker of the London Stock Exchange, to purchase the scrip in question in the said Stock Exchange, which he did in the ordinary way. It remained in the hands of the said Clayton, as the plaintiff's broker, for disposal, or to be exchanged for the bonds when issued, as the plaintiff should direct, at the time Clayton parted with it as hereinafter mentioned." And then the 9th paragraph says, "The scrip of loans to foreign Governments, entitling the bearers thereof to a bond for the same amount when issued by the Government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by members of the public for over fifty years"—that represents the date of the decision in *Gorgier v. Mievville*. "It is and always has been the usage of such bankers, money dealers, and stock exchanges during all that time to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign Governments or their agents delivering the bonds when issued to the bearers of the scrip." Now in that state of circumstances, the special case having told us how these documents pass, we find that the plaintiff himself is a person who acquired his title to the scrip in question in that way. He acquired his title by instructing a broker named Clayton to go into the market and deal with the scrip in the manner in which the respondents in the case before us have themselves dealt with it, that is to say, that Mr. Clayton discharged his duty towards the appellant by the delivery to him (and with this the appellant was satisfied) of certain Russian and Hungarian scrip fully paid up, without any inquiry whatever as to the preceding title, without taking into consideration whether or not the Russian Government, or Messrs. Rothschild as their agents, could be considered as the persons primarily liable. He was content to receive in the market this document which would entitle him to receive a bond upon its mere production, and in like manner upon his parting with it would entitle any holder to receive a bond in the same way that he himself had become entitled to receive one. He left that document with his broker for disposal, or to be exchanged for bonds as he might think fit to direct. The broker unhappily pawned it for a debt of his own. Now it is also found in the case that these instruments are taken as securities, and pass from hand to hand as such. Here is a gentleman in possession of a document, which on the face of it entitles the holder to receive another document of a different character, a bond instead of scrip, upon the mere presentation of it by him as holder. He knows that if he places this document in the hands of a broker, that broker, if he

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should be told to dispose of it, would do so by simply handing over the scrip, as it had been handed to him for his client, the appellant, when the latter became entitled to it. The person buying of his broker would not be expected to ask, and, according to the course of business and dealing in the market, would not necessarily ask any question as to how the scrip had been acquired, and what the title of the previous owner of it had been. The appellant, therefore, gives the broker scrip which is disposed of every day in the market, and has for the last fifty years been disposed of every day in the market, upon the sole presentation of it by the holder, the seller, or the pledger, to the person to whom he wishes to sell or to pledge it, and that without any suspicion being aroused to suggest the necessity, or even the propriety, of asking a single question further. Can a person who himself acquired the instrument in that manner, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely upon that instrument, but that as soon as he parts with it the holder will, as he did, become in a position to claim those bonds which he might himself have claimed if he had retained possession of the scrip, can he, placing it in the hands of a broker with no instructions whatever, except to dispose of it as he may direct, can he, according to the principle of the cases which were referred to in the course of the argument with regard to limited agency, recover the value of the scrip against a *bond fide* holder for value, when on the face of it that which constitutes, you may say, the authority of the agent, namely the possession of the documents, appears to be sufficient alone for obtaining the bonds in question? I agree with my noble and learned friend on the woolsack in thinking that this case might be disposed of upon that ground alone. But we are brought to the same conclusion if we refer to the decision in the case of *Gorgier v. Mieville*, and consider how that case has been acted upon for the last fifty years, according to the statement contained in the special case itself. In the very able argument of Mr. Benjamin it was pointed out that there was a distinction between that case and the present; but the only difference is this: in that case the court had to deal with the bonds themselves on which the Russian Government was bound to make the payments; in this case we have to deal with an instrument which entitles the bearer to receive those bonds, all the payments on the scrip having been made at the time when it was handed over. Can there be any rational distinction between these two documents? Or, as Bramwell, B., put the question, if a broker was able to go into the market with a portion of the scrip in one hand and a bond in the other, and sell them both, could you hold that there was a substantial or rational distinction to be drawn between the right of a person who so acquired according to the practice of the Stock Exchange the one document, and the right of a person who in the same way acquired the other? I do not think we need go into the nice distinction which Mr. Benjamin so ingeniously laid before us by tracing the gradual extension of the doctrine of the negotiability of instruments. I think it would be sufficient to rest upon the decision in the case of *Gorgier v. Mieville*, and to say that there is no substantial distinction in fact between the instrument in that case and this instrument, which was immediately exchange-

able for money, and intended to be so, and, further, that no sufficient authority is given by the doctrine of principal and agent which would authorise your Lordships to say that a man who gives his agent full power, according to the custom of the market in which he employs him, to dispose of an instrument of that kind, by giving him an instrument which, according to the custom of that market, is passed from bearer to bearer, can be heard at the same time to say: "These are secret instructions, known to me and my agent only, which limit his right to that right which alone I say I have conferred on him as my agent." The appellant having intrusted this document to the agent, and the agent having parted with it according to the custom of the market, and there being a *bond fide* title on the face of it, it seems to me that that title is perfectly good against the appellant.

LORD SELBORNE.—The scrip in this case is not one of those contracts in writing which have their nature, incidents, and effects defined and regulated by English law, so that a judge in an English court is bound, without evidence, to know whether and how (if at all) they are legally transferable, and to reject any evidence of a customary mode of transfer if at variance with the law. It is not like the iron scrip which was the subject of Lord Cranworth's remarks in *Dixon v. Bovill* (*ubi sup.*), nor like the bond in the case of *Orouch v. The Credit Foncier* (*ubi sup.*). The Court of Queen's Bench, in deciding that case, relied upon the distinction between English instruments made by an English company in England and a public debt created by a foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder, on which there cannot properly be said to be any right of action at all, though the holder has a claim on a foreign government. The Russian and Austrian scrip now before your Lordships belongs, in my judgment, to the latter, and not to the former category, and I know of no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country according to any custom or usage which may be shown to prevail, if consistent with what appears on the face of the instrument. Considering it to be clear that the engagement, whatever may be its effect, which appears on the face of this scrip, is that of the foreign government, and not of Messrs. Rothschild, I desire to express my entire agreement with what was said by Lord Romilly, M.R., in *Smith v. Woguelin* (L. Rep. 8 Eq. 198), "It is in my opinion a complete misapprehension to suppose that because a foreign government negotiates a loan in a foreign country it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever be the bondholders. Suppose a French or Belgian company, residing in Paris or Brussels, instruct their agents in London to subscribe for some of these bonds, is the contract between the Peruvian Government and a Belgian company to be regulated by English law because the contract is made by their agents in London, or are the contracts to vary according to the domicile of the subscribers to the

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loan? If the French government should negotiate a loan on certain specified terms, whether negotiated in London, in Brussels, or in Paris, the same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So if the English Government were to negotiate a loan in Paris, or in New York, the English law must be applied to construe and regulate the contract." The special case upon which your Lordships have to decide is silent as to the laws of Russia and of Austria with respect to the character and negotiability of these instruments. They must be construed, as was laid down by Lord Lyndhurst in *The King of Spain v. Machado* (4 Russ. 239), according to the obvious import of their terms; and the special case states, in paragraphs 9 and 10, that they have been largely dealt in, according to the usage which, for more than fifty years, has generally prevailed among bankers, money dealers, and the members of the English and foreign stock exchanges with respect to the scrip of loans of foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the Government. This usage, which is expressly said to have extended to the scrip now in question, and to have been always recognised by the foreign Governments delivering the bonds, when issued, to the bearer of the scrip, has been to deal with the scrip, for the purposes of purchase, sale, and loans of money on security, as a negotiable instrument transferable by delivery only. According to the opinion of Lord Tenterden in *Lang v. Smyth* (*ubi sup.*), the proof of such usage is sufficient to justify the inference that such instruments are negotiable in the states by which they are issued, so as to render evidence of the law of those states unnecessary. Tindal, C.J., added in the same case that the question, when the effect, not of the instrument transferred, but of the transfer of that instrument in England, is in dispute, is not so much what is the usage in the country from which the instrument comes, as that in the country where it was passed. The usage so stated in the present case appears to be the legitimate, natural, and intended consequence, unless there be any law to prohibit it, of that representation and assignment which appears on the face of the scrip itself when construed according to the obvious import of its terms. It is, in its proper nature, a receipt or voucher for the several instalments, the payment of which in full is to entitle the bearer to bonds for the amount therein mentioned. Between the person to whom it was first issued on the payment of the first instalment, and the Russian or Austrian Governments, there was no other contract than this, that in exchange for his money he should receive this document as an instrument intended to give title, not to himself as an original creditor of that government, nor to any other person as claiming title under him by assignment, but directly and immediately to any one who might happen to be the bearer when the time for the delivery of the bond should arrive. The saleable and marketable quality of the scrip depended upon its having this particular nature and character, and to have this nature and character it was necessary that it should be capable of passing from hand to hand as a negotiable instrument. That that was the intention of the Government which issued it can-

not admit of doubt, and the appellant, whose title was so acquired, and every other holder, must be taken to have acceded to the representation upon the face of the document by virtue of which it did obtain general currency, in fact, in the English market, and also in the markets of Europe. I should have no difficulty in coming to a conclusion favourable to the respondents on these grounds; but when the fact is added that upon the delivery of the scrip all the instalments necessary to give a complete right to the 100*l.* stock mentioned on the face of the instrument had been actually paid, the case becomes more clear. After these payments had been made, and receipts for them signed, the scrip was as much a symbol of money due, and as capable of passing current upon the principle explained in the authorities with respect to bank notes, exchequer bills, and bonds, as it would have been if a bond had been actually delivered in exchange for it. It represented, though in a different form, precisely the same amount of indebtedness of the foreign government, which the bond would have done, and I agree with Bramwell, B., in thinking that under the circumstances there is no substantial difference between the present case and *Gorgier v. Mievilla*. I therefore concur in thinking that the judgment of the Court of Exchequer Chamber ought to be affirmed with costs.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitor for the appellant, J. B. Batten.

Solicitors for the respondents, Trinders and Curtis Hayward.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Saturday, April 29.

(Before JAMES and MELLISH, L.JJ. and BAGGALLAY, J.A.)

ELLIS v. THE LOCAL BOARD OF BROMLEY. (a)

Enclosure Act—Right to dig gravel from existing pit—Lateral extension of pit—Mode of working gravel pit—Destruction of surface.

By a private Act of Parliament, passed in 1764, for the purpose of extinguishing the right of common over certain commonable lands in the parish of Bromley, it was enacted that it should be lawful for the surveyors of highways of the parish at all times thereafter to cut, dig, gather, take, and carry away any quantity of gravel, or other materials for repairing roads, out of and from any pit or pits then in the possession of the lessees of the lands subject to the rights of common, to be made use of for and towards the making, laying out, or repairing any highway or road lying and being within the said parish, without paying anything for the same; and the surveyors were thereby required to fence in the said pits, and to repair the said fences as occasion should require.

One of the pits mentioned in the Act was situated in

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

a field containing upwards of nine acres. This field had become vested in the plaintiff, who filed a bill to restrain the local board, in whom the powers of the surveyors had become vested, from extending the area of the pit in a lateral direction, and from digging gravel so as to injure the surface of the field. There was no evidence as to the condition of the pit at the date of the passing of the Act, but it was proved that in 1826 the extent of the pit was one and a half acres, that it had been enlarged to two acres in 1862, and that since that time it had been further enlarged, such enlargement being made by destroying the surface and digging out the gravel.

Held (reversing the decision of Jessel, M.R.), that the Act gave power to get the gravel in the ordinary mode of working a gravel pit, and that, as the evidence showed that this gravel pit had been usually worked by extending its area, the defendants were entitled to continue working the pit in that way, although the surface was thereby destroyed.

This was an appeal from a decision of the Master of the Rolls.

By a private Act of Parliament passed in 1764 (4 Geo. 3), entitled "An Act for extinguishing the rights of common in, over, and upon certain commonable lands and grounds within the manor and parish of Bromley, in the county of Kent," after reciting that there were within the manor and parish of Bromley certain commonable lands and meadow grounds, whereon the freeholders and inhabitants of the said parish had right of common and pasture from the 10th Oct. to the 5th April in every year; that the Lord Bishop of Rochester was, in right of his bishopric, lord of the manor, and that William Scott was, by virtue of a lease granted by the said bishop, possessed of all the said commonable lands and meadow grounds; and that the said lands and grounds in their then situation, were incapable of improvement, and it would be advantageous to the said William Scott, and to all persons having right of common or common of pasture in, over, and upon the said lands and grounds, if the said right of common or common of pasture was extinguished, and a proper recompense and satisfaction was made to the said persons for their right of common or common of pasture thereon; it was enacted that from and after the 24th June 1764, all rights of common or common of pasture in, over, and upon the said commonable lands and meadow grounds, should cease, determine, and be for ever extinguished; and that the yearly rent of 40*l.* should be issuing and going out of all the said commonable lands and meadow grounds, to be payable and paid by the said William Scott, and all and every other person and persons who should or might be possessed thereof, to the churchwardens or overseers of the poor of the said parish of Bromley for the time being, in lieu and satisfaction of, and full compensation for, such rights of common. And the Act contained the following enactment: "That from and after the 24th day of June 1764, it shall and may be lawful to and for the surveyor or surveyors of the highways of and for the said parish of Bromley for the time being, from time to time and at all times thereafter, to cut, dig, gather, take, and carry away, or cause to be cut, dug, gathered, taken, and carried away, any quantity or quantities of gravel, or other materials for repairing of roads, out of and from any pit or

pits now in the possession of the said William Scott, and lying and being within the said parish, to be made use of by him or them, or as he or they shall direct, for and towards the making, laying out, or repairing any highways or road lying and being within the said parish, without paying anything for the same; and such surveyor or surveyors is and are hereby required effectually to fence in the said pits, and to repair the said fences, as occasion shall require, or cause the same to be done, in such manner as to prevent any mischief or accident happening therein."

One of the pits mentioned in the Act was situated in a field containing upwards of nine acres, and called the Great Page Heath Field, over the whole of which a stratum of gravel thirty feet thick extended.

By an award made in 1826 under the provisions of the Bromley Enclosure Act of 1821, this field and the gravel pit therein were allotted by way of exchange to one Wells, of whom the plaintiffs in the present suit were the successors in title.

The plaintiffs filed their bill against the Local Board of Bromley, in whom the rights and duties of surveyors of highways for the parish of Bromley had become vested under the provisions of the Local Government Act 1858, which were adopted by the parish in 1867.

The bill prayed that the defendants, their servants, workmen, and agents, might be restrained from further extending the area of the said gravel pit in Great Page Heath Field in a lateral direction, and from digging, cutting, gathering, taking, or carrying away any gravel or other materials for repairing of roads from or out of the said pit in such manner as to break up, destroy, or injure the surface of any part of the adjoining lands belonging to the plaintiffs.

There was no evidence as to the condition of the gravel pits at the date of the passing of the Act of 1764, but a comparison of the award of 1826 with the Ordnance survey in 1862 showed that the area of this pit had been extended from 1*a.* 2*r.* 12*p.* in 1826 to 2*a.* 0*r.* 9*p.* in 1862.

The effect of the evidence as to usage is sufficiently stated in the judgments of Jessel, M.R. and Mellish, L.J., *infra*.

The cause came on for hearing before the Master of the Rolls on the 21st Feb., when, after a protracted argument, his Lordship, without calling for a reply, delivered the following judgment: This case has been argued in such a manner and by such eminent counsel, that I cannot help suspecting that what is very plain is very difficult to understand. Had it not been for the argument, I should have thought it very clear indeed. A pit means a hole; and when I say so, I have before me the only general Act of Parliament which had been passed relating to supervisors of highways taking gravel or materials for road-making from gravel pits. I allude to the Act of the 5 Eliz. c. 13, which gives power to the supervisors of highways to get stone out of open quarries, and, if there are not open quarries, to dig for gravel and other materials on the lands next to the highways, not being houses, gardens, orchards, or meadows. Then it says: "It shall not be lawful to any such supervisor or supervisors by virtue of this Act to cause any rubbish to be digged out of any quarry or quarries, but only shall extend to such rubbish as shall be found there ready digged by the owner or

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owners of the said quarry or quarries, or otherwise by his or their licence and commandment; (2) nor shall not extend or give authority to any supervisor or supervisors to dig or cause to be digged any gravel, sand, or cinders in the house, garden, orchard, or meadow of any person or persons; nor that it shall be lawful by this Act to any such supervisor or supervisors to cause any more pits to be digged for gravel in any several and enclosed ground than one only; and that the same pit or hole so digged for gravel as is aforesaid shall not in any way be in breadth or length above ten yards over at the most: (4) and that every such supervisor as shall cause any such pit to be made and digged for gravel, sand, or cinders as is above said, shall within one month next after any such digging or pit made, cause the same to be filled and stopped up with earth, at the costs and charges of the parishioners." If not, he shall pay five marks to the owner. Here I have an Act of Parliament *in pari materia*, and it describes a pit as being a hole. That is my understanding of the word "pit." Then we have the particular Act of Parliament in question in the present suit, which is an Act of Parliament passed in 1764. It recites that the Bishop of Rochester, in right of his see, or as rector of the parish, is entitled to the manor; that in that manor there is a large quantity of Lammas land; that one William Scott is lessee under the bishop—no doubt he was lessee of the manor, although he is called lessee of the land;—that the freeholders have a right of common over the land from October to April in every year, and that it is very desirable to get rid of the right to common; and it enacts that the right of common shall cease, and that a rent of 40*l.* a year shall be paid to the parishioners in compensation for the loss of the right of common, which makes the whole a fee simple in the bishop, subject to the lease to Scott. And then it enacts: [His Lordship read the clause above set out, giving the surveyors power to get gravel from the pits, &c., and continued:] Now, as the law then stood under the Act of Elizabeth which I have mentioned, this being land in the neighbourhood of a road, the surveyor had a right to dig for gravel. It was not an orchard, or a house, or a garden, or a meadow, and he had a right to dig for the gravel subject to restrictions: he could only dig for a month, and he was to pay five marks if he did not fill in the pit or hole next after the expiration of one month. That was his position. Now what the Act of 1764 says is this: Instead of being limited to a month, he is to dig as long as he likes, that is, as long as the gravel will last, and, instead of paying for it, he is to take it for any period he likes without paying anything for it. Instead of being limited to making a hole ten yards across in each way, he is to take it out of any of the pits now in the possession of William Scott. That is all. Now I was gravely asked to say that this power to take gravel out of Scott's pits empowered the surveyors, if the gravel failed in the pit, because they had dug down to the bottom, to dig laterally in the neighbouring land which adjoins it, and to take gravel at their will and pleasure, without any limit, from the sides of the pit. And they actually say that the only possible limit is the extent of the field, which happens to be 9½ acres, or thereabouts. All I can say is that, if I understand language, there is no foundation for any such contention. The right

to take gravel or other materials out of a hole means to take it out of a hole, and not to make the hole larger by taking it out of the neighbouring land, so that, although it may contain a part of the old hole, it is a new one. The Act empowers them to take gravel out of the hole then in the possession of William Scott; but the hole they have formed was not in his possession, but is another hole. It appears to me that there is no doubt and no ambiguity in the Act of Parliament. But the Act does not stop there, for it goes on in this way: "And such surveyor or surveyors is and are hereby required effectually to fence in the said pits"—to fence in the pits in the possession of William Scott. If I put a fence round a hole at the top of it, when it is fenced in the hole is defined, and there is no doubt what the extent of the hole is. There is no power to take down that fence—which is the theory of the other side—and make a new fence; it is quite true that they are "to repair the said fences as occasion shall require, or cause the same to be done in such manner as to prevent any mischief." What is the mischief? It is to prevent animals and people from falling down into the pit: that is what the fencing is for. It does appear to me that that requires the surveyor before he digs anything to fence in the pit; he is not to dig until he has fenced in "the said pits now in the possession of William Scott." I must say, to me it is remarkably plain. But I have sometimes thought things very plain on points of construction, and I have found other judges differ from me, and it may be so in this case; but I do think it plain beyond any controversy, as far as I am concerned, that the right to dig gravel out of a hole in William Scott's possession does not mean out of any hole which the people who have a right to take gravel may choose to make. Then I was asked to assume that the gravel was all worked out of the hole when the power was given. I must say that is too absurd. I cannot assume anything of the kind. No doubt there was plenty of gravel. The stratum of gravel was thirty feet thick, and even now it is not worked out, although it is not so good or so easy to work lower down, and it may be more expensive to get it. As I understand, there are several feet of gravel at the lowest part of the hole remaining unworked, and no doubt there was a great deal there at the time of the passing of the Act of Parliament. To my astonishment—and it is not the least marvellous part of the case—there is a prescription pleaded, that under the Prescription Act the surveyor of highways has a right to take the gravel out of the enlarged hole. Mr. Bagshawe said that there was an ambiguity in the Act of Parliament, and that, therefore, evidence of usage was admissible to explain it. I do not see the ambiguity; and, in the second place, I have no evidence of contemporaneous usage. The evidence only goes back to just before 1830; and, as I understand it, what has happened has been this. The owners of the soil have themselves worked the gravel, and in working it have enlarged the hole, and all that has ever been done has been, as far as I can see, for the surveyors of highways to take some gravel out of this enlarged hole. The right to enlarge it independently does not seem to have been claimed. Then it is said that the surveyors must have gravel to repair the roads. The answer is that they cannot have it longer than it exists. The owner may work out all his gravel at once if he

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pleases. It cannot be said that it will last one year, or ten years, or fifty years. The surveyors are limited: they can only take what is necessary for repairing and maintaining the roads. The owner's right is unlimited, and therefore the surveyor's right may be of a very temporary character, and of little value. Then it is said that they have in fact enjoyed this right without dispute. What does that mean? If they have done this without right, that will not give them a right by prescription. It is not an unknown thing for surveyors of highways to act in this way. They take gravel from commons or waste places without anybody interfering. The whole right comes to this, that they have done it without being remonstrated with. There was no attempt, and there could be no attempt, to carry this usage back to 1764. The fact that they have done this for 30 years does not show that they had any consent to do it before. This is not a case where usage from time immemorial is presumed from usage for a period of 20 or 30 years, for this could not be from time immemorial. As to contemporaneous practice, there is no evidence. It appears that the theory of interpreting an ambiguous document by contemporaneous practice does not apply when you have no evidence of contemporaneous practice. This practice may have existed in 1827 or 1828, but I cannot help observing that there is no old inhabitant called to carry the practice back further. As far as I can see, the defendants have no case whatever, for I think their right does not go beyond the Act of Parliament, and the Act of Parliament restricts their right to the particular pit or pits in possession of William Scott. I have one more observation to make. It has been said that this pit has been worked ever since 1764. There is no proof of that. I can see from the Act of Parliament that there were several pits, I do not know how many, in the possession of William Scott at the time the Act passed. The words of the Act are, "out of or from any pit or pits," which seems to me to show that there were more than two; the word is not "either," but "any," pit or pits. It is known that there were two, and it looks as if there were more than two; but I cannot tell whether the other pit or pits have not been worked, and perhaps they did not have recourse to this pit until comparatively lately—30 or 40 or 50 years ago. What is the limit to the claim here? In this case it is the $9\frac{1}{2}$ acres of which the field consists. But what is to happen to the other pits? I have no evidence about the boundary of the other pits on the enclosed lands. It is not sufficient to say, We can suggest a boundary for this pit, because this happens to be a field of $9\frac{1}{2}$ acres. What do you say to the other pits? Where are your boundaries there? As I said before, the case appears to me plain, therefore I shall grant an injunction.

From this decision the defendants appealed.

Bagshawe, Q.C. and *Speed*, for the appellants.—The words of the Act empowering us to take the gravel are very wide and do not restrict us in any way, except that we can only use what we take for making or repairing highways or roads within the parish. The words are "cut, dig, gather, take, and carry away;" and they clearly authorise us to take the gravel in a lateral direction. The evidence shows that we are only working the pit in the way in which it has been worked as far back as living

memory extends; and *Waterpark v. Fennell* (7 H. of L. Cas. 650) shows that, if there is any ambiguity in the words of the Act, evidence of usage is admissible to explain them.

Davey, Q.C. and *C. P. Ilbert* for the plaintiffs.—The defendants claim a right to destroy the surface of our land, and they must prove an express grant of such a right. In *Bell v. Wilson* (14 L. T. Rep. N. S. 115; L. Rep. 1 Ch. 303), where a conveyance reserved to the grantor all mines and minerals, it was held that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry; and yet the conveyance reserved to the grantor very full liberty to "dig, bore, work, lead, and carry away" the minerals; and there was evidence that the usage of the country was to work freestone by open quarry. Therefore that is a strong case in our favour. In *Wakefield v. The Duke of Buccleuch* (23 L. T. Rep. N. S. 102; L. Rep. 4 E. & L. 377) the House of Lords held that the lord of the manor had power to let down the surface on making compensation; but it was only because the conveyance there contained a provision as to compensation for destruction of the surface that the House of Lords held there was a right to let down the surface. In *Hext v. Gill* (27 L. T. Rep. 291; L. Rep. 7 Ch. 699) Mellish, L. J., in delivering the judgment of the court, said with reference to *Wakefield v. The Duke of Buccleuch*: "I think that no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion." That is also strongly in our favour; but the words of the Act which require the surveyors "to fence in the said pits and to repair the said fences as occasion shall require" conclusively show that it was intended that the area of the pits should not be enlarged beyond their limits at the time of the passing of the Act. [JAMES, L.J.—That does not seem so to me, for the words "as occasion shall require" may apply to the fencing as well as to the repairing of the fences.]

F. Stevens, for a defendant in the same interest as the appellants, took no part in the argument.

Without calling for a reply,

JAMES, L.J. said: With all proper deference to the opinion of the Master of the Rolls, I confess I do not agree with his decision. The gravel pits which are the subject of this appeal are expressly referred to in the Act of Parliament which was passed in 1764 for the purpose of extinguishing the right of common over commonable lands within the manor of Bromley. When this Act was passed, gravel had been dug from parts of the manor for the repair of the roads and for other purposes. The terms of the Act referring to these pits are as follows: "From and after the 24th day of June 1764, it shall be lawful for the surveyor or surveyors of the highways of the said parish of Bromley for the time being, from time to time and at all times thereafter, to cut, dig, gather, take, and carry away any quantity or quantities of gravel or other materials for the repairing of roads out of and from any pit or pits now in the possession of the said William Scott, and lying and being within the said parish, to be made use of by him or them, or as he or they shall direct, for and

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towards the making, laying out, or repairing any highway or road lying and being within the said parish, without paying anything for the same; and such surveyor or surveyors is and are hereby required effectually to fence in the said pits and to repair the said fences as occasion shall require, or cause the same to be done in such manner as to prevent any mischief or accident happening therein." That is, they are to be at liberty to get out of and from any of the pits gravel or other materials. That really seems to be the true meaning of the section of the Act which says that they may cut, dig, gather, take, and carry away gravel. To "cut" implies something more than digging out of a hole. The Master of the Rolls seems to have been of opinion that a pit must be something in the nature of a hole in the ground which can be worked by means of a shaft or well; that they must go down by the shaft and work out the gravel, or whatever it may be, by mining operations. In my opinion it is not working by a shaft or well that is intended to be referred to here by the word "cut." If you turn the words used into Latin-English, the meaning of the Act is plain enough, and that is that they are to be at liberty to excavate gravel or other materials out of and from an existing excavation. It is, of course, utterly impossible to take gravel from an existing excavation without either deepening it or enlarging it laterally. I am not aware of any principle of our law, or of anything arising out of the natural fitness of things, which would require the gravel to be taken from the north, or south, or east, or west side of the pits, or to be taken vertically or laterally. It appears to me that what was intended by the Act of Parliament was that the pits should be worked or excavated in the ordinary and reasonable manner in which they had, at the time the Act was passed, been done. The persons who have given evidence on the part of the defendants have given evidence showing that the usual mode of working such pits is by a roadway being made into the pit, for a cart to go down and gather up and take away the gravel. In the ordinary course of such operations, carried on for a number of years, the pit is necessarily either deepened or extended laterally. There is nothing, either in the bill or in the evidence, to show that anything has been done by the defendants otherwise than they were entitled to do according to the ordinary mode of user of a gravel pit. Reference was made by counsel to those cases which show that, in mining or excavating minerals and things of that kind, the persons who do so must leave a support to the surface. That, however, has application only to mining properties, and not to gravel pits, which must ordinarily be entirely open from the top to the bottom. I am, therefore, of opinion that the defendants have done nothing but that which they were authorised to do by the Act of Parliament.

MELLISH, L.J.—I am of the same opinion. It seems to me that the whole question in dispute really turns upon this, What is the meaning of the words of the Act which say that "it shall be lawful for the surveyor or surveyors of the highways of the said parish of Bromley for the time being from time to time and at all times thereafter, to cut, dig, gather, take and carry away any quantity or quantities of gravel or other materials for the repairing of roads out of and from" certain pits? Upon these words the question arises, What is the

meaning of cutting, digging, and taking away gravel? My understanding of the working of a gravel pit is that the gravel may be taken either from the bottom or from the sides of the pit. Gravel taken from the sides of the pit is just as much gravel taken from the pit as gravel taken from the bottom of it. I think it is impossible to draw any distinction between the one mode of taking it and the other. The Master of the Rolls, in my opinion, put too narrow a meaning upon the word "pit." What is the natural and ordinary meaning of a gravel pit? I take it to be this, that it merely means an excavation from which gravel may be got. Whether the gravel is taken from the pit laterally or vertically, it is still a gravel pit within the meaning of the Act. It was said in the course of the argument that no express power was given by the Act to take gravel from the surface. But, even if no express power be given to take away the surface of the soil under which the gravel is, yet it was said, on the other side, if a right to take that gravel is granted, that is as strong as a power to take the surface, and I quite agree with that. If the right were given to take the gravel which was in the pit, and which extended absolutely, as I understand, up to the top of the ground, except in so far as it was covered by a mere surface of mould, it necessarily follows that the right of affecting the surface of the soil, in so far as necessary, was also given. Then, with regard to the evidence as to the mode of user, if it had been found that in working this gravel pit for a series of years after the passing of the Act, say up to the year 1860, the gravel has always been worked without enlarging the area of the pit, but that then in and from 1860, because the roads in the parish of Bromley had largely increased, and more gravel was consequently required, the surveyors of the parish, or the defendants, had begun to enlarge the area, then an argument might arise as to whether the mode in which it is now worked by the defendants is different from that in which it was worked in 1764. That sort of argument, however, is met by the evidence which has been given on the part of the defendants, which certainly goes to show that, so far back as living memory extends, the gravel of the pit has always been got in the same manner as it is now—namely, by digging and by enlarging the area. That is proved by what is called the evidence of the oldest inhabitant. If evidence is given, say, by a man who says he is seventy years of age, and that he has always lived in the parish, that gravel has always within his memory been got from the pit in the mode in which it has been got since, say the year 1860, by the defendants, such evidence points to the conclusion that the mode in which the gravel has been got since 1860 is the same as the mode in which it was got by the owner previous to the passing of the Act, and afterwards by the surveyors. I think that the evidence shows that the gravel pits were not worked in any different manner in 1860 from that in which they had been worked at any time previously, and my opinion is that the defendants have a right to take the gravel in the ordinary way, even if doing so does enlarge the area of the pit. I think the limit, and the only limit, is as to the means in which gravel is ordinarily got. For instance, I do not think they could, if the gravel were exhausted at one part of a pit, by tunnelling or mining go through a hundred yards of earth to

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get to the gravel which was known to be under a different part of the surface. My opinion, therefore, is that, so far as they can get it, and until they come to the end of the gravel, they may work it in the ordinary way.

BAGGALLAY, J.A.—In my opinion it has not been established that the Bromley Local Board have acted in excess of their powers which are derived under the Act of 1764. What was the purpose for which the power of taking gravel from the pits was conferred? Not only to enable the surveyors of the parish of Bromley to repair the then existing highways and roads, but also to make new highways and roads in the parish. Since the passing of the Act the roads and the highways in and about Bromley have been largely increased, and now amount to a length of twenty-seven miles in the aggregate. By the terms of the Act I think it was to be a perpetual right to take the gravel for this purpose for all the time during which the gravel would last; otherwise the Act would have stated to what extent it was intended that the gravel should be taken. The next thing to consider is what is the effect of the right conferred by the Act of Parliament. It is true that the pits referred to were situated on land which was Lammas land, over which there were common rights. I think, however, that the words of the Act giving the power of digging gravel from the pits which were then in existence, show that it was intended to confer the right to take gravel sufficient for the purposes indicated by the Act, and that this appears by the words "cut" and "dig." These words not only give the right to carry the pits lower down, in order to get the gravel which was there, but also to take gravel from the pit's side, and by so cutting the gravel at the side to enlarge the area of the pits. But, of course, this was a right which was to be exercised in a proper and reasonable, and not in an oppressive, manner. There is no suggestion that what the defendants have been doing has not been done in a fair manner, assuming of course that they have the right to extend the area of the pits. An argument has been raised upon the terms of the clause in the Act with reference to fencing the pits. It has been contended that the provision in the Act requiring the surveyors to effectually fence in the pits and repair the fences as occasion should require, in such a manner as to prevent any mischief or accident happening, pointed to a fencing in of the pits as they existed at the date when the Act was passed; that the repairs were confined to the fences which had been put up in the first instance, and that those words therefore precluded the enlargement of the pits. But I read the words of the Act of Parliament as requiring this fencing to be done as occasion should require, these words equally applying to new fencing to be thereafter put up, as to keeping in repair the fences already existing; that is, that the new fencing was to be kept in repair exactly as the previous fencing was. It has been suggested, also, that the construction of the words of this clause of the Act for which the defendants, the surveyors, contend, has the effect of placing an unreasonable burden upon this small piece of land, and that in process of time, if the surveyors' contention were right, three acres out of the nine acres of land in respect of which this question has arisen might be

taken up for the purpose of supplying gravel for the repair of the roads in the parish. But when this right of taking gravel was conferred it must be borne in mind that the portion of land in which the pit is situated was not nine, but 300 acres of land. The bill must, therefore, be dismissed with costs. *Appeal accordingly allowed.*

Solicitors for the appellants, *Stoneham and Legge*, agents for *Latter and Willett*, Bromley.

Solicitors for the respondents, *Ellis and Ellis; Stevens*.

SITTINGS AT WESTMINSTER.

Monday, May 1.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., DENMAN, J., and POLLOCK, B.)

WHITELEY v. TAYLOR. (a)

Copyhold lands—Contract of sale—Title—Admission of vendor—Deposit.

In an agreement for sale of certain copyhold property the vendors contracted to give such title as they possessed at the time of the agreement "to extend over twenty years." The vendors were assignees of an unadmitted devisee, and had a complete equitable title, but refused to get in the legal estate on the ground that they were not bound to do so under the above mentioned contract. A second term of the agreement was that "purchaser was to prepare his own conveyance and surrender at his own expense."

Held (affirming the decision of the Queen's Bench Division), that the purchaser was entitled to a surrender of the legal estate, and that vendors must pay all fines necessary to enable them to make such a surrender.

APPEAL from the Queen's Bench Division.

This cause was tried at the Manchester Spring Assizes 1874, before Mr. Justice Denman, when by consent of parties a verdict was found for the plaintiff, for 93*l.* 1*s.* 9*d.* and 40*s.* costs of suit, subject to the opinion of the court upon a special case to be stated.

The chief facts as stated in the special case were as follows:

5. An agreement was made on the 29th Sept. 1871, between the defendant, who was one of the trustees and devisees of Samuel Butterworth, deceased, and of James Henry Butterworth, deceased, and the plaintiff for the sale of an estate called Upper Shaw, for the sum of 650*l.*

6. The above agreement was not intended to be a final agreement between the parties, and on the 3rd Oct. following, the plaintiff paid to the defendant a deposit of 65*l.* in respect of the said purchase, and entered into the following further agreement, dated the 29th Sept. 1871.

Between the trustees and the devisees of Samuel Butterworth, deceased, and James Butterworth, deceased (hereinafter called the vendors), of the one part, and Joseph Whiteley, of Rippenden (hereinafter called the purchaser), of the other part. The vendors agree to sell and the purchaser agrees to purchase at the sum of 650*l.* all that farm called Upper Shaw, in Soyland, upon the terms and conditions following:

1. The vendors to give such title as they now possess to extend over a period of twenty years.
2. The purchaser to prepare his own conveyance

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and surrender at his own expense, and pay for all acknowledgments of married women and all costs for examining deeds and journeys, and also costs for abstract of title.

3. The vendors to receive the current half year's rent.

9. James Radcliffe, the purchaser, under a deed of 22nd Dec. 1851, had been in possession of the rent and profits of these premises for twenty years, and was willing to join in the conveyance to the purchaser.

11. Requisitions on the title were delivered by the plaintiff to the defendant on the 3rd Jan. 1872, and answers were received, which are appended hereto.

15. The question for the opinion of the court is whether the title disclosed entitled the plaintiff either to rescind the contract and sue for his deposit, or to sue the defendant as for a breach of contract in not furnishing a title in pursuance with his contract.

From the abstract of title which was attached to the special case, it appeared that the title was traced through Samuel Butterworth, who had the legal estate in 1855, the year of his death. He devised it to Sarah Butterworth with a devise over to Geo. Mills and others on certain trusts.

Sarah Butterworth died in 1856. In 1870 new trustees were appointed, and they are parties to the present sale.

From the replies to the requisitions, it appeared that neither Sarah Butterworth, nor George Mills, nor the new trustees had ever been admitted. In reply to the requisition that the title should be perfected by their admission, the vendor refused this except at the purchaser's expense.

Whereupon plaintiff brought his action for the recovery of his deposit and expenses.

The Court of Queen's Bench gave judgment for the plaintiff. Against this decision the defendant now appealed.

Edwards, Q.C., and *Henn Collins* in support of the appeal.—The vendors are assignees of an unadmitted devisee and owners in possession. By the other side it is argued that because we cannot surrender without admittance we cannot give any title at all. As a matter of fact, all the vendors have contracted to do is to give such title as they now actually have, and that title is to extend over twenty years. Now, a good title in equity is one thing, a good title at law is another; the vendors have the first, and that is the title they have contracted to sell. The other they cannot get without paying one or two fines, and that they are willing to get at the purchaser's expense, but it is not the title they now have. Merely general expressions may not bind the purchaser, but he is bound by a clear stipulation as to title (1 *Dart V. & P.*, 150, 5th edit.) In support of this he cited

Freme v. Wright, 4 Madd., 364;

Wilnot v. Wilkinson, 6 B. & C., 506;

Ashworth v. Mounsey, 22 L. T. Rep. 121; 9 Exch. 175.

In the court below the case was made to turn upon the position we were in under the Wills Act (1 Vict. c. 26, s. 3) as unadmitted devisees. We have given and shown a title for twenty years, and we cannot nor have we contracted to give better. [JESSEL, M.R.—Have you ever seen a conveyance of a title? Right title and interest no doubt are often combined, but an assignment of a title is not common.] The word title appears to have been

used in the sense given it in the case of *Freme v. Wright* (*ubi sup.*)

Herschell, Q.C. and *Crompton*, for the plaintiff, were not called upon.

JESSEL, M.R.—In this case it does not appear necessary for us to decide the question upon the third section of the Wills Act, and I do not wish to express assent or dissent to any cases that may have been decided under that section by the Court of Queen's Bench. In this particular instance the vendors are at most assignees in the second degree from an unadmitted devisee. It is evident, therefore, that they cannot possibly surrender so as to admit the plaintiff. Is the purchaser entitled to a conveyance of the legal estate? There is no question whatever that the vendors have a complete equitable title in the property, and can convey a perfect equitable estate, and what they assert is that the purchasers cannot compel them to get in the legal estate. On the first clause of the contract two questions arise, for it stipulates that the "vendors shall give such title as they now possess," but it is asserted that that is modified by the remainder of the clause, "to extend over a period of twenty years." But that may mean, and probably does mean, that the vendors are not bound to deduce a title for longer than twenty years. The next part of the agreement appears to settle very distinctly, however, what was the real intention of the parties, for that states that "the purchaser was to prepare his own conveyance and surrender at his own expense." That surely shows there was to be a legal conveyance of the copyhold, but, though providing for the costs of such conveyance, it does not include the payment of fines. The appeal must be dismissed with costs.

KELLY, C.B.—I am of the same opinion.

MELLISH, L.J.—This is an agreement to sell a farm, and that would imply that a good title was to be sold, but to what extent the vendor was bound to give a good title, is specified by the conditions attached to the agreement. If the vendor has a good title he must convey it. The object of the conditions is to protect the vendor if he has not a good title. If he is doubtful about the title, and thinks he can only sell a possessory one, he states in the agreement that he has had that possessory title for a period of twenty years. But, as a matter of fact, the vendor has a good title, and, therefore, the qualifications in the agreement mean nothing at all. The vendor must give the most perfect title that is within his power.

DENMAN, J. and POLLOCK B., concurred.

Appeal dismissed with costs.

Solicitors for plaintiffs: *Paterson, Snow, and Burney.*

Solicitor for defendant: *G. E. Forster.*

Wednesday, May 10.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and POLLOCK, B.)

WRIGHT (clerk) v. DAVIES (clerk). (a)

Ecclesiastical dilapidations—Statute 34 & 35 Vict. c. 43—Exchange of livings—Mutual releases—Simoniack contract.

After the passing of the Ecclesiastical Dilapidations

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

Act of 1871 (34 & 35 Vict. c. 43) an agreement was entered into by the plaintiff and defendant for the exchange of the livings they then held, and one term of such agreement was that neither party should make any claim upon the other for dilapidations.

At the time the agreement was made it was stated by the defendant to the plaintiff that the necessary repairs would be about equal in amount for each of the benefices. This, however, proved otherwise, but there was no allegation of fraud.

It was now sought to set aside the agreement as being against public policy and in its nature simoniacal.

Held (affirming the decision of the Common Pleas Division), that the agreement was not in contravention of the Ecclesiastical Dilapidations Act of 1871, also that the term in the agreement as to dilapidations was merely ancillary to the contract for the exchange, and that the contract, therefore, was not simoniacal or invalid.

This case came before the court upon appeal from the Common Pleas Division.

The defendant was incumbent of Gisburn, in the county of York and the plaintiff was vicar of the parish of St. Mary's, in the county of Huntingdon, and subsequent to the passing of the Act of 34 & 35 Vict. c. 43, they mutually agreed to exchange livings. In 1874 the plaintiff found that the amount of dilapidations for the parish of Gisburn was 247l. 19s. 6d., and for this amount he sought to make the defendant liable.

To a declaration to that effect the defendant pleaded the terms of the agreement for exchange of livings entered into with plaintiff.

To this plea the plaintiff in his replication said: That the repairs necessary for the parish of St. Mary's amounted to the sum of 32l. 10s., and the plaintiff further says that at the time of making the said alleged agreement and exchange the defendant represented and stated to the plaintiff that the repairs of the buildings of his the defendant's said benefice of Gisburn were merely nominal, or equal in amount to the repairs of the plaintiff's said benefice of St. Mary's, and the plaintiff further says that such agreement was made by the plaintiff on the faith and belief that such representation of the defendant was true and correct and not otherwise; whereas, in fact and in truth, the repairs of the defendant's said benefice of Gisburn amounted to the sum of 247l. 19s. 6d., as the defendant knew or ought to have known, and such statement and misrepresentation and such alleged agreement was and is an evasion of and in contravention of the said Act.

This replication was demurred to by the defendant, and such demurrer was argued on the 20th Jan. 1876, and upheld by the court (Lord Coleridge, C.J., Brett and Denman, JJ.).

Against this judgment plaintiff now appealed. (The facts of the case and the judgment below will be found fully reported 33 L. T. Rep. N. S. 858).

Baylis, Q.C. (C. Crompton with him) for the appellant.—The plea in this case is bad and the replication good. The decision in the case of *Goldham v. Edwards* (16 C. B. 437; 25 L. T. Rep. O. S. 198; 24 L. J. 189, C. P.; 17 C. B. 141, Ex. Ch.) was prior to the Act of 1871. The plea in this case is copied from that one, but the law is now different. [JESSEL, M.R.—If you rely upon misrepresentation in equity it is an allegation of

fraud which is sufficient to avoid the contract, or it is nothing at all. This is a contract which cannot be rescinded; it has no relation to equity.] It is only stated as an answer to the plea. The law before the passing of this Act was that an action on the case, and therefore one for damages, could be brought against the late incumbent or his executors, but debts would take priority over damages. But now this is changed into an action for debt against the late incumbent or his representatives. There were also two other methods of proceeding, by deprivation and by sequestration. [JESSEL, M.R.—Under the old law the new incumbent was liable to be sequestrated or deprived of his living, whether he recovered from the old incumbent or not.] Yes, and the Act was to amend this; whereas this agreement would put the parties into the position they would have been in prior to the Act, and it is, therefore, in contravention of the Act. The primary intention of the Act was to protect the benefice and secure the repair of the buildings. The preamble clearly shows that the position of the incumbent is merely that of a trustee for the living; if he receives any money he has to pay it over within a given time to the governors of Queen Anne's bounty; he cannot release the old incumbent in any way. [MELLISH, L.J.—The real question is whether the new incumbent is a trustee of the action or not; if he is, he could never compromise an action of this kind.] It is contended he is. [JESSEL, M.R.—Then he could never accept 10s. in the pound though he may be certain he could not get more. The Act does not say he is to be a trustee of the action, it merely says that if he recovers the money he must pay it over; he must pay the money himself, but the Act does not say he shall recover it from the old incumbent. To say "if you get money it shall be trust money" is different to saying "you shall be a trustee to get the money."] Sect. 39 creates the trust. The 47th section would be rendered a dead letter by an agreement such as this; under sects. 40 and 60 the new incumbent is made liable if the old incumbent does not pay; but this is a new liability only coming into operation after six months. [MELLISH, L.J.—So long as the new incumbent pays, it matters to no one save himself who has provided the money.] I now proceed to the replication that the agreement was simoniacal. [JESSEL, M.R.—If there was any simony it was upon your side. To take a living plus a benefit is not simony, which is what you are complaining of. How can it be simoniacal to say, "I will take a living but won't pay." You allege that you gave about 200l. to get your living, which may be simony, but that cannot make the other presentation simoniacal.] In *Downes v. Craig* (9 M. & W. 166) Lord Abinger appears to suggest that an arrangement of this kind would be simoniacal. On both these grounds, therefore, the judgment of the court below should be reversed.

Gully and Crump, for the respondent, were not called upon.

JESSEL, M.R.—This is an appeal from the Common Pleas Division as to the effect to be given to an agreement entered into between plaintiff and defendant. The questions raised are two. It appears that an agreement was entered into by the parties for an exchange of livings, one term of which was "that no payment of any kind on either side should be made for dilapidations." Now it does not appear what the respective values of

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the livings were, but it is said that the defendant represented that the dilapidations for his benefice of Gisburn were merely nominal, or about the same in amount as for the plaintiff's benefice of St. Mary's, but there is no allegation in the pleadings that this agreement was made corruptly, nor is there anything to show that this arrangement as to dilapidations was anything but merely subsidiary to the contract for the actual exchange, and not itself the motive for the exchange. The plaintiff now finds that he has to pay 250*l.*, whereas the defendant was only to pay 30*l.*, whereupon he says, "I can recover the larger sum from you (the defendant), because my bargain to pay that sum for you is illegal, as it is against the policy of the Act of 1871. I was the bare trustee of the action for the Governors of Queen Anne's Bounty; I could not, therefore, release you from the action, so you are as liable as if no agreement had been made by us." Secondly, it is said that the bargain is a simoniacal one, and that therefore the plaintiff can avoid as much of it as is illegal without avoiding the whole. On the first point it is only necessary for us to consider the true meaning of the Ecclesiastical Dilapidations Act of 1871. Before that Act was passed there was an action for damages for the amount of the dilapidations, and it might have happened that the new incumbent might have recovered the whole amount and put it into his own pocket, and in that way the living might have wholly lost it. The new Act enables the bishop to have the dilapidations surveyed and to point out how the necessary repairs are to be made, and it also enables the new incumbent to bring an action for debt for the amount stated by the surveyor in his report against the old incumbent or his representatives. But when the new incumbent recovers the money he is to pay it over to Queen Anne's Bounty, and whether he recovers it or not, he is still liable to pay the amount within six months, and also to do the repairs, though when done he can get the money back; and even though the amount of repairs might exceed that stated in the surveyor's report, he would be still liable. If he neglected to do the work, then the Governors of Queen Anne's Bounty might do it themselves. The result is that an easy remedy has been provided by the Legislature for insuring the necessary repairs, and the remedies, though themselves simplified, are not changed in substance. The 36th and 37th sections of the Act do not make the new incumbent a trustee of the action, but of the proceeds he may receive from the old incumbent, which is a totally different thing. A trustee of an action cannot release the debtor of a *cestui que trust* from the action; the person released would be still liable; but the question between the trustee releasing and the party released would be quite a different one. Such an interpretation of this Act would also very much interfere with the new incumbent making any compromise with the old one; he could only do it by an appeal to the court, which would be a most undesirable state of affairs. The words of the Act are plain; sect. 36 runs, "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity." The sum is to be a debt, and therefore the creditor can release it. The 37th section says, "The new incumbent shall, as and when he shall recover the

said sum, forthwith pay the amount recovered to the governors; and if and whenever he shall recover any further part of the said sum he shall, in like manner, forthwith pay to the governors the further part so recovered." Now, I am of opinion it would have been much better if the same words had been used in the second clause of this section as in the first, for I am satisfied they mean the same thing, i.e., that "if" and "whenever" mean the same as "as" and "when" in the first clause; neither of these sections says the new incumbent "shall sue," they lay no obligation upon him to recover the money. They make him trustee of the money he has received, and do no more. By the 40th section the new incumbent is bound to pay the balance to the governors, whether he gets it or not. Again, by the 42nd section the new incumbent is bound to have the repairs executed within eighteen months. Then the 47th section, which has been referred to in the course of the argument, depends entirely upon a final certificate having been given; if the new incumbent cannot get that certificate sect. 47 will not apply to him. As to the second point, it is not alleged in the pleadings that the contract is simoniacal; to make it so you must allege that the inducement for the exchange was the payment of money or money's worth, but there is nothing of the kind here, the arrangement as to the repairs is merely ancillary to the contract for exchange, and neither party looked upon it as an inducement or motive. Plaintiff certainly did not for he thought the dilapidations were about equal in amount, and still, even supposing the defendant had known of the difference, he would have been receiving and not giving a consideration. The expression that he "ought to have known" is so vague that it may mean anything; it may mean that he ought to have got a surveyor to make a long and careful examination for which he may have had even to take down part of the buildings, but it surely cannot mean that as a clergyman he ought to have known. The words are too vague and too general. A simoniacal agreement is a corrupt one and a corrupt one of a very bad kind. I do not think we can listen to a suggestion of anything of the kind upon these pleas. The appeal must be dismissed.

KELLY, C.B.—This action arises from an exchange of livings, one of the terms of the bargain being that plaintiff should not call upon defendant to execute any repairs or make good any dilapidations. After this agreement had been entered into, with the assent of the respective patrons and bishops, an order was made specifying the amount of repairs necessary, which was between 200*l.* and 300*l.*, and this action is brought to recover that amount from the defendant. The latter says that the plaintiff is precluded from bringing his action by the above agreement. The case cited (*ubi sup.*) is decisive to show that such an action could not have been maintained prior to the late Act, but it is argued that now the case is otherwise, and that such an agreement as the above is against public policy, and it would be so if it had a direct tendency to violate the provisions of an Act of Parliament. But the effect of the new Act is merely that the new incumbent may maintain an action for debt against the old incumbent, and then there are a series of provisions as to what he is to do with the money he recovers. The Act also contemplates the possibility of this money not being recovered, and then the new

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incumbent is himself liable; that is done for the benefit of the parish. If the money is not recovered the law is not defeated and nullified, for the new incumbent may be compelled to do the repairs, and that is all the Act requires. In case he fails to do them he remains liable for the rest of his life; so there can be nothing against the policy of the law in releasing the old incumbent, when by the 43rd section the right against the new incumbent can be enforced by sequestration. A very clear and sound distinction has been taken by the Master of the Rolls—namely, that he is not trustee for the action, but only for any money he may have recovered from the old incumbent. If the new incumbent receives money he must pay it over; if he does not he remains liable himself, and in either case the law is satisfied. As to the second point that the contract is void for simony or fraud, the answer is clear, in either case the law requires that the charge should be precisely and expressly stated; here there is no express allegation of simony or fraud, and we cannot infer it from obscure language such as this. The judgment of the court below must be affirmed.

MELLISH, L.J. and POLLOCK, B. concurred.

Judgment affirmed.

Solicitors for the plaintiff, *Shaw and Tremellen.*

Solicitors for the defendants, *Norris, Allen, and Carter.*

May 1 and 2.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., DENMAN, J., and POLLOCK, B.)

RAWLEY v. RAWLEY. (a)

Contract—Set-off—2 Geo. 2, c. 23, s. 13—Infancy—Ratification not in writing—9 Geo. 4, c. 14, s. 5.

To a declaration containing the usual money counts, the defendant pleaded by way of set-off money due upon a promissory note. To this plea there was a replication that at the time of the contracting of the alleged debts, the plaintiff was an infant, to which the defendant rejoined that the plaintiff, after he attained the age of twenty-one years, and before action brought, ratified the promise to pay the amount due to the defendant.

Held (affirming the decision of the court below) that the 5th section of 9 Geo. 4, c. 14, applied to set-off, and that as in this case there was no ratification in writing by plaintiff after he came of age of debts contracted while an infant, the plea of set-off could not be maintained.

APPEAL from the judgment of the Queen's Bench Division.

The case was tried at Westminster on the 14th June 1875, before Field, J., when the facts appeared to be shortly as follows:

The plaintiff and defendants were brothers, the sons of an oilman who carried on business at Notting Hill.

The father started plaintiff, then an infant, in the business of a greengrocer at Kensington, and in this business he failed in 1872. He at that time borrowed several small sums from defendant on I.O.U.s, and subsequently borrowed money of a Mr. Cayley, to prevent the shop being shut up, the defendant giving security for the amount, whereupon plaintiff gave defendant a promissory note for 43l., which was to cover money paid to Cayley,

and also various small sums lent by defendant to plaintiff.

In 1872 the father died, and in Feb. 1874, the defendant agreed to purchase the plaintiff's interest in the business carried on at Notting Hill. The amount to be paid for the share of the business was to be referred, and an award was made, under which the plaintiff now claimed 60l.

In Dec. 1873, shortly after he came of age, the plaintiff called with the defendant at the offices of Mr. Tatton, his solicitor, and there, according to the defendant's evidence, verbally agreed to pay the amount he owed to defendant upon the above promissory note.

The verdict was entered for the defendant on the ground that the set-off had been duly ratified by plaintiff, with leave to plaintiff to move to have the verdict entered for himself, on the ground that there had been no sufficient ratification.

The court below had made the rule absolute to enter verdict for plaintiff, and from this decision the defendant now appealed.

Francis Turner (with him the *Solicitor-General*, Sir H. Giffard, Q.C.) for the defendant (the appellant).—Before 9 Geo. 4, c. 14, a verbal promise was sufficient to revive a contract made during infancy; there is, therefore, a right to set-off a debt so ratified, unless that right has been by statute expressly taken away. By the above Act no doubt the right of action has been taken away, but not, as it would appear, the right of setting off a debt only verbally ratified. That there is a distinction between the two cases is evident from *Frances v. Dodsworth* (8 L. T. Rep. 391; 17 L. J. 185, C.P.; 4 C.B. 202) where in giving the judgment of the court, Wilde, C.J., says, "It is clear that that part of the statute which gives a general form of plea did not contemplate a replication; and that, however inconsistent with the general provisions of the Act it would be to allow a scheduled debt to be set-off, yet the statute does not provide for the case; and we are not aware of any admitted principle which will sanction the court in supplying the omission." In *Brown v. Tibbitts* (6 L. T. Rep. N. S. 385; 31 L. J. 206, C. P.; 11 C. B., N. S., 855) it was held that an attorney may set off his bill of costs, notwithstanding he has not delivered a signed bill one month before action—and this is supported by *Harrison v. Turner* (10 Q. B. 482) and by *Lester v. Lazarus* (2 C. M. & R. 665; 5 L. J. 13, Ex.). [JESSEL, M.R.—The right of action is not destroyed in the case of attorneys—it is only suspended. In this Act there is the intention of destroying the right.] The contract is not made void by the Act, but voidable; the remedy is barred, not the debt destroyed. This will appear clearly by comparing Lord Tenterden's Act with 37 & 38 Vict. c. 62. *Gee v. Liddell* (35 Beav. 829). In the 9 Geo. 4 c. 14, the statute deals differently with debts barred by Statute of Limitations and with debts contracted during infancy. To the end of sect. 4 the statute applies to debts barred by the Statute of Limitations which are recited in the Act; but at sect. 5 the ratification of debts contracted during infancy comes into question. But sect. 4 cannot be taken as applying to sect. 5. Probably, if the Act had been a longer or more modern one, it would have been divided under different heads, as in the Lands Clauses Consolidation Act, under which it has been held that the

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various headings were evidence of intention to confine one part of the Act to one subject: (*Brand v. Hammermith Railway Company*, 21 L. T. Rep. N. S. 238; L. Rep. 4 Eng. & I. App. 171.) So here we may take it that set-off is not included in sect. 5 of Lord Tenterden's Act.

Philbrick, Q.C. and *B. T. Reid, contra*, were not called upon.

JESSEL, M.R.—The question we have to decide is simply one of law; and that question is whether an action being brought by a person who was an infant, and defendant pleads a set-off, to which plea there is a replication of infancy, with a rejoinder of ratification, the defendant can avail himself of that ratification although it is not in writing. It is argued that although no action could have been brought upon this ratification, still Lord Tenterden's Act as to ratification does not apply to set-off when pleaded against an infant. In the first place, when we look for the meaning of the Act we find its principal object stated in the title, "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements;" and in the body of the Act we find this enactment, "That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." Now, when the Legislature decides that to make an infant's promise valid it must be in writing, it would be a most singular result if we were to decide that this set-off were good. But it is also clear that set-off is founded upon statute, and the only meaning of that statute is to prevent cross actions. In was not intended to give any new rights to a defendant; all that it did was to enable him to avail himself of the rights he had in the same action in which he was defendant. When the Act says that mutual debts may be set against each other, it means such claims as can be enforced. A debt capable of being set-off, therefore, must be one for which an action can be maintained; and that would be sufficient for us in this case. But in addition to that, we see that the words of the section are that "No action shall be maintained," and these words are not so difficult to interpret as the words of the 21 Jac. 1 c. 16, which says that "All actions of account, &c., should be commenced within six years next after the cause of such action." This merely limits the time within which an action may be brought, and this has been held equally to bar a plea of set-off. It is quite true Lord Tenterden's Act does not alter the words of this law, but what the 4th section of his Act says is, "That the said recited Acts and this Act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise." No action can be brought after a given time still, and I don't see how this clause can apply to set-off in "this Act," unless it be pleaded in an action of this kind. Thirdly, we are bound to follow the literal construction of the Act of Parliament where that is clear and unmistakable, and here it distinctly says this Act shall be deemed to apply to set-off. We must, therefore, treat set-off as if it were for the purposes of this Act equivalent to an

action, and so in the 5th section we must take the word action to mean, or at all events to include "set-off." On all these grounds the judgment of the court below must be affirmed.

KELLY, C.B.—It was extremely desirable that this appeal should be brought before us, as it involves a question of great and general importance, and I am of opinion that on two grounds this demand is altogether barred. In the first place, we must consider the words of the Act itself; they are undoubtedly that "No action shall be maintained whereby to charge any person upon any ratification of a contract made during infancy unless such ratification be in writing." I take the substantial meaning of that section to be that such a verbal promise or revival shall not only be insufficient to maintain an action, but that it shall be of no legal effect whatever. The question is not whether an action shall be maintained, but whether such promise constitutes a revival of the contract. The words that "no action can be maintained" are equivalent to saying that it is not a debt which in any way or under any form or circumstances can be enforced. In the statute of set-off the words are "mutual debts." Is this a debt at all—it certainly was not one during the infancy—has it become one by ratification? And can it be the subject of set-off if not of an action? On both these points the 4th section of the Act aids us: "This Act shall be deemed to apply to any set-off;" that applies to the whole, and therefore to the 5th section. The question must be determined on the literal construction of the statute, and the provisions of the Act are conclusive on the point now before the court. The attorneys' cases cited are different, there is nothing to show that there the action could not have been maintained at some later period. They are analogous to an action on a bill of exchange not due, which can be put in in bankruptcy, although no action can be brought on it. But this case is a totally different one, and this alleged ratification has no legal effect whatever either to support an action or a plea of set-off.

MELLISH, L.J.—I am of the same opinion. The proper construction of the statute of set-off has been fully considered and laid down by Wilde, C.J. in the case of *Francis v. Dodsworth* (*ubi sup.*). He says, "The judicial construction of this section (Q. G. 2, c. 22) has been that no debts can be used by way of set-off under this statute except such as are recoverable by action;" and again, "It seems to me, therefore, that as the debt sought to be set-off by this plea is not, under the existing circumstances, a debt for which the defendant could have maintained an action, it cannot be availably used by way of set-off." That applies directly to the case before us. In order that this should be a "mutual debt" it must be one on which an action could be brought, and this appears to me to be one on which no action can be brought. The only argument on the other side arises from the cases of the attorneys' bills. But they differ from this case—for in them the remedy is only postponed; but Lord Tenterden's Act does not merely postpone debts contracted by an infant, it takes away the action altogether unless they are revived in writing. Therefore, the debt is a mere nullity without a written ratification. On these grounds, as well as on those that have been already mentioned, I think the appeal must be dismissed.

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DENMAN, J.—It is difficult to distinguish the case of *Brown v. Tibbatts* (*ubi sup.*) from the present one, but upon full consideration I find grounds on which it may well be distinguished. That case was decided upon the words of 6 & 7 Vict. c. 73 s. 37, words extremely like those of the section of Lord Tenterden's Act which is under our consideration. It is, however, I think, a legitimate observation that the words were not precisely the same as in the present statute—moreover, the subject-matter was totally different. There the Chief Justice based his decision very much on the ground of long-established practice, but that tells directly in the opposite way in this case. In *Francis v. Dodsworth* (*ubi sup.*) the plea of set-off was held to be on the same footing as the commencement of an action. I am of opinion, therefore, that a verbal ratification in this case is insufficient.

POLLOCK, B.—I am of the same opinion. In my opinion the judgment of this court might be well based on the construction put on the Statute of Limitations and set-off. So far back as *Remington v. Stevens* this question has been settled so far as the Statute of Limitations is concerned. That case is commented on in *Francis v. Dodsworth* (*ubi sup.*). In the latter case it is quite clear that Wilde, C.J. speaks of a well understood construction, and I should prefer to rest my judgment on the authority of that case.

Judgment affirmed.

Solicitors for plaintiff, West and King.

Solicitor for defendant, W. Tatton.

Wednesday, May. 3

RANDALL, SANDERS, AND CO. (LIMITED) v.

THOMPSON.(a)

Stay of proceedings in action—Agreement to refer—Common Law Procedure Act 1854 (17 & 18 Vict. c. 125, s. 11).

The plaintiff claimed from the defendant a certain sum as balance of account for work done. The defendant denied his liability to pay. After some correspondence it was agreed between them to refer the matters in dispute to arbitration. W. was appointed arbitrator, and proceeded with the reference. The evidence on both sides was duly taken, but ten months having elapsed without any award having been made by the arbitrator, the plaintiff refused to be bound by the award, and brought his action to recover the balance of account alleged to be due. The master, at the defendant's request, made an order staying all further proceedings, and the Queen's Bench Division (Blackburn, J. and Field, J., dissentients Quain, J.) confirmed the order on the ground that the agreement to refer was within the provision of sect. 11 of the Common Law Procedure Act 1854. The plaintiff appealed.

Held (reversing the judgment of the majority of the Queen's Bench Division), that the plaintiff was entitled under the circumstances to bring his action, inasmuch as sect. 11 only applied to a subsisting agreement capable of being carried into effect.

Per Mellish, L.J.—Where there is no agreement except to refer a particular dispute about a particular matter, and the agreement has not been made a rule of court, and is consequently

revocable, then, if such an agreement be revoked, it is at an end.

Blythe v. Lafone (1 El. & Bl. 435) followed.

APPEAL from a judgment of the Queen's Bench Division.

This was an action brought to recover the sum of 99l. 6s., a balance of account for work done by the plaintiffs, as builders. On 17th of Sept. 1874, the plaintiffs, by letter, proposed to refer the matters in dispute to arbitration. After some correspondence plaintiffs stated that a Mr. Cox was their surveyor, and defendant stated that Mr. Nixon was his surveyor. After some correspondence between the surveyors acting as agents for the parties, the following agreement to refer was prepared and signed:

12, Dartmouth-street, Westminster. S.W.,

4th Feb. 1875.

Re St. Mark's Church, Walworth.

Dear Sir,—In the above matter a dispute has arisen between the parties respecting the balance due from the defendant (a builder) and the plaintiff, who executed the stonework at the above work. In consideration of the parties not being able to arrange the matter amicably, we the undersigned, acting as the respective surveyors in the matter, beg that you will undertake to arbitrate between us, and do hereby agree that your award shall be final and binding upon both parties, without any appeal whatever, and shall be glad to receive an early appointment from you.—We are, Sir, yours faithfully,

THOMAS NIXON,

2, Dartmouth-street, Westminster, Surveyor for defendant.

JOHN COX,

15, Duke-street, Adelphi, Surveyor to plaintiffs.

The arbitrator accepted the appointment by letter, and proceeded with the reference from time to time, and took the evidence of all the witnesses on both sides. Some ten months or so, however, elapsed without the arbitrator ever making an award. The plaintiffs thereupon repudiated the said arbitration, and refused to be bound by any award, in consequence of the arbitrator having neglected to make an award within a reasonable time, and gave notice of his refusal to be bound by such award both to the arbitrator and the defendants.

The plaintiffs afterwards commenced an action, whereupon the defendant obtained an order from one of the masters, staying all further proceedings therein.

Against this order the plaintiffs appealed to Denman, J., who referred the question—so far as it relates to the applicability of sect. 11 of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125)—to the full court.(a).

(a) Whenever the parties to any deed or instrument in writing, to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which such action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

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The plaintiff afterwards moved the Court of Queen's Bench, when the following judgments were given by Blackburn, Quain, and Field, JJ.:

Blackburn, J.—The question that arises before us in this case is the effect of an agreement made between these two parties. It appears that matters of difference had arisen between them, and they entered into an agreement in writing by which they undertook to refer existing disputes. The agreement is within sect. 11 of the Common Law Procedure Act 1854. In *Blyth v. Lafone* (1 Ell. & Ell. Rep. 435; 28 L. J. 164, Q. B.) it was decided by this court that an agreement to come within this section must be an agreement to refer disputes arising out of an original agreement. On the other hand Willes, J., in *Mason v. Haddan* (35 L. T. 163; 6 C. B., N. S., 526), dissents from the view expressed by the court in *Blyth v. Lafone* (*ubi sup.*), and expresses a doubt whether they meant to decide as they did. We have therefore to decide ourselves which of these two conflicting decisions we will adopt. We are all agreed that the words of the clause are general, and apply to differences existing; and, speaking for myself, I prefer to follow the decision arrived at in *Mason v. Haddan* by the Court of Common Pleas. My opinion is that we have power. What is the meaning of the 11th section? Before that Act the power to refer was but an agreement, which, if broken, could be the ground for an action and damages. This was considered undesirable, so the 11th section of the Common Law Procedure Act was passed. The agreement should be considered of such a kind as to make the bringing of an action a breach. If we are satisfied that the defendant is always ready for arbitration, and there is no reason why the question should not be referred, the arbitration would still be pending, and if for nine or ten months no award has been made the judge would still have power to extend the time for making such an award. No such thing has, however, been done here. Moreover, it is the plaintiff who has given notice that he revokes his authority. Again, though the agreement in question might have been made a rule of court under sect. 17, still the Legislature has left it optional with the parties whether or not they will avail themselves of the provisions. The arbitrator in this case has not made his award, and consequently the agreement to refer has been broken, but if the plaintiff concurs in appointing the same gentleman to go on with the arbitration, the award will be good, and even now he may concur if he so chooses. If the defendant were to decline to join in renewing the arbitrator's authority, that would be a very good reason for applying to us to do away with the stay of proceedings. The power to stay does not depend upon a pending reference, but upon the agreement to refer, and therefore the power to stay in this case was expressly given us by the 11th section.

Quain, J.—I venture to differ with regard to the construction to be put on sect. 11. According to the 15th section the arbitrator was *functus*

proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit, provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require.

officio. It has been well established that prior to the Common Law Procedure Act the parties had always a right to revoke. The first attempt to restrict that power was made in the reign of William III. (9 & 10 Will. 3, c. 15), which had only a very imperfect result, as it was still possible to revoke before the award, even though the agreement had been made a rule of court. By 3 & 4 Will. 4, c. 42, s. 39, where the reference is in pursuance of a submission which contains an agreement that it shall be made a rule of court, there was no power of revocation without leave of the court, and that was the position of affairs at the passing of the Common Law Procedure Act. Sect. 17 of the Common Law Procedure Act 1854 makes no difference as to this power, and if it does not bring the case within the scope of 3 & 4 Will. 4, c. 42, s. 39, it does not affect it at all. Does sect. 11 interfere with the power of revocation? Not a word is said there about revocation, so that where an arbitration has been revoked so as to make an award impossible, no question can arise under sect. 11. No doubt the liability on the agreement to refer would remain, but that agreement must be a living one. If the proceedings are once stayed there is no power for the arbitrator to proceed without a new consent. Sect. 11 appears to me to contemplate an existing reference, and one that may go on to completion, so in this case the right to stay proceedings must fall. It strikes me that the defendant is not in a position to make an application under sect. 11 until he has acted in accordance with sects. 15 and 17. The gist of my view of sect. 11 is that where the action is stayed the arbitrator must be in a position to proceed without a fresh consent. There must be a living arbitration to fall back upon, and that is not the case here, because the authority of the arbitrator has been revoked, and secondly, the time within which the award can be made has elapsed.

Field, J.—My opinion is that the judge has power under sect. 11. This case does not fall within the introductory words of the section. Both parties agreed to refer the differences in question to a particular person, who is able and willing to go on with the reference. One party has violated the agreement, and has revoked the authority to refer, and so prevented the award being made. He has gone further, and brought an action on the very matters he solemnly agreed to refer. Now sect. 11 says this (his Lordship read the section). But it is said the power to stay cannot be exercised for two reasons, first, because three months have elapsed, and so under sect. 15 the power to make an award has gone, and secondly one of the parties having broken the agreement, has withdrawn his authority. But, as it seems to me, the judge has the power to determine these questions. If the plaintiff consents the reference may be proceeded with, and there is no reason why one of the parties should be able to get rid of the arbitration. As regards effluxion of time, the lapse is not a sufficient reason why the arbitrator should not make his award, for his powers may be prolonged at any moment.

From this judgment the plaintiffs appealed.

R. O. Lane for the appellants.—The 11th section of the Common Law Procedure Act has no applicability here. That section points not to an agreement to refer, made after a dispute has arisen, but to one made before—in fact, an express provision

that future differences should be referred. The deed or instrument referred to is that upon which the action is brought. *Blythe v. Lafone* (1 El. & Bl. 435; 28 L. J. 164, Q. B.) is a strong authority in our favour. That was an action on a charter-party, in which there was no agreement to refer, but a written correspondence had taken place between the plaintiff and defendants after the alleged causes of action by which the parties had consented to refer the matters in difference to arbitration, and Lord Campbell, C.J. expressly says that "section 11 does not apply to the case of a subsequent agreement of parties to refer a matter in difference, arising out of another instrument, where there is no stipulation to refer contained in the original instrument." No doubt the other side will rely on *Mason v. Hadden* (33 L. T. 163; 6 C. B., N. S., 527) in which Willes J., doubts the doctrine laid down in *Blythe v. Lafone* (*ubi sup.*). What he said, however, was a mere *obiter dictum*, as the point did not directly arise before him. An agreement to refer which has failed cannot be within the section. [MELLISH, L.J.—It is a special agreement to refer a dispute, and, if properly revoked, is it not at an end?] There was here, moreover, no arbitration in existence, and the arbitrator having become by operation of law *functus officio*, there was no right to stay the action. By sect. 15 it is provided that in the case of a submission, which might be made a rule of court, if no time were limited within which the arbitrator was to make his award, it should be made within three months, and it is also provided that he might at any time enlarge the time for making his award, or the time might be enlarged by an order or by consent of the parties. Sect. 15 applies to cases where not only the submission is by an order of the court, but where it is a submission such as this which could be made a rule of court. Here there is no pretence for saying there has been an enlargement of the statutory time, and certainly no implied consent of the parties can be inferred. As regards the authority to revoke before the award is made, see

Re Drury, 38 L. J. 278, Ch.;

Mills v. Bayley, 32 L. J. 179 Ex.; 2 H. & C. 36;

He also cited

Re Rouse Myer, L. Rep. 6 C. P. 212; 40 L. J. 145, C. P.

Bigham, for the defendant.—Even assuming there is a power to revoke, the 11th section does not give power to stop the action. Here the parties have entered into an agreement; that agreement has not been fulfilled, and it is no answer that one side have violated it. [MELLISH, L.J.—Must there not be a subsisting agreement?] There is a subsisting agreement, unless the agreement has been rescinded by consent. Sect. 11 was intended to meet this very case.

JESSEL, M.R.—I am of opinion that this appeal must be allowed. The question we have to decide is a short and simple one, and arises under sect. 11 of the Common Law Procedure Act 1854, under which the court is entitled to stay proceedings in an action where there is an existing agreement to refer to arbitration, and it is capable of being performed. In this case the agreement to refer was not made a rule of court, and was revoked before action brought. It has been suggested that the person revoking would have power to withdraw the revocation; that, however, could not be done without consent, and even if the consent were

obtained, there would be a new agreement. There there was no existing agreement, and therefore the matter in question could not be referred to arbitration under the powers of sect. 11. The words of the section are these: "Wherever the parties to any deed or instrument in writing, &c., shall agree that any then existing or future differences between them or any of them, shall be referred to arbitration, and any one of the parties so agreeing shall nevertheless commence an action at law, it shall be lawful for the court in which the action is brought, &c., upon being satisfied that no sufficient reason exists why such matters cannot be, or ought not to be, referred to arbitration according to such agreement as aforesaid, to make a rule or order staying all proceedings in such action." The words "such agreement as aforesaid" are very material, and I am of opinion the section has no applicability to a case such as this.

KELLY, C.B.—There can be no doubt that this is not an agreement to be performed in *future*, but an agreement by which the parties then and there referred differences which were existing to arbitration. There is here no agreement which the court can enforce. If the court interfered, the result would be to compel the parties to enter on a new reference. An agreement between the parties to refer existing disputes and disputes which might thereafter arise is different altogether from the case now before us. The Act enables the court, when there is an agreement in existence, and there has been a violation of that agreement which requires their interposition, to interfere. But the section which confers this power on the court has no application in the present case. The Legislature has provided a remedy for the state of things which has arisen here, though the parties have not availed themselves of it, which is to make the submission a rule of court. The statute requires that there should be an existing agreement; no such agreement is to be found here, and the statute therefore has no operation. The judgment of the Queen's Bench Division must therefore be reversed.

MELLISH, L.J.—I think sect. 11 applies to a subsisting agreement which is capable of being carried into effect. It sometimes happens that though the parties may have agreed at one time, such agreement may have come to an end. I think that the section is not confined to a general agreement in the instrument in writing to refer to arbitration. Yet there is a material difference between such an agreement to refer a particular dispute. In the former case, although revoked, the general agreement would still continue and be operative. But where there is no agreement except to refer a particular dispute about a particular matter, and the agreement has not been made a rule of court and is consequently revocable, then if such agreement be revoked, it is at an end. The expressions that fell from Mr. Justice Field during the course of his judgment, as to going before a judge to get the time enlarged, convince me that the right to have the time enlarged relates only to an agreement which has not been revoked, and is capable of being performed. I cannot think that this section compels parties to make a fresh agreement for a new arbitration, for that is, in my opinion, the result of the judgment that has been given by the court below. I am of opinion that this agreement

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does not 'come within the words of the section; and that if the Legislature had so intended, they would have said so in plain terms. Possibly such an enactment would be beneficial; however that might be, this section only applies to a subsisting agreement capable of being performed, and which has been violated. The judgment of the Queen's Bench Division must therefore be reversed.

DENMAN, J.—Having had this matter before me at chambers, I wish to say that whether plaintiffs were right or wrong in the course they adopted, forms no part of my judgment. I agree with the rest of the court, and also with the judgment of my brother Quain, that sect. 11 does not apply. I think it impossible to hold, without violating the plain meaning of the section, that a fresh arbitrator can be appointed. It is plain that Blackburn, J., did not fully appreciate the words "cannot be," as distinguished from "ought not to be." The order of the court below must be discharged.

Judgment reversed with costs.

Solicitor for appellant, *A. E. Copp.*

Solicitors for respondent, *Pritchard and Englefield.*

Monday, May 8.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and POLLOCK, B.)

SOUTHWELL AND ANOTHER v. BOWDITCH. (a)

Mercantile contract—Broker—Principal and agent—Sold note—Personal liability of broker.

The plaintiffs in this case sought to make the defendant, who acted as their broker, liable upon the following sold note, which he had sent to them:

"I have this day sold by your order, and for your account, to my principals, about five tons of pressed anthracene. Payment in cash, less 1 per cent. brokerage.—W. A. Bowditch."

Held (reversing the decision of the court below), that as there was no usage proved which would govern such a contract, it must be interpreted literally; and upon a strict interpretation of its terms the broker could not be held personally liable.

APPEAL from the Common Pleas Division.

Upon the trial of the action at Guildhall on the 16th Dec. 1874, a verdict was entered for plaintiffs, with leave to the defendant to move to enter a nonsuit or a verdict for himself, upon the ground that there was no evidence to support plaintiff's case.

On the 15th Jan. 1876, the Court of Common Pleas (Lord Coleridge, C.J., Grove and Denman, JJ.) discharged the rule defendant had obtained, in accordance with leave reserved.

Against this decision defendant now appealed.

The facts of the case and the judgment of the court below are fully reported 34 L. T. Rep. N. S. 133.

Cohen, Q.C., A. L. Smith, and Purvis, for the appellant.—No doubt, if a person signs a document *simpliciter*, it binds him, but only to the contents of the document. The signature is the strongest evidence that defendant is bound by this document, but what he is bound to do depends upon the terms of the note itself. The court below seems to have considered that the words "I have

this day sold," are equivalent to "I have this day bought of you." There are three forms of note generally used by brokers, given in Blackburn on Sales, p. 89. "In two of these cases the broker on the face of the note says, 'I am contracting with you for a principal;' in the first he gives the name of the principal, in the second he does not, but in each case he professes on the face of the writing to be selling as an agent." And that is the present case, for the purchase is not made here in the broker's name, but by the broker for his principals. Here there has been no evidence of a custom which would qualify the contract, and *Fleet v. Morton* (26 L. T. Rep. N. S. 18; L. Rep. 7 Q. B. 126), is an authority directly in our favour. In *Humfrey v. Dale* (E. B. & E. 1004; 27 L. J. 390, Q. B., Ex. Ch.), the words of the contract were qualified by the usage of trade. In *Paice v. Walker* (22 L. T. Rep. N. S. 547; L. Rep. 5 Ex. 173; 39 L. J. 109, Ex.); and *Sharman v. Brandt* (L. Rep. 6 Q. B. 120), and cases of that class, the action was between one contracting party and the agent of the other; but this case is between one contracting party and his own agent. Without being in itself a contract with his principal, this note is useful as a warranty by the broker that he has a principal; it also shows that he has completed the contract, and it is necessary under the Statute of Frauds.

Aspland (with him *Benjamin, Q.C.*).—Wherever a man purchases goods as agent for another whose name he does not disclose, he is himself liable. The sold note in this case must imply that defendant bought as well as sold. *Humfrey v. Dale* (7 E. & B. 272) decides the very point. Lord Campbell, in his judgment, says: "The defendants, signing as brokers, say they have sold for Thomas and Moore to their own principal, whom they do not name, but for whom they by necessary implication say they have bought." And the same view was held by Crowder, J. and Marten, B., when the case went to the Exchequer Chamber on Appeal: (E. B. & E. 1004.) The defendant, therefore, is liable. They also cited and referred to the cases of

Pennell v. Alexander, 3 E. & B. 283;

Fleet v. Mutton, *ubi sup.*;

Paice v. Walker, *ubi sup.*;

Cropper v. Cook, 17 L. T. Rep. N. S. 603; L. Rep. 3 C. P. 194.

JESSEL, M.R.—This is an appeal from the Common Pleas Division of the High Court of Justice, and the question to be determined by us is as to the interpretation of a mercantile contract. I may observe, in the first place, that I am not aware that there is any difference between the rule applicable to the interpretation of mercantile contracts and of all other contracts. In the absence of some particular usage, written contracts must be construed to have the meaning they would appear to bear grammatically, and that applies to the contract before us. The writer intended to say that he acted as broker between two principals, viz., the purchaser and the vendor. The contract is, "I have this day sold by your orders and for your account to my principals about five tons of pressed anthracene . . . payment in cash in fourteen days after delivery, less 2½ per cent. discount, and 1 per cent. brokerage.—W. A. Bowditch." That is the whole of the contract. He says, "Sold by your order and for your account," and "sold to my principals," i.e., sold to people for whom I am acting as broker, and there is nothing whatever to

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

show that Bowditch was not acting as broker. But there are two ways in which the broker might make himself personally liable: first, either by words in the contract itself, or secondly, by some implied contract arising from the usages of trade. But it cannot be said that the first is the case here; there is nothing in this contract by which the defendant says "I make myself liable;" nor are there any words upon the face of it from which such a liability can be implied. I think there cannot be a more vicious kind of interpretation than by the comparison of various contracts, on the ground that the difference between them is exceedingly slight. Argument by differentiation is most dangerous, as none is more likely to lead to misconstruction. As to the second way in which a broker may make himself liable, there is no usage of trade proved here. In the court below a particular authority was much relied upon, which seems to have decided that you can admit evidence of usage in the interpretation of written contracts, but the usage must be such a one as would not be contradictory to the written contract; it must be explanatory of the contract. This, no doubt, would appear to vary the contract as written, but some of the judges tried to get over the difficulty by saying that the usage was additional to the written contract, that it added an implied incident to the contract. Evidence of usage might, therefore, have been admissible whereby to charge the defendant in this case; but that has not been done—that would have reduced the whole matter to a question of pleading. The judges in the court below do not appear to have differed in the view they took of the case, namely, that whatever they may have thought of the written contract they must give it a peculiar interpretation, because it is a mercantile contract. Grove, J. says, "I am free to admit that if this had not been a mercantile document, and we were construing a new form of contract in the same words, there might have been a real distinction between the words, 'I have sold for you,' and the words 'I have bought of you,' but the question is, what the meaning of a document such as this is viewed as a mercantile document." For my part, I do not know where such a rule of construction as that would begin or end. He refers to *Humfrey v. Dale* (*ubi sup.*) alone as to this document being a contract of purchase. Again, Lord Coleridge, C.J., in his judgment, says: "We are dealing with a common form of document, well known to everyone who has had anything to do with mercantile matters, and to give the note such a construction as is suggested would, it appears to me, be going contrary to its well known meaning among mercantile men;" and then he refers to two cases, *Humfrey v. Dale* (*ubi sup.*), and *Fleet v. Murton* (*ubi sup.*). Denman, J., takes the same view. He says: "The words have practically received judicial construction by the Court of Queen's Bench and Exchequer Chamber, and we cannot, in my opinion, upset what has so long been treated as the true construction of a well known mercantile document." No one says that they have given the natural interpretation to the contract on reading its terms; nor that they have given its proper construction as a mercantile contract; but that they are bound to hold that this contract is not to have its natural meaning. Previous decisions may have said that "sold" means "bought," and "bought" means "sold," and those decisions may

be known to thousands of business men, so it becomes necessary for us to find if such cases exist. Let us examine those upon which the court below relied. In *Humfrey v. Dale* (in which case I may mention that the words of the contract were similar to those in the present case, but not exactly the same), Lord Campbell, in giving the judgment of the court (7 E. & B. 273), says: "We have then, as the case now stands, clear evidence of a contract of bargain and sale between the plaintiff as the seller and the undisclosed principal of the defendants." He then examines the evidence and says that on the ground of usage the defendant is liable. He has decided that without usage the broker is not liable, but he finds that he can admit usage to control the written contract, and that usage proves that the broker is personally liable. On appeal, Willes, J., said (E. B. & E. 1003): "The writing relied upon shows the defendants to have sold as agents for the plaintiff; whereas the plaintiff, to sustain his action, must make out that the defendants purchased of him as principal." Crowder, J., based his judgment on two additional grounds—the fact of these having been two notes (here we have but one note), and he relies upon the usage of trade which had been proved. Martin, B., relied upon the usage of trade. Channell, B., was of the opposite opinion. Williams, J., relied upon the usage of trade. Cockburn, C.J., says: "I am clearly of opinion, that as the evidence was offered not to vary but simply to explain the terms of the contract, it was admissible, on the principle on which evidence of the usage of particular trades has in so many other instances been admitted." He relies upon the usage of trade. The series of judgments in that case amounts to this: those who dissented from the judgment of the court below do so on the ground that there was no contract binding upon the defendant; those who affirm the decision do it on the grounds that although there is no contract binding the defendant by its own terms, still by the usage of trade he is bound as a principal. I now turn to the only other case referred to by the court below. In *Fleet v. Murton* there was a contract in similar terms to the present one, and again the usage of trade was relied upon. Cockburn, C.J., says: "I quite agree in the propriety and soundness of the decision given in the recent case of *Fairlie v. Fenton* (22 L. T. Rep. N. S. 373; L. Rep. 5 Ex. 169; 39 L. J. 107, Ex.), where the plaintiff contracted as a broker for a principal named; for in that case the principal was named, and I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting as broker for a principal and not for himself as principal; and in that case also the broker would not be liable on the contract if the principal failed to fulfil his contract." Then he goes on to say that evidence of custom was admissible, and that after that evidence the brokers were properly held liable—in other words, the broker was not liable except upon evidence of the custom. In the same case there is a remarkably clear judgment given by Blackburn, J., in which he says: "I take it there is no doubt at all in principle, that a broker, as such, merely dealing as broker and not as purchaser of the article, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller, and that, conse-

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quently, where the contract, as in the present case, in terms, says 'sold to A. B.,' or 'sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods, he is simply the broker making the contract." Thus he shows the fallacy of the notion that "sold for you" means "bought of you." He then discusses the admissibility of evidence of custom, and decides the case upon the custom proved. Both upon principle, therefore, and upon authority, and the only cases I have referred to are those cited by the judges of the court below, I am of opinion that the defendant is not liable.

KELLY, C.B.—Mercantile contracts, like all others, must be so construed as to give effect to the language contained in them according to the usual and grammatical construction of language, otherwise you make those who enter into them parties to a contract they never intended to enter into. Is there anything here to render the defendant liable upon this contract when construed according to its natural meaning? I am of opinion there is not. The cases referred to are no doubt sound in point of law. The usages of trade are most important, but the usage that a broker, if he contracts on behalf of an unnamed principal, is personally liable, has no bearing upon a contract where the question of usage does not arise. Here we have only to look at the precise terms of the contract, and it becomes impossible to raise a doubt as to whether it is a contract between the plaintiffs and defendant or between the plaintiffs and some third party. "I have this day sold by your order and on your account to my principals;" can that mean anything but that you are the sellers, my principals the purchasers. This is the only accurate construction possible. There are cases, no doubt, in which the broker is held personally liable, not on the ground of acting for unnamed principals, but because he is named in the contract as a principal. That is not the case here. The only ground for the decision of the court below is, that the express words, "sold for you," is equivalent to "I have bought from you," but that rests entirely upon a *dictum* in *Humfrey v. Dale* (*ubi sup.*), and when we examine the case, we find that it was the custom, which was proved, that rendered the phrases equivalent. Here the decision cannot be maintained, because by the plain language of the contract the defendant is neither purchaser nor vendor. There are no grounds even for suggesting that he is personally liable.

MELLISH, L.J.—I am of the same opinion. A mercantile contract must, like any other, be construed according to the natural meaning of its words, unless it is governed by some usage. The words of this contract are, "sold by your order and for your account to my principals." Now it appears to me there is a material distinction between the words "bought from you" and "sold for you." The former words would mean, I have entered into a contract with you, either on my own account or on account of some principal, and if the name of this principal is not disclosed, the party making the contract would be personally liable. But the only meaning of the words, "I have sold for you to my principals," is, "I, being your broker and also the broker for other principals, have made a contract between you and my principals." There are clearly no words in this con-

tract by which the defendant has made himself liable as principal. In *Humfrey v. Dale* (*ubi sup.*), a usage was proved, according to which the broker was held liable—a term was added to the contract by the custom and usage of trade. In that case the only difficulty arose from the form of the declaration, as was pointed out by Blackburn, J., in his judgment; but the majority of the court got over that difficulty. The judges in the court below appear to suggest that because there was a usage in some particular trades, by which the broker was held personally liable upon a contract such as this, that therefore they ought to hold the defendant liable, although no such usage has been proved here. In the cases cited, the usages were merely in particular trades and places, and you cannot, because a usage is proved in one case, and in one trade and place, apply it to contracts made in a different trade and a different place. Here the broker is merely a witness of and not a party to the contract, and cannot be held personally liable.

POLLOCK, B.—I am of the same opinion. Has the broker so named himself in this contract as to make himself a buyer or seller, as in *Thompson v. Davenport* (2 Smith's Lead. Cas. 7th edit. p. 364)? I am of opinion he has not done so; he has simply acted as broker, and cannot, therefore, be held personally liable. *Judgment reversed.*

Solicitors for the plaintiffs, *Venning, Robins, and Venning.*

Solicitor for the defendant, *Anthony Carr.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON.)

March 31, April 1, 3, and 4.

CRAIG v. PHILLIPS. (a)

Company—Circular letter—Prospectus—Promoter—The Companies Act, 1867, s. 38.

In March 1873, P. sent C. a circular letter containing very laudatory expressions concerning certain smelting works and a colliery, stating that a company was in contemplation with a capital of 75,000*l.* divided into 15,000 shares of 5*l.* each, and asking "how many of these shares of 5*l.* each will you take in the event of your approving of the prospectus which will be shortly issued?" but stating, "you are not committed to take any shares at all if you do not like to do so." On the 10th May 1873, P. purchased the property for 16,125*l.*, and on the 29th of the same month re-sold it for 23,725*l.*, to trustees on behalf of a company, which was subsequently duly incorporated and registered. From and after the 10th May, P. was a promoter of the company and was appointed the managing director by the articles of association. The prospectus, which was issued on the 2nd June 1873, embodied most of the statements contained in the circular letter, but only mentioned the sale by P. to the company. C., relying on the letter and the prospectus, took 200 shares in the company. In 1875, all the subscribed capital having been called up and no dividends having been declared, and the purchase by P. having come to the knowledge of C., he filed a bill against P.,

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

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charging that he had been induced to take the shares by the fraud and misrepresentation of P., and that the purchase by P. ought to have been mentioned in the prospectus, and praying that he might be indemnified by P. against the moneys he had paid for the shares.

Held, that the purchase of the property by P. was not such a contract as was required by sect. 38 of the Companies Act, 1867, to be specified in the prospectus.

Held, also, that the evidence failed to support the charges of fraud and misrepresentation.

This was a suit to obtain the repayment from the defendant of a sum of 1000*l.* and interest, which the plaintiff alleged he had been induced to pay for certain shares in a company by reason of the misrepresentations and fraud of the defendant.

The bill stated that prior to the issue of the circular of the 26th March 1873, the defendant made himself thoroughly acquainted with certain smelting works, rolling mills, and a colliery situated at Penclawdd, in Glamorganshire.

That in March 1873, the defendant, as a promoter of the company, sent the following printed circular to the plaintiff:

26th March 1873.

My dear Sir,—The coal question as affecting those mines in which you and I are specially interested, is one of very serious importance. Having regard to the high prices we are now paying, and to the very inferior quality of the coals supplied, the difference is about 100 per cent. against our mines, which, upon a consumption of some 12,000 tons yearly, amounts to a very large sum. This is a matter which must be dealt with boldly, and as every shareholder in Cornish mines is interested in the question, he should do his utmost in his individual capacity to remove the difficulty. In submitting the matter referred to in this letter, I rely upon every one to whom it is now sent giving it his most careful attention, as I feel assured that the only way to overcome the difficulty is for all the shareholders in our mines themselves to possess a good colliery by which means, and I repeat by which means alone, we (as shareholders in important mines) may cease to be anxious as regards their coal supply, and at the same time receive that profit ourselves which at present finds its way into the pockets of colliery proprietors, agents, and Cornish coal merchants, who are fattening on our dependent position. Apart, however, from the great benefit to the mines, it gives me much pleasure to state that the business will be exceedingly lucrative, is of a very high class character, and affords an opportunity that rarely occurs, in fact, even if it did not possess the manifest advantage of insuring first-rate coal at fair prices for our mines, I should unhesitatingly lay it before you as a first class investment already giving large profits, and one that will, moreover, steadily increase in prosperity and importance.

The property comprises two valuable concerns—a well-known smelting works in Wales, and a colliery immediately adjoining, which, under the arrangement of the purchase, is to be added thereto, the two combined forming a most complete establishment. The reputation of the works and their brand is well-known throughout the kingdom. The situation is exceedingly favourable for all the metal and coal markets, as well as for the shipment of coals to the various ports in Cornwall. The facilities, indeed, for carrying on a very large and lucrative trade are possibly unprecedented, and I have very strong reasons for knowing that this is an opportunity that will not occur again. In offering it to you in the terms of the prospectus I have kept in view the requirements of our position and the urgency of the matter as regards our own mine, I may mention that the property will at once be taken up by others if declined by you, and that it includes the leases of the smelting works and colliery, the plant, machinery, goodwill, &c. . . . The coal is of the very finest bituminous quality, and, what is of great importance, perfectly free from fire damp, and from its favourable

situation to the railway is inexpensively worked. The properties may be very briefly described as follows:—Smelting works, colliery, railway, and free dock capable of taking vessels of 200 tons burden (then followed a detailed description). . . . The colliery is also supplied with pumping and drawing engines and boiler of the best construction. All this has cost a fortune in laying out and years of time in gradually accomplishing it. The detailed prospectus, with the plans of the works, elevations, and inventories, can alone do justice to the property. These are now being prepared; but the sole object of my now addressing you is to ascertain what interest you are disposed to take in the undertaking. The capital of the company will be 75,000*l.*, in 15,000 shares of 5*l.* each, and the shares are purposely made of this small amount so as to admit the most moderate shareholder. The sum of 10*s.* per share is to be paid upon application, and 10*s.* per share upon allotment. . . .

In order to ascertain practically what each individual shareholder will do in this matter I wish to ask you how many of these shares of 5*l.* each you will take in the event of your approving of the prospectus, which will be shortly issued. I inclose you a printed form of reply, so as to save you any trouble of writing, and all that you have to do is to fill in the number of shares you propose taking, and return it to me as soon as possible in the inclosed stamped envelope. You are not committed to take any shares at all if you do not like to do so. It is merely for my guidance now, for as soon as I receive all the replies the prospectus will be sent to each person who has sent me the inclosed form, and no prospectus will be sent to those who do not reply. The concern is not a speculation at all, but an investment, and instead of my working it by myself and with one or two others, I am quite willing you should share in its advantages, which will be more fully and accurately referred to in the prospectus which will be shortly issued. I shall be glad to receive your early reply, and I remain, yours faithfully,

H. L. PHILLIPS.

That on the 10th May 1873, the defendant entered into a written agreement with one Townsend Kirkwood, for the purchase of the smelting works and colliery, for the sum of 16,125*l.* in cash.

That on the 29th May 1873, an agreement was entered into between the defendant of the one part, and Henry Rutter and Thomas Lambe Phipson, as trustees on behalf of a company about to be incorporated under the Companies' Acts 1862 & 1867, and registered with limited liability, under the name of the South Wales Smelting and Colliery Company (Limited), of the other part, whereby it was agreed that Henry Rutter and Thomas Lambe Phipson should, within three months from the date thereof, cause to be duly registered and incorporated a company with limited liability, having a nominal capital of not less than 75,000*l.*, under the name of the South Wales Smelting and Colliery Company (Limited); and that the company, when formed, should purchase, and the defendant should sell to the company, the said smelting works and colliery for the sum of 23,725*l.* in cash.

That on the 2nd June 1873, the defendant issued the prospectus to the public. The prospectus, after stating the name of the company, and that the capital was 75,000*l.*, in 15,000 shares of 5*l.*, and setting out the names of the officers (amongst whom the name of the defendant appeared as the managing director), and that the company was formed for the purpose of purchasing the smelting works and colliery at Penclawdd, continued as follows:—

The works cover a very considerable area, and there is still a large extent of ground occupied. They have been constructed on the most scientific principles and regardless of expense. They are most admirably situated for a large trade, and the Swansea and Carmarthen Railway runs all along the smelting works (with branches into

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the same made at a very great cost), and communicates with the London and North Western, the Great Western, and the Midland Railways, thus enabling the ores of the lead mines of North and South Wales and the North of England to be brought into the Works at the most moderate rates. . . .

The facilities for the conveyance of minerals and coals by sea to and from Cornwall and Devonshire are also exceptionally good. An excellent free dock adjoins the works, giving accommodation to vessels of 200 tons burden, therefore vessels bringing lead ores from Cornwall can load back with coals for the mines. . . .

The coal is of the finest bituminous quality, and, moreover, free from fire-damp, so that no explosion or accident from that cause can occur. It is excellent for smelting, coking, gas, smithy, mining, and household purposes. . . .

It is rarely such an opportunity as the present occurs for embarking in a sound established and good paying concern. The property is offered to the public as a *bona fide* means for the employment of capital to extend an already remunerative business. The consideration to be paid by the company for the purchase of the several leases under which the property is held, the goodwill of the business, plant, machinery, houses, buildings, &c., is 23,725*l*. Mr. Henry Louis Phillips is the owner and vendor of the said property, and it has been arranged that he shall join the board as managing director for the protection of himself and friends who are largely interested in the company. A contract has been entered into, dated the 29th May 1873, made between the said Henry Louis Phillips, vendor, of the one part, and Messrs. Henry Butter and Thomas Lambe Phipson, as trustees, for and on behalf of a company to be incorporated under the name of the South Wales Smelting and Colliery Company, Limited, purchasers, of the other part, for the purchase of the leases, plant, machinery, houses, goodwill of the business, &c., from the said Henry Louis Phillips, for the consideration above mentioned. . . .

No "promotion money" whatever will be paid. The expenses will be simply confined to the amount necessarily disbursed. . . .

That on the 9th June 1873, the defendant wrote a letter to the plaintiff asking him to fill up an application for shares as soon as possible, and stating "the shares are only 5*l*. each, and being a trading and manufacturing concern, where the profits are very great, you may rely with the utmost confidence not only in having dividends this year, but in having a very much higher rate of dividend than is usually to be obtained."

That the plaintiff, relying on the good faith of the letters and of the prospectus, applied for and was allotted 200 shares in the company.

That on the 16th July 1873, the company was incorporated and registered; and by the articles of association the defendant was appointed the permanent managing director of the company at a salary of 350*l*. per annum.

That calls were made from time to time to the amount of 4*l*. 10*s*. per share, and on the 1st July 1874, the plaintiff paid a final call of 10*s*. per share, making in all the sum of 1000*l*.

In July 1875, the plaintiff filed his bill against Henry Louis Phillips, setting out the above facts, and charging that the circular and prospectus contained material misrepresentations, fraudulent suppressions, and false statements of material and important facts, all of which were known to the defendant to be false, in particular that the statements as to the existence of the colliery, the quality of the coal, the capability of the free dock to take vessels of 200 tons burden, and the large profits to be derived, were materially untrue, and were inserted by the defendant with the view of deceiving the public and inducing persons to take shares in the company.

The bill also charged that the relation of the

defendant to the company was fiduciary at the date when he signed the agreement with Townsend Kirkwood on the 10th May 1873, and that he ought, pursuant to the 38th section of the Companies Act 1867, to have specified in the prospectus the names of the parties to the said contract with Townsend Kirkwood, and that prospectus not certifying the same was fraudulent on the part of the defendant as regards the plaintiff who took the shares in the company on the faith of the letter and prospectus without any notice or knowledge of such contract; and the plaintiff prayed for a declaration that he was induced to take shares in the company by the fraud and deceit of the defendant, and that the defendant was liable to indemnify him from the cost of such shares; and that the defendant might be decreed to repay the plaintiff the sum of 1000*l*. paid by him on the shares so taken by him with interest. The defendant by his answer denied that any misrepresentations or fraudulent statements were contained in the prospectus or the other documents; but admitted that from and after the 10th May 1873, though not before, he was a promoter of the company, and that he entered into the contract with Kirkwood with the general intention, though not for the express purpose of forming or procuring the incorporation of a company for working the smelting works and colliery, and alleged that if no such company had been formed he should have gone to his private friends to join him in working the premises as a private concern, and insisted that the circular was not a notice inviting persons to subscribe for shares within the meaning of the 38th section of the Companies Act 1867, but was simply a letter written to obtain information for his own private guidance, and that at the time it was sent he had determined to purchase the property, but had not determined whether to carry it on by means of a company or as a private concern, and the purpose of the letter was to enable him to form an opinion and decide which of the two courses he should adopt. The defendant also admitted that no profits or dividends had as yet been made or paid by the company; that at the time the company was formed the colliery had not been opened out, but alleged that it was well known that valuable seams of coal did lie under the property, and that coal of first rate quality had since been reached and was now being worked.

Sir H. M. Jackson, Q.C. and Langley for the plaintiff.—We contend that by virtue of the circular letter the defendant, at the time when he entered into the contract with Kirkwood, was a fiduciary purchaser for the plaintiff and all other persons to whom that letter was sent, and who took shares in the company on the faith of it; and that the suppression of that contract from the prospectus was fraudulent on the part of the defendant as against the plaintiff and such other persons (*Gover's Case*, L. Rep. 1 Ch. Div. 182, 188) within the meaning of sect. 38 of the Companies Act 1867. Further, apart from the statute, we are entitled to relief, because the letter and prospectus contain material misrepresentations for which the defendant is answerable, even if he may not have known them to be untrue.

Hichens v. Congress, 1 Russ. & My. 150 (n);

Peck v. Gurney, 25 L. T. Rep. N. S. 446; L. Rep. 8 H. L. 377;

Scott v. Dixon, 29 L. J. 62, Eq. (n);

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Kent v. Freehold Land Company, 17 L. T. Rep. N. S. 77; L. Rep. 4 Eq. 588;
Beck v. Kanlorwicz, 3 K. & J. 230;
Gerhard v. Bates, 2 El. & Bl. 476.

Kay, Q.C. and *W. W. Karslake* for the defendant.—The purchase from Kirkwood was not a contract which ought to have been set out in the prospectus. The defendant bought for himself. The letter created no fiduciary relationship, but was merely tentative to ascertain whether, in the event of a company being formed, the plaintiff would support it. The defendant did not become a promoter of the company until after he had purchased the property. *Gover's Case* (*sup.*) is quite distinct from this. There the defendant bound himself to form a company. This is, therefore, simply a case of alleged misstatements in a prospectus, and the question is whether the material facts, which are alleged to be untrue, were untrue to the knowledge of the man who made them. We submit that the evidence fails to establish any instance of material misrepresentation, or to bring home *scienter* to the defendant. They cited

Central Railway Company of Venezuela v. Kisch, L. Rep. 7 E. & I. Ap. 99;
Imperial Mercantile Credit Association v. Coleman, L. Rep. 6 E. & I. Ap. 189;
Henderson v. Lacom, L. Rep. 5 Eq. 249;
Peck v. Gurney (*sup.*), per Lord Cairns, p. 409;
Palsey v. Freeman, Sm. L. C. (Com. Law) 82.

Sir H. M. Jackson, Q.C., in reply,

The VICE-CHANCELLOR.—This is a case of very considerable importance. The plaintiff by his bill asks for this relief, a declaration that he was induced to take shares in a company by the fraud and deceit of the defendant, and that the defendant is liable to indemnify him in respect of any loss on such shares. The suit, therefore, has nothing to do with the 38th section of the Companies' Act 1867, but is, in my opinion, an action for deceit, and nothing else, and is to be dealt with on the same principles which, before the Judicature Act prevailed in the courts of common law and which have always prevailed in courts of equity, namely, that the fraud and deceit alleged must be proved. The 38th section of the statute is of a totally different kind. I do not understand that in *Gover's case* (*sup.*) the judges of the Court of Appeal have decided any more than this, that if there was any remedy against the man Mappin the claimant there was left to pursue it in any way she might think fit. It was not within the power of the judges of the Court of Appeal to deal with that case in any other way than they did. Now, the Act of Parliament requires (sect. 38) "that every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise." Now the prospectus in this case complies with the statute to this effect: "Mr. Henry Louis Phillips is the owner and vendor of a colliery, and it has been arranged that he shall join the board as managing director for the protection of himself and friends, who are largely interested in the company. A contract has been entered into, dated 27th May 1873, made between the said Henry Louis Phillips, vendor, of the one

part, and Messrs. Henry Rutter and Thomas Lambe Phipson, as trustees for and on behalf of a company to be incorporated under the name of the South Wales Smelting and Colliery Company, Limited, purchasers, of the other part, for the purchase of the leases, &c., and so on, and in a previous paragraph the consideration to be paid by the company is stated at 23,725*l.* In my opinion the statute is literally complied with in this respect, and it is impossible to raise any question successfully upon the non-compliance of the prospectus with the statute. If, as in *Hitchens v. Congreve*, the remedy sought was upon the ground of misrepresentation in the prospectus, then the plaintiff by himself alone, or on behalf of the other shareholders, might have sought a remedy in that respect. But that is not the remedy which he asks in this bill, neither is it consistent with the allegations in the bill nor with the evidence that has been adduced, and I say again that in my opinion that point is wholly beyond this case, and cannot form the subject of any decision I am called upon to give. Now in treating this case as an action for deceit, which it is, I am of opinion that it is necessary for the plaintiff, who alleges, as he does in very pointed and painful terms in his bill, that a fraud has been practised upon him, to prove that fraud. It is important for him to make out that the defendant did knowingly and wilfully make to him a false representation, and that he was induced by the facts of that false representation to enter into the contract which is at present perfectly binding. Now what are the facts.—[His Lordship then dwelt at some length upon the terms of the letter of the 10th March 1873, and the prospectus, and held that the evidence failed to show that they contained any exaggeration or misrepresentation, and in the course of his observations remarked.] Now if it stood upon that letter alone, in my opinion there is no case in which I can impute to the defendant any intention to deceive. Well, then the prospectus comes next, and it must be observed that after that letter was written in March, the defendant, who seems to have been very well satisfied that the business was an exceedingly good one, of his own responsibility and with his own moneys buys from Mr. Kirkwood the works, the subject of this company afterwards formed, for 16,000*l.* odd. At that time nobody could say that he was bound by that letter. The plaintiff cannot say he had agreed to take any shares. Quite the contrary. He was not asked to take shares but only to express his opinion of how many shares he would like to have, without binding him in the slightest degree. Nor is there any intention in the letter that he should be bound. The defendant being a perfectly free man, notwithstanding that letter, pays 16,000*l.* odd for the works. He states that at that time he intended to work the business in connection with some capitalists whose names he mentioned, but that the negotiations with them fell through, and he thereupon determined that a company should be formed. Thereupon, the company is formed; and having, as he says, made a most excellent bargain—having bought for 16,000*l.* what he was persuaded was worth 23,000*l.*—he sells it to the trustees of the company for that sum openly, above-board, with no suppression of any fact, and no misleading, and in the prospectus specifying the

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actual price which the company is to pay, and specifying as the statute requires, the names of the parties, the dates of the instruments, and the object of the company, in order that no person may be misled (which is the object of the statute) by a prospectus into taking shares in a company the nature of which he was not aware of. Now the plaintiff took his shares on receiving that prospectus, which is very complete and contains no exaggeration that I know of, but which contains some particulars which are yet to be noticed; for the main stress of the argument has been that the prospectus spoke of a coal mine and of a certain dock forming part of the smelting works, and described them in a manner which was in itself untrue, and which being held out to the plaintiff was the deceit by the defendant which induced the plaintiff to take the shares in question. [His Lordship then went fully into the evidence on these points, and found that it failed to support the allegations in the bill, and concluded thus:] In my opinion there is no ground for the charges I have referred to that the letter and prospectus contained fraudulent misrepresentations and fraudulent suppressions. The bill is filed upon such ground as that only, and there is no ground for saying that sect. 38 of the statute has not been complied with, or that for any other reason as a shareholder he would be entitled to relief. I am of opinion, therefore, that the case entirely fails and the bill must be dismissed with costs.

Solicitors for the plaintiff, *Hughes, Hooker, and Co.*

Solicitor for the defendant, *A. Kerby.*

Saturday, April 8.

Re PRYOR'S SETTLEMENT TRUSTS. (a)

Lands Clauses Act—Settled lands taken by local board—Dividends of invested purchase money—Defective order for payment of—Subsequent order—Costs—Practice.

Where the purchase-money of settled lands taken by a local board was paid into court and invested, and the dividends, on the petition of the trustees of the settlement, ordered to be paid to them by name, or one of them, and both the trustees died, the court, on the petition of the new trustees for payment of the dividends to them, declined to order the local board to pay the costs of the second petition.

THIS was an application for payment of the dividends arising from a sum of 39*l.* 7*s.* Reduced 3*l.* per Cent. Annuities.

The annuities represented a sum of 366*l.* 5*s.*, the purchase moneys of lands subject to the trusts of the marriage settlement of Mr. and Mrs. Pryor, which had been taken by the Bristol Local Board of Health for the purposes of their Act, with which was incorporated the Lands Clauses Act.

On the 11th June 1870, an order had been made on the application of the then trustees of the settlement, that the interest to accrue on the bank annuities should be paid "to them or one of them" until further order.

Both the trustees had since died, and new trustees had been appointed. The new trustees now applied that the dividends from time to time to

accrue on the bank annuities might be paid to them or the survivor of them or other the trustees or trustee for the time being of the settlement.

Romer, for the petitioners, asked that the respondents might pay the costs of the application, and referred to

Re Goe's Estate, 24 L. T. Rep. O. S. 152.

E. S. Ford, for the Bristol Local Board of Health, contended that as a defective order had been made on the first petition, the respondents ought not to be ordered to pay the costs of the present application. He cited

Re Audenshaw's Trusts, 1 N. E. 255;

Esparis Hordern, 2 De G. & Sm. 263;

Re Byron's Trusts, 7 W. E. 367.

Romer, in reply.

THE VICE-CHANCELLOR.—Assume that both parties are equally to blame in not seeing that a proper order was made on the first occasion, why should I make one pay the costs of this application more than the other? The petitioners are entitled to their order, but I can make no order as to costs.

Solicitors for petitioners, *Clarke, Woodcock, and Rylands.*

Solicitors for respondents, *Warry, Robins, and Burgess.*

June 30, July 4, 5, 7, 11, 12, 14, 17, and 27.

MACKETT v. THE COMMISSIONERS OF HERNE BAY. (a)

Private Act of Parliament—Dedication of lands for purposes of—Proposed roads, streets, and squares—Adverse possession—Statute of Limitations—Injunction.

In 1830 A. projected the formation of a seaside town, to be built on his lands, and a plan was prepared which showed the sites of various streets, roads, and squares, proposed to be made and formed on such lands. In June 1833 a private Act of Parliament was obtained by which the lands described on the plan were made a distinct parish for the purposes of the Act, and by which commissioners were appointed in whom were vested all roads, streets, and ways, then made and used by the public, or thereafter to be made and adopted by the commissioners as public ways under the Act. The Act also conferred plenary powers on the commissioners with regard to the paving, lighting, draining, and repairing, of such streets, roads, and ways.

In Feb. 1833 A. had sold and conveyed to B., who was one of the principal promoters of the Act, and one of the First Commissioners appointed thereunder, several of the plots of land described on the plan and on which were delineated the sites of certain of the proposed roads, streets, and squares. Previously and subsequently to the Act numerous houses had been built, and some of the roads, streets, and ways shown on the plan had been wholly or partially formed, and had been adopted by the commissioners, but no houses were at any time erected on the lands conveyed to B., and the same (including such parts as comprised the sites of the proposed roads, streets, and squares) were from 1833 to 1867 uninterruptedly held and enjoyed and cultivated as arable and pasture lands by B. and his lessees.

In 1868 the commissioners gave B.'s devisees notice

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law

of their intention to take possession of the sites of the proposed streets, roads, and squares shown on the plan, and in 1871 they proceeded to mark, grip up, and stump out such sites on the ground that the same had been dedicated to the purposes of the Act by the promoters of the Act, and that they were acting within their statutory powers. On bill being filed to restrain the commissioners from so doing,

Held, that although there might have been a dedication of their lands by the promoters of the Act, such dedication was not complete until the intended streets and roads had been used and adopted by the public; and that, there having been no such use and adoption for upwards of forty years, the proposed sites were not within the statutory powers of the commissioners, and an injunction granted accordingly.

Held, also, that the powers of the commissioners were only to be exercised in respect of roads which were made or which should be made consequent on the erection of buildings to which such roads would be applicable and useful, but that no rights, statutory or other, could be acquired so as to prevent the exercise of the powers given by the Act to require and compel the formation of roads and streets whenever and wherever the state of circumstances requiring such roads and streets should come into existence.

In the year 1830 Sir Henry Oxenden, who was the owner of an estate of considerable extent at Herne, in the county of Kent, considered that a part of his estate was suitable for the formation of a seaside watering place, and accordingly procured a plan to be made by a local surveyor of a portion of the estate which he severed from two of his farms, the one called Underdown Farm and the other Sea-street or Ashbee's Farm, and which he offered for sale in lots. The plan so made had described upon it streets, roads, and squares, a plantation, a parade, a terrace, and a pier, none of which then existed, as indicated on the plan, but which were put upon the plan for the purpose of showing to purchasers the use which might be made of the lands.

In and prior to the month of Feb. 1833 Sir H. Oxenden sold and conveyed to one John Brough and others in fee several of the plots of lands described upon the plan. Some of these plots of land comprised the sites of certain of the proposed roads, streets, and squares shown on the plan, and called Oxenden-square, Hanover-square, Brunswick-square, King's-road, Clarence-street, Montague-street, &c.

In the month of June 1833 a private Act of Parliament, 3 & 4 Will. 4, c. 105, was obtained, by which the lands comprised in and described by the above plan were formed into a district parish for the purposes of the Act, under and by the name of "The Town of Herne Bay." The preamble of the Act was as follows: "Whereas a certain portion of the parish of Herne, near or adjoining to the pier at Herne Bay, in the county of Kent, hath of late years increased in houses and other buildings, and may become a place of considerable resort, and many houses and buildings are now being erected there, and it would tend greatly to the accommodation, safety, and convenience, not only of the inhabitants of such portion of the said parish but of all persons resorting to and passing through the same, if the roads, streets, ways, lanes, and other public passages and places now formed

and made, and hereafter to be formed and made, within the said portion of the said parish were properly paved, lighted, cleansed, watched, and improved, and all nuisances, annoyances, encroachments, projections, and obstructions therein removed and prevented, and if an efficient police were established therein; and whereas it would greatly facilitate the purposes aforesaid if the said portion of the said parish were separated for such purposes from the remainder of the said parish, but the above purposes cannot be effected without the aid and authority of Parliament; and whereas a map or plan has been made of the said portion of the said parish so intended to be separated for the purpose of more clearly ascertaining the boundaries of the same, which map or plan has been deposited in the Parliament office and a duplicate thereof has also been deposited with the parish clerk of Herne aforesaid, which said boundaries are on the map or plan described by a dotted line," be it enacted, &c.

By the 3rd section of the Act certain named persons and their successors were appointed commissioners for the purposes of the Act to be a body politic and corporate, under the name of "The Commissioners for Improving the Town of Herne Bay," and by that name to have perpetual succession and a common seal.

The material sections of the Act were—

Sect. 27.—That all the present roads, streets, ways, lanes, and other passages and places now used by the public within the said town, and all carriage or footways or passages which shall hereafter be made or adopted by the commissioners as public ways or passages under or by virtue of this Act, and the pavements, flagstones, curbstones, stones, gravel, and other materials belonging thereto respectively, and also all lamps, lampirons, lampposts, watchboxes, watchhouses, and other houses and buildings hereafter to be erected or fixed up or purchased by virtue of this Act . . . shall belong to and be the property of, and the same are hereby vested in the said commissioners. . . .

Sect. 28.—That it shall be lawful for the said commissioners, and they are hereby authorised and empowered to open, form, set out, and make a new and commodious road not exceeding in width 40ft. . . . which said road when made shall be, and the same is hereby vested in the said commissioners, and from time to time to cause the said road, and all the present roads, streets, ways, lanes, and other passages and places now used by the public, and all future roads, streets, ways, lanes, and other passages and places which shall be adopted by the said commissioners under this Act within the said town or any part thereof, as well as the carriage as footways to be repaired, made, formed, amended, paved, flagged, or otherwise sustained, and the same, and the pavements, flagging, and other materials thereof to be taken up and relaid, and with such materials and with such drains, gutters, sinks, or watercourses . . . as the said commissioners shall think fit. . . .

Sect. 30.—That no person shall at any time make or cause to be made any alteration in any paved, pitched, or stoned public foot or carriage way, before, behind, or at the side of his house, building, ground, or land without the consent or licence in writing of the said commissioners first had and obtained.

Sect. 33.—That it shall be lawful for the said commissioners, and they are hereby required to cause all such parts of the roads, streets, ways, lanes, and other public passages, and places within the said town which are now in the estimation of the said commissioners sufficiently built upon but not finished, paved, flagged or otherwise put in good order and condition, and all such roads, streets, ways, lanes, and other public passages and places as are now making or may hereafter be made within the said town or any part thereof, although fully built upon, to be made, paved, flagged, repaired, and cleansed with such gutters, sinks, common or main sewers, drains, or watercourses, and with such materials

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and in such manner as the said commissioners shall deem meet and necessary. . . .

SECT. 36.—That if the said commissioners shall cause any road, street, way, lane, and other public passage and place within the said town to be paved, flagged, or otherwise put into good order or condition, or make any such gutter, sink, common or main sewer, or watercourse, under, through, along, above, below, or about the same road, street, way, lane, and other public passage and place, before the said road, street, way, lane, and other public passage and place are made and built upon, then and in every such case the owner or occupier of any ground abutting or adjoining to any such road, street, way, lane, or other public passage and place not built upon or attached to any house or building, shall not be liable to pay any part of the expenses and charges of such paving, flagging, or making any such road, street, &c., until such ground shall be built upon or attached to some house or building, when and not before such owner or occupier of such house or building shall be liable to pay such and the same expenses and charges, to be recoverable in manner provided.

SECT. 37 empowered the commissioners to adopt any new road, street, &c., within the town of Herne Bay, all such roads, streets, &c., so adopted, to be thenceforth deemed and taken to all intents and purposes as public highways.

SECTS. 86 and 87 empowered the commissioners to purchase lands within the town of Herne Bay for the purposes of the Act, but not without the consent of the owners thereof.

SECT. 98 enacted that every person (occupier, owner, or mortgagee), in possession of any hereditaments which should be purchased or taken for the purposes of the Act, should deliver up possession of such premises to the commissioners upon having six calendar months' notice from the commissioners to quit the same.

SECT. 109 empowered the commissioners to raise, from time to time, the moneys necessary to defray the expenses of carrying the several powers and purposes of the Act into execution by levying a rate, to be called "The Repairing, Lighting, and Watching Rate."

This Act was passed with a view to carry out the wishes of Sir H. Oxenden, and a large number of the inhabitants and landowners within the new district of the "Town of Herne Bay," and to provide that the "Town of Herne Bay" should be laid out and built upon in accordance with the plan. After the passing of the Act numerous plots of land were divided and set out with reference to such plan, and were sold and built upon.

No houses, however, were at any time erected on any part of the lands which had been conveyed to J. Brough, nor were any of the proposed roads, streets, and squares ever formed or laid out on such lands; but the same lands, which previously and at the time of the passing of the Act had been used as arable and pasture lands, continued to be occupied and cultivated in the same manner with the adjoining lands, and were exclusively held and enjoyed uninterruptedly and as of right by John Brough and his undertenants and lessees until the year 1867.

In February 1867 John Brough died, having by his will devised his real estates upon trust for Sarah Mackett, the wife of George Mackett, for life, with remainder to John Mackett in fee.

In March 1868 the commissioners held some meetings, and discussed the question of taking possession or of marking out the boundaries of the sites of Hanover and Oxenden-squares, and certain of the proposed streets and roads, including King's-road, Clarence-street, and Montague-street, and accordingly caused the following printed notice to be served upon George Mackett and others: "I am requested by the Herne Bay Pavement Commissioners to inform you that boundary posts will be put down marking out the various

streets, ways, lanes, squares, and public passages belonging to the said commissioners within the town of Herne Bay, according to the map or plan of the town deposited in the Parliament Office 28th June 1833; and further take notice that you are hereby required to remove all obstruction from the said streets, ways, lanes, squares, and public passages now occupied by you on or before 29th Sept. 1868, nor are you to cultivate any of the said street, ways, lanes, squares, and public passages after the above date."

In pursuance of this notice the commissioners caused to be gripped up and stumped out a part of the lands belonging to the devisees of John Brough, and which formed the western extremity of the proposed site of King's-road, and which was then in the possession and cultivation of their tenants. Thereupon the solicitors for the devisees and trustees of John Brough's estate caused the following notice to be served on the commissioners:—

To the Commissioners for improving the Town of Herne Bay.

Gentlemen,—It having been intimated to us as solicitors for the trustees and devisees of the real estate of John Brough, late of Herne Bay, in the county of Kent, Esquire, deceased, that you, the above-named commissioners, have entered upon certain land of the said deceased at Herne Bay aforesaid for the purpose of stumping out or making a certain pretended street called King-street, Herne Bay, in the county of Kent, the land of which pretended street forms part of the real estate of the said John Brough, deceased, and such entry having been made by you without any authority from the said trustees or devisees. We hereby give you notice on their behalf to refrain from entering upon the said land or upon any other land at Herne Bay aforesaid, the property of the said John Brough, deceased, now the property of his said trustees and devisees, and that in the event of any further entry being made by you upon the said lands, after this notice you will be considered as trespassers, and such proceedings will be taken against you as the circumstances may require and our clients be advised. We further give you notice that a suit (*Mackett v. Mackett*) is now pending in the Court of Chancery for the administration of the real estate of the said John Brough, deceased.—Dated this 16th day of February, 1869.

Nothing further was done by the commissioners until the month of Oct. 1871, when they resolved "to take possession of the roads and squares as shown upon the plan of the town on which the Act of Parliament was obtained," and Mr. T. W. Collard, a surveyor, was appointed to mark out the boundaries of the roads and squares according to the plan.

On the 11th Dec. 1871, the solicitors of the trustees and devisees under John Brough's will, hearing of the contemplated action of the commissioners, served them with the following notice:

We beg to call your attention to the previous letters herein, and to inform you that we cannot allow any trespass to be committed by the commissioners or their servants upon lands belonging to this estate, and that, if any such trespass be committed, we shall take such proceedings against the parties as may be necessary for the protection of our clients' interests in the property, and hold the commissioners responsible for all damages and costs.

On the 20th Dec. 1871, and following days, T. W. Collard and other persons, acting under the direction and with the authority of the commissioners, entered upon the lands of J. Brough, which formed the sites of the proposed streets, roads, and squares called Hanover-square, Oxenden-square, King's-road, Clarence-street, Montague-street, and John-

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streets, and gripped up a considerable quantity of the land at the sides of such alleged streets, roads, and squares, broke down and carried away the fences placed on the same lands wherever they intersected the alleged sites of such proposed streets, roads, and squares, and damaged and destroyed the growing crops there, and otherwise acted as if they were absolutely entitled to such lands.

In the meantime the suit of *Mackett v. Mackett* had abated by reason of the death of parties, but was revived as soon as practicable, and ultimately, in July 1872, leave was obtained to commence the present suit.

The plaintiffs charged that the commissioners had no power to take or purchase compulsorily the lands in question, or to acquire any rights or control over the same unless and until the same were duly formed, laid out and dedicated as roads, streets, and squares, and were adopted as such by the commissioners, which the same had never been; that the commissioners had no right or power to compel or require the making or formation of any of the proposed roads, streets, or squares, or to interfere with or control the sites of the same until the same were laid out or constructed by the owners, and were actually adopted by the commissioners pursuant to the Act; that the sites and the proposed roads, streets, and squares had been comprised in the conveyances to J. Brough, and, having been held and enjoyed uninterruptedly by him and his lessees for more than thirty years adversely to the rights of the commissioners and all other persons, had become absolutely vested in him at the time of his death; and the plaintiffs prayed for a declaration that the commissioners had no right, title, estate, or interest under the Act, or otherwise over the lands being the sites of the proposed streets, roads, and squares, except so far as the same had been duly laid out and formed by the owners of the soil, and had been adopted by the commissioners in accordance with the provisions of the Act; for an injunction to restrain the commissioners from entering upon, gripping up, marking out, or in any way taking possession of, or interfering with, the sites of the said proposed roads, streets, and squares; and for damages.

The commissioners by their answer stated that John Brough was a solicitor, and a resident of considerable local influence in the town of Herne Bay, previously to and at the time of the passing of the Private Act, of which he was one of the principal promoters; that the Act could not have been passed without good evidence having been afforded to the Houses of Parliament that the promoters thereof had dedicated such of their lands as were described in the deposited plan for the purposes of the Act; that an instrument of dedication was in fact executed by the landowners, promoters, and supporters of the Act, but such deed was believed to have been burnt in the fire by which the Houses of Parliament were consumed in the year 1834; that J. Brough, Sir H. Oxenden, and others, by their conduct as such promoters precluded themselves and their successors from afterwards disputing the dedication of their estates, so far as necessary for the purpose of the Act; that the sites of the proposed roads, streets, and squares claimed by the plaintiffs were either never vested in J. Brough, or were vested in him subject to all

the statutory provisions in the Act; that J. Brough was one of the first-named commissioners under the Act, for more than thirty years took an active and principal part in all their proceedings, that he was from time to time re-elected, and was frequently chairman of, and nearly always present at the meetings of the Commissioners, and that he never assented or pretended that he had any right or title to hold his lands so as in any manner to interfere with the provisions of the Act. The Commissioners also alleged that shortly after the passing of the Act all the roads, streets, and squares delineated on the plan were actually marked or laid out, and the position thereof defined by boundary marks; that many of the roads, streets, and squares were unmade at the date of the passing of the Act, and that many had since been made and had become highways; that to allow the claim of the plaintiffs would be to render the future building of the town according to the plan impracticable, and would also intercept, rent off roads and communications, and destroy easements which had been relied on by many purchasers of land, and on the faith of which many houses had been built and many plots of land had been sold; that the sites of the proposed roads, streets, and squares were in fact dedicated and adopted as such by them, and that they had full power to do so, and that the same were vested in them for the purposes of the Act; and that none of such sites had been used, occupied, or enjoyed in the manner contended for on behalf of the plaintiffs and their predecessors in title, but only upon sufferance of the commissioners and under circumstances which precluded the acquisition of any adverse statutory title, and that such possession and occupation had always been subject to the rights of the commissioners and of the public to such sites under the Act and to the extent thereby provided. The commissioners also relied on sect. 138 of the Act, which enacted that no action or suit should be commenced or prosecuted against any person for anything done in pursuance or under the authority of the Act after the expiration of three calendar months next after the fact committed or the cause of action has ceased or determined.

The other material facts and the arguments are sufficiently noticed in the judgment.

Kay, Q.C., Everitt, and Bullen appeared for the plaintiffs.

Hemming, Q.C., Colt, and Anderson appeared for the defendants.

The following authorities were referred to in the course of the arguments:

- Berridge v. Ward*, 10 C. B. N. S., 400;
- Lord v. Commissioners for the City of Sydney*, 12 Moo. P. C. 473;
- Poole v. Huskinson*, 11 M. & W. 827;
- Corporation of Healy v. Batley*, 1 L. Rep. 19 Eq. 375;
- Roberts v. Karr*, 1 Camp. 262 (n);
- Rez v. Inhabitants of Cumberworth*, 3 B. & Ad. 108;
- The Attorney-General v. Bishop of Manchester*, 15 L. T. Rep. N. S. 646; L. Rep. 3 Eq. 436;
- North British Railway Company v. Dodd*, 12 Cl. & F. 722;
- The Attorney-General v. The Great Eastern Railway Company*, 23 L. T. Rep. N. S. 344; L. Rep. 6 E. & I. App. 387;
- Cubitt v. Lady Mazze*, 29 L. T. Rep. N. S. 244; L. Rep. 8 C. P. 705;
- Beckett v. Corporation of Leeds*, L. Rep. 7 Ch. 421;
- Squire v. Campbell*, 1 My. & Cr. 459;
- Barracrough v. Johnson*, 8 A. & E. 99.

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The VICE CHANCELLOR.—The plaintiffs, who claim to be owners of the several parcels of lands particularly mentioned in the pleadings, and which are situate at Herne Bay, in Kent, complain that the defendants, who are the "Commissioners for improving the town of Herne Bay," and who are appointed under a local Act of Parliament of 3 & 4 Will. 4 (1833), c. 105, did, in the month of December 1872, enter upon the plaintiff's lands, that the defendants gripped up and carried away a considerable quantity of the soil, broke down and carried away the fences, damaged and destroyed the growing crops, and acted as if the defendants were absolutely entitled to the lands, and as if the plaintiff had no right or interest therein, and further, that the defendants did these things under the pretence that they were authorised by the statute I have mentioned. The plaintiffs thereupon prayed for a declaration that the defendants are not entitled, either under the statute or otherwise, to enter upon any part of the plaintiff's lands, being the proposed sites of certain streets, roads, or ways, except so far as any public street, road, or way has been duly made and laid out and adopted by the commissioners in accordance with the provisions of the Act, and for an injunction restraining the defendants from entering upon or taking possession or interfering with the lands claimed by the plaintiffs, and that the defendants may be ordered to pay to the plaintiffs such damages as the court shall assess, together with the costs of the suit. The defendants admit that the several acts complained by the plaintiffs were done by the order of the commissioners, and they justify such acts upon two grounds: first, that the plaintiffs have no title to the lands in question, and, secondly, that if they had, whatever has been done by the commissioners has been done in exercise of the powers conferred upon them by the statute. These issues would seem to be in their nature by no means complicated or difficult, the facts relating to them being once ascertained; nevertheless, many days and much paper have been occupied by the statements of the evidence, and by the long cross-examination of witnesses on both sides, and by the arguments of counsel, embracing an immense quantity of details, a very large proportion of which have been by no means necessary for the decision of the questions submitted to the court; but inasmuch as the defence is mainly rested upon those details, and upon the objections which have been raised upon them by the defendants, it is necessary that they should be considered to some extent. [His Lordship then referred to the circumstances which gave rise to the passing of the private Act of Parliament and to the title of John Brough to the lands in question, and continued.] In the description of the parcels in the several conveyances to J. Brough, it is clear that the vendor and also the purchaser had in contemplation that roads were intended to be or might be made. No express mention of or reference to Sir H. Oxenden's then existing plan is made, but the land conveyed is mentioned as abutting upon or being bounded by roads "intended to be made," or "agreed to be made"—the phraseology is different in the several deeds—but in no instance is any mention made of an actually existing road. The purport and meaning of these expressions are obvious when the then construction of the land and what

must be considered to have been the intention of the parties dealing for the sale and purchase of plot of "building land" is borne in mind. Nothing is reserved or excepted by the vendor, but he carefully stipulates that "if and when" any road shall be made he shall not be under any liability as to its maintenance or repair. Upon the words I have referred to, the defendants have argued that there was a complete dedication by Sir H. Oxenden of so much of his land as would form the roads upon which the land he conveyed to the several purchasers abutted. But although this may well be, so as to prevent any claim by him or his successors, I am of opinion that to make the dedication complete to the extent and for the purposes of the defendant's contention, there must also be evidence of the use and adoption by the public of the intended roads, and that after the lapse of forty years, during which there has been no such use and adoption, the lands in question in this suit are, within the statutory powers conferred on the defendants, not as existing roads, but liable to be made roads, and if when the prescribed conditions shall be found to have been complied with by which alone they can be brought into existence as public roads. The evidence establishes the fact that from the periods of the several conveyances I have mentioned, the several lands claimed by the plaintiffs have been in actual and undisturbed possession of the several purchasers, and especially of the late J. Brough, from the time when his title accrued; that he was the ostensible and reputed owner; that the lands were cultivated as arable and pasture land; that, as to the land comprising what is called Hanover-square, it was effectually fenced in, and the exclusive possession of it was preserved; and that, although it is proved that some persons occasionally made a way for themselves across the land, they could only effect this by getting through or over the gates and fences which the owner had put up for the protection of his property. The like proof is given of the possession and cultivation of the land forming part of what on the plan is called Oxenden-square, and which extends up to the King's-road; and, although upon one occasion, in the year 1854, the commissioners put down posts which would prevent the passage by carts across a part of this land, the then tenant cut down one of the posts (his right to do so not being disputed) so as to preserve the free passage for his carts which he had up to that time enjoyed and used, and which use and enjoyment were continued until the commissioners asserted the right now complained of. At its southernmost end the land last mentioned abuts upon the grass pathway which runs on the northern side of Sea Street Farm. Along this, in the direction of King's-road, and at a distance of thirty or forty feet the commissioners caused a grip to be cut, but the tenants of this land continued to cultivate it in the usual manner and ploughed through the grip. King's-road appears to be in the same state as it was when the Act passed, except that recently some rubbish has been shot or laid there by the commissioners, and it was and is rough and unformed. Another of the parcels of land adjoins what is called on the map John-street, and this has been tilled and cultivated in like manner by the tenants of Mr. Brough. A part of John-street, extending from the sea to High-street, has been long formed and made under the Act, and is not

in question, but the extension of that street southward has always remained and still remains in grass with no road formed or made, or indicated in any other manner than that some trees have been planted along the sides, and that some posts were once set up across it—the only use of which would seem to be to prevent the passage of carriages, and which posts have since rotted away. At a part of this land where it adjoins what is called Clarence-street, on the deposited plan, several years ago a blacksmith's forge was erected, as it appears, with the consent of Mr. Brough, and the only suggestion that this was ever used by the public is that horses were brought to this shed to be shod; but it is clear that no road or roadway there was at any time formed. And during the whole period Brough and his tenants have been in the occupation, cultivation, and enjoyment of all the lands in question, without dispute or interference by any person or authority; and during the same period the poor's rate, the town rates, and the tithes, have been paid in respect of the ownership and occupation of the same lands. During the same period no act has been done or attempted by the authority of the commissioners from which it can be inferred that they claimed to be entitled to the roads in question, nor has any house been built, nor are any projected or begun upon any part of the lands abutting upon or bounding the intended roads, or for which it could answer any useful public purpose that roads should be made. Upon the first question, then, it appears to me that upon the evidence the plaintiffs have established a sufficiently clear title as owners of the land in question to lay a ground for their complaint against the defendants, who, upon a claim and colour of title, entered upon the plaintiff's lands, prostrated the fences, seized the crops, and committed acts of unquestionable damage. In so far as the evidence of the plaintiffs tends to establish a possessory title for more than twenty years, the defendants not only dispute it in fact, but they insist that such a title would be ineffectual against them—their powers conferred by the statute not being affected by any prescriptive adverse right. In this latter contention I think the defendants are justified; but then it becomes necessary to consider what is the nature and what the extent of their statutory authority. The defendants did at one time claim to be entitled in fee simple to the roads, but that claim was given up at the bar as untenable, and the question appears to depend upon the terms of the statute. In 1833 several plots of land, including those I have mentioned, had been sold and houses had been built, and it was then thought expedient to apply to Parliament for an Act separating the land comprised in the plan from the remainder of the parish of Herne. Accordingly an Act was obtained (3 & 4 Will. 4, c. 105) which received the royal assent on the 28th June 1833. The preamble, which shows conclusively the grounds upon which and the purpose for which it was passed, is in these terms [his Lordship read it]. The map or plan there mentioned is identical in outline with the plan which had been made for Sir H. Oxenden, and appears to have been traced from the latter, and it shows that some, but not a great number of houses had then been built. The only purpose for which the plan mentioned in the statute is referred to is to point out the boundaries of the new district over which

the provisions of the Act were to extend and apply, and which was thenceforth to be as it has ever since been and is called "the town of Herne Bay." The Act proceeds to appoint commissioners, and to confer upon them certain powers incident to their office. It is in the form which at the time of its passing was that universally adopted, and it does not differ in any substantial respect from the numerous other statutes for paving, lighting, and watching specified districts which had been passed before the Lands Clauses Consolidation Act, and the other Consolidation Acts, by which, among other useful purposes, the needless repetition of provisions and clauses of universal and necessary application is avoided by reference to the terms of those statutes. The ground upon which the commissioners, the defendants, justify the acts complained of, and which they admit, is to be found in the provisions of this statute, and this must needs be so since it is clear beyond dispute that they can have no power or authority whatever, save what is conferred upon them by this statute. It becomes therefore necessary to consider what is the actual extent or limits of that power or authority. [His Lordship then read the material sections of the statute.] By the same statute the commissioners are empowered to make a new and commodious road from the southern extremity of Brunswick-street to the spot where Herne Common abuts upon the turnpike road from the town to Canterbury, and for this purpose the usual powers of compulsory purchase from the owners of lands are conferred upon the commissioners, but excepting as relates to this particular road, no powers whatever are conferred upon the commissioners enabling them to purchase or acquire any lands whatever. It is impossible to doubt that if it had been the intention of the promoters of the Bill to take powers to make roads generally they would have asked for such powers. It is equally impossible to infer that any such extensive powers are contained in, or to be implied from, the provisions of the Act. It has been suggested, in the course of the arguments for the defendants, that, inasmuch as the purpose and policy of the Act and its tendency are for the improvement of the town of Herne Bay, and for what has been called the development of the town, the Act ought to be construed in this sense, and ought to be read as conferring upon the commissioners such powers as will best tend to accomplish that purpose and policy. I do not, however, think that the statute can be read otherwise than according to its precise and plain expressions. The policy and purport are, in my judgment, very clear and explicit. The powers which it confers upon the commissioners, and the duties which it prescribes, are that the existing public roads and ways already formed shall be preserved for the use of the public, and that by degrees, and when and as often as other public passages, to be formed and made after the passing of the Act, shall be so made and formed they shall be properly paved, lighted, watched, and improved. To accomplish these objects, and to establish an efficient police, the commissioners are empowered to levy upon the inhabitants a rate called the "Repairing, Lighting, and Watching Rate," on the occupiers of all buildings and lands within the town, not exceeding 3s. in the pound, and when levied upon such land or houses as shall not be lighted or

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watched, or shall not abut upon any part of the roads or passages which shall be lighted or watched, a rate not exceeding 1s. in the pound. This distinction between the amounts of the rate to be levied must be borne in mind in construing the Act, for if the rate were to be single and uniform it would be competent to the commissioners to levy the rates indiscriminately upon the owners of all lands and houses within the town, whether they did or did not enjoy the advantages to be procured by the expenditure of the moneys which the commissioners are authorised to raise by means of the rates. That the construction I have mentioned as the true and only construction of the statute was put upon it by the commissioners themselves, is clear, from the manner in which they applied and dealt with it for many years after its operation commenced, as is evident by the extracts from the minutes of the proceedings set out in their answer. Not only do those minutes contain no exercise or assertion of right over any roads which had not been built upon or were adjacent to such roads, nor any staking out or authority over them, although the roads which had been made and publicly used were from time to time repaired by the commissioners, but in 1857 the commissioners appointed a committee consisting (among other persons) of two of the witnesses for the plaintiffs to find out all the public roads and ways, and to mark and stump the same to their proper width according to the Act of Parliament. What report was made upon this subject does not appear. That the question of the right of the commissioners over the roads had been raised is apparent from the minutes of the 4th Oct. 1858, in which it appears that it had been resolved to take counsel's opinion respecting the roads and squares of the town; but it would also seem that the question had been in some way disposed of since by a resolution of the 1st Nov. following. It was not only determined that counsel's opinion should not be taken, but that the question should not be re-opened without giving fourteen days' notice of a special meeting for that purpose; and there is no trace of the subject having been further discussed. Trees have been at various times planted in and about the town, but it seems that this was for the purpose of ornamenting and improving the appearance of the place, and not with a view of acquiring or asserting any right over any of the roads. But what is of greater importance in considering the manner in which the commissioners exercised their rights is that, with respect to a street leading from the south to the sea (called Beach-street on the deposited plan), the owner of the land at that end built upon it so as wholly to close the northern end; and that, as to another street (without a name on the plan) leading from William-street and part of the estate of Mr. Brough, a church has been built on the greater part of that site, and this without any claim or objection on the part of the commissioners. The expectations which may have been entertained at the passing of the Act have not been realised. Several houses have been since erected, but the larger part of the town remains unbuilt upon, and there are no buildings whatever abutting on any of the roads or ways claimed by the commissioners and the subject of this suit. [His Lordship then stated the facts which gave rise to the present suit, and proceeded.] The defendants, among other things, have insisted

on the provisions of the statute 4 & 5 Will. 4. c. 105, s. 138, prohibiting any action or suit for anything done in pursuance or under the authority of the Act after the expiration of three months next after the act committed or the cause of action has ceased. Considering the nature of this case, the title set up, and the claim made by the commissioners in the first instance, although that has now been partially disclaimed, and the effect of the protests and notices given on the part of the plaintiffs, I do not think they are barred of their suit, the main object of which is to obtain a declaration of right and to prevent the commissioners from interfering with that right, nor can I doubt that this court has jurisdiction to determine the questions which have been raised upon the record. It is not suggested by the defendants that they were induced to take the proceedings complained of for any public present purpose, or that the safety or convenience of the public or the inhabitants of the town required their interference, but, insisting that under the Act of Parliament the roads and streets were vested in the commissioners for the purposes of the Act, they submit that it was proper for them in the exercise of their public duty to prevent any persons from acquiring statutory rights over the roads, streets, and squares which had been and remain effectually dedicated to the purposes of the Act. It is, moreover, abundantly clear that no rights, statutory or other, can be acquired so as to prevent the exercise of the powers given by the Act to require and compel the formation of roads and streets whenever and wherever the state of circumstances requiring such roads and streets shall come into existence. The defendants would seem to have considered that the statute gave them plenary powers over all the roads and squares described upon the deposited plan; but the purpose for which and the terms in which the deposited plan are referred to are so clearly expressed in the statute as to show that the powers of the commissioners are only to be exercised in respect of roads which were made, or which should be made, consequent upon the erection of buildings to which such roads would be applicable and useful. And it has now been very conclusively decided that whatever representation may be made on a plan deposited and referred to in an Act of Parliament is of no effect, unless the representation is incorporated in the Act: (*North British Railway Company v. Dodd*, 12 Cl. & F. 722; *Attorney General v. The Great Eastern Railway Company*, 23 L. T. Rep. N. S. 344; L. Rep. 6 H. L. 367.) Under these circumstances I am forced to the conclusion that the defendants have misconceived and misused their powers, and that they have unlawfully invaded and damaged the property of the plaintiffs. The decree, therefore, must be that the plaintiffs are entitled to a declaration in the terms of the first two paragraphs of the bill, and that the plaintiffs are entitled to be paid by the defendants the damages which the plaintiffs have sustained by the wrongful proceedings of the defendants, for which purpose an inquiry must be directed in the usual form, and that the defendants pay to the plaintiffs their costs of this suit.

Order accordingly.

Solicitors for the plaintiffs, *Fielder and Sumner*.Solicitors for the defendants, *Lumley and Lumley*.

Wednesday, May 17.

(Before Vice-Chancellor HALL.)

GOTT v. NAIRNE. (a)

Will—Honorary trust—Bequest for purchase of an advowson—Direction to accumulate—Right of legates to immediate transfer of fund.

A testator gave 12,000*l.* to trustees, on trust, with the whole or such part as they should think fit of that sum to purchase an advowson, and nominate to it such person as they should think proper. Subject to this trust the advowson was to be held in trust for A. until he should have a benefice worth a clear 1000*l.* a year, or died. Until the advowson was purchased the fund was to accumulate, and at the end of twenty-one years, or on the death of A., or on his being presented to a benefice worth a clear 1000*l.* a year, the fund, or so much of it as had not been employed in the purchase, was to belong to A. absolutely.

The fund had been accumulating for about twelve years. No advowson had been purchased, but the trustees were not desirous to be relieved of their trust:

Held, that under such circumstances A. was not entitled to have an immediate transfer to him of the fund.

DEMURRE.

William Gott, by a codicil to his will, bequeathed to R. Nairne and T. W. Nelson the sum of 12,000*l.* upon trust, that they or the survivor of them, or the executors or administrators of such survivor should, as soon conveniently as might be after the testator's decease, but nevertheless at their sole and absolute discretion, invest the whole or such part as they should think fit of the said sum of 12,000*l.* in the purchase of an advowson and right of patronage of, in, and to some ecclesiastical benefice in England, with the right of next presentation thereto. And the testator directed that until his son John Gott should be duly presented to and inducted into some ecclesiastical benefice which should produce a net annual income of 1000*l.* at the least (after deducting the necessary charges and outgoings in respect thereof), or should previously depart this life, the trustees should nominate to the said ecclesiastical benefice, when and so often as any vacancy should occur, such fit and proper person as they might in their uncontrolled discretion select or choose for that purpose. Subject as aforesaid, the trustees were to stand possessed of the advowson and right of presentation in trust for John Gott, his heirs and assigns. The testator also directed that until the 12,000*l.*, or such part of it as the trustees should think fit, had been invested as aforesaid, they should invest it in specified securities, and for the term of twenty-one years from the date of his death, accumulate it and the income thereof, by way of compound interest. And he declared that such accumulated fund should be applicable to the purchase of the advowson, and that the interest of the 12,000*l.* and the accumulations thereof, together with the securities in which they might be invested at the expiration of the twenty-one years, should, so far as they had not been laid out in the purchase of the advowson, belong and be paid to John Gott, his executors or administrators. Provided, however, that if John Gott should die or be

inducted into some ecclesiastical benefice of the annual value aforesaid, before the trustees had entered into any contract for the purchase of an advowson, or if any part of the 12,000*l.*, or the accumulations thereof, should remain undisposed of after completing such contract, then the 12,000*l.* and the accumulations thereof, or so much of the same as should remain undisposed of, should belong and be paid to John Gott, his executors or administrators.

The testator died in 1863. The trustees had received the 12,000*l.* and invested it and the accumulations, as directed, but no purchase of an advowson had been made.

John Gott, the son, had been presented to the vicarage of Leeds, and it was in dispute between the trustees and himself whether or not that benefice was worth a clear 1000*l.* a year.

The action was brought by John Gott against the trustees.

The statement of claims set out the above-mentioned facts, but claimed to have the trust fund handed over to the plaintiff, irrespective of any question as to value of his present living.

The defendants demurred generally.

G. Hastings, Q.C. and Kekewich, for the demurrer.—The defendants do not decline to carry out the trust created by this will. The plaintiff, therefore, cannot claim this fund, unless he can show that he is the exclusive object of the trust. But it is clear that the trustees may, at any time until the expiration of twenty-one years from the testator's death, create a *cestui que trust* by purchasing an advowson and presenting some person other than the plaintiff to it. The case is like that of *Mussett v. Bingle* (W. N. (1876) 170), where a request to erect a tombstone was upheld, the trustees being willing to carry it out. They cited

Harbin v. Masterman, 25 L. T. Rep. N. S. 200;

L. Rep. 12 Eq. 559;

Talbot v. Jevors, L. Rep. 20 Eq. 255.

Dickinson, Q.C. and *Ingle Joyce*, for the plaintiff.—Both the fund and the advowson belong to the plaintiff, subject to the direction to accumulate the interest on the fund and the purchase of and presentation to an advowson. As to the accumulation, it is clear that where there is a simple direction to accumulate a fund and give it to A. twenty-one years hence, he, if of full age, is entitled to receive it at once. As to the purchase of the advowson, there are a series of cases of which *Gosling v. Gosling* (John. 265) is the most important, showing that the legatee in such a case is entitled to have the fund at once, unless the testator has shown a clear intention that some one shall have the enjoyment of it in the meantime. Here the testator's object was evidently to benefit the plaintiff alone, it being clear that there was no other person whom he specially wished to benefit. There is no trust for any person except the plaintiff, no person who now or at any time can call upon the trustees to purchase a living. *Harbin v. Masterman* (*sup.*) is in our favour, for there the Vice-Chancellor would have divided the fund amongst the residuary legatees, had they not been charities. They cited also

Thomson v. Shakespeare, John. 612; 1 De G. F. & J. 399;

Lewin on Trusts, 6th edit. p. 94.

G. Hastings, Q.C., replied.

The VICE-CHANCELLOR.—In this case the trus-

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tees disclaim any beneficial interest in the fund in question, but do not say that they are unwilling to perform the trust. They do not look upon this trust as beneficial to themselves, but—there being something to be done, perfectly legal—the trustees are desirous to do it. The plaintiff, then, not having shown that the trusts are simply and solely for his benefit, and such as he has a right to put an end to, the demurrer must be allowed. I see no reason why the trustees should not be allowed to carry out this trust. And it is to be observed, that they are to nominate to the benefice, when purchased, “when and so often as any vacancy shall occur.” So that even if they purchased an advowson and presented the plaintiff himself to it, that would not at once put an end to their trust. Moreover, it does not follow that the whole fund would be expended in purchasing the advowson. The demurrer, must, consequently, be allowed; but the plaintiff will have leave to amend, and thus raise the question of the net value of his present benefice.

Solicitor for the plaintiff, *B. Smith*, for *Ford and Son*, Leeds.

Solicitor for the defendants, *T. W. Nelson*.

COMMON PLEAS DIVISION.

Thursday, May 4.

HAWKINS v. WALROND AND OTHERS. (a)

Landlord and tenant—Distress—Covenant to consume hay, &c., on premises—Sale of goods distrained—Statute 2 W. & M. c. 5, s. 2—56 Geo. 3, c. 50, s. 11.

The plaintiff was tenant to the defendant W. whose agents the other defendants were, under a lease which contained a covenant by the plaintiff not to remove hay, &c., from the demised premises, but to use them thereon.

The plaintiff being in arrear with the rent of the demised premises, the defendant W. distrained upon certain hay, &c., upon the premises, and sold the same under a condition that the purchaser should not remove the hay, &c., bought from the demised premises, but use them thereon.

Held, that such a restriction could not be legally imposed by the landlord, and that if, in consequence of the imposition of such a restriction, the hay, &c., sold for a price less than the best price that could be got, the landlord and his agents were liable in an action.

By the statement of claim it appeared that the plaintiff was tenant under a lease to the defendant Walrond of a farm at Kentisbeare, in the county of Devon, and of a close at Uffculme, in the same county, for a term of twenty-one years from the 25th March 1869. The other defendant was the agent, it appeared, of the defendant Walrond, and distrained and sold, under his orders, certain hay and unthreshed corn seized as a distress.

It appeared that the lease contained a covenant by the plaintiff in the usual form not to remove hay, unthreshed corn, &c., or to sell or dispose of them off the demised premises, but to use them on the premises for the improvement thereof.

The hay and unthreshed corn seized as above stated was sold by auction, but upon the terms and subject to the condition that it should be used on the premises.

It was alleged in the statement of claim that,

in consequence of this restriction, the best price which could be gotten for the said hay, &c., was not obtained.

The Act 56 Geo. 3, c. 50, s. 11, enacts that—

No assignee of any bankrupt . . . nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crops of any person or persons engaged in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, &c., or any manure, &c., or other dressings intended for such lands and being thereon, in any other manner and for any other purpose than such bankrupt . . . or other person so employed in husbandry ought to have taken or disposed of the same, if no commission of bankruptcy had issued or no such assignment or assignments had been executed or sale made.

The Act 2 W. & M. c. 5, so far as is material to the present point, is as follows:

Whereas the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby, for the remedying whereof.

2. Be it enacted that from and after the first day of June 1690, where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house . . . replevy the same . . . that then in such case . . . the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised by two sworn appraisers . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, &c.

The covenant of the lease did not appear on the pleadings, but it was agreed by both parties that it was to be referred to as though it had been set out on the pleadings, and that the whole question should be decided on the demurrer to the statement of claim.

B. S. Wright (O. S. O. *Bowen* with him) for the defendants, in support of the demurrer to the statement of claim, contended that the Act 56 Geo. 3, c. 50, s. 11, being later than the Act 2 W. & M. c. 5, overrode that Act, if inconsistent with it, and that the latter Act applied to all purchasers of farm produce, so that, even if the landlord had imposed no restriction upon the use of the property sold under the distress, the law would have done so, and that, consequently, the announcement of the fact that it could only be used on the premises was not the imposition by the defendants of any restriction; but merely a proper publication of the restriction which the law imposed, and a fair warning to intending purchasers of what the law compelled them to do with the property if they purchased it. The case of *Abbey v. Patch* (8 M. & W. 419), he contended, was an express authority that a landlord selling a distress might sell under a restriction such as that now complained of. In that case Lord Abinger, in giving judgment (28th May 1841), said: “The only question is whether the landlord, having distrained for rent, was bound to sell the hay and straw to be consumed off the premises, in a case in which, according to the terms of his covenant, the tenant had no beneficial interest in them. I do not think he was. As the question comes to be decided by us for the first time, we may decide it upon the general principle that the tenant cannot be in a better situation, by means of a distress, than he would be while paying his rent faithfully. When

the landlord, therefore, sells under a distress, he should sell no more than the tenant could himself dispose of." The other judges concurred in this judgment, one of them (Rolfe, B.) referring to the Act 56 Geo. 3, c. 50, as throwing light upon the subject. In the case of *Wilmot v. Rose* (3 E. & B. 563) it was decided that sect. 11 of 56 Geo. 3, c. 50, applied not merely to purchasers under an execution, but prohibited purchasers of farming stock from the tenant from dealing with it otherwise than the tenant might do. *Ridgway v. Stafford* (6 Ex. 404) was an unsatisfactory case (decided in 1851), since the court there refused a rule applied for by a defendant, sued under circumstances similar to the present, pursuant to leave reserved to him at the trial. He referred also to

Frusher v. Lee, 10 M. & W. 709;

Jones v. Hamp, *Ibid.* 700.

A. Wilson (A. Charles with him) referred to *Wilmot v. Rose*, as reported in 23 L. J. 281, Q. B., as showing that the court in deciding that case expressly distinguished it from the case of a sale by the landlord. [He was then stopped by the court.]

LORD COLERIDGE, C.J.—In this case judgment must be given for the plaintiff. The plaintiff is a tenant under a lease to one of the defendants. The defendants are the landlord and his agent, who was constituted by him his bailiff to distrain. The plaintiff complains that the landlord's bailiff having distrained for rent in arrear, sold it under an illegal condition, and so did not obtain the best price that could be gotten. The pleadings were somewhat informal, but by agreement between the parties this demurrer is to be dealt with as though the covenant appeared upon the record. The covenant in question was a covenant not to carry away from the premises, or sell, or dispose of, hay, unthreshed corn, &c., but to use the same on the premises for the improvement thereof. It is upon that covenant entered into by the tenant with his landlord that the defence is grounded, taken in connection with the 11th section of 56 Geo. 3, c. 50. The defendants in effect say, this is a covenant that you shall not sell the hay, &c., to be consumed off the premises, and all that we have done is to sell to a purchaser who is bound to do that which, had there been no distress, you, the tenant, must have done, namely consume the hay, &c., on the demised premises. It may be, say the defendants, that in consequence of the condition imposed on the purchaser the distress fetched less than it would have done if sold without any condition, yet as no purchaser could use the hay, &c., otherwise than in accordance with the plaintiff's covenant, they had they say a right to sell subject to the obligation so to use it. The validity of this defence depends upon sect. 11 of 56 Geo. 3, c. 50. It is an "Act to Regulate the Sale of Farming Stock Taken in Execution." The preamble refers only to legal process, but sect. 11 in words is not confined to executions or legal process, but goes apparently beyond the scope of the preamble. It is argued that it extends it extends to all purchasers of farming produce, and that no purchaser can use farming produce in any way other than that in which the tenant might use it; and, that as the landlord in the present case only bound the purchaser to use it in the way in which the tenant must have used it, the tenant suffered no wrong, and the sale was

for the best price that could, under that restriction, be obtained. I do not think this is the true construction. The sale here was a sale under a distress; now the right to sell a distress is a comparatively modern right, and one created by statute and regulated by statute. Anciently the landlord could annoy and injure by taking and holding a distress, and so force a tenant to pay rent in arrear, but he could not sell the distress. The power of sale created by statute, as I have said, must be exercised according to the terms of the statute giving the power. The statute which gives the power of sale is 2 W. & M. c. 5, which enacts that the goods distrained may, after appraisal, be sold for the best price that can be gotten for the same. The landlord must sell subject to the statutory conditions, and cannot impose conditions which prevent the distress from being sold at the best price that can be gotten for the same. The other statute to which reference has been made (56 Geo. 3, c. 50), is not a statute dealing, as does the statute of 2 W. & M., directly and distinctly with sales under distress. The statute 56 Geo. 3, c. 50, was passed, as appears on the face of it, for a different purpose and with a different object. The language of the statute 56 Geo. 3, c. 50, s. 11, is satisfied by confining it to the case of purchasers from tenants. Is there any decision which ought to bind us, conflicting with this view? I think not. The case of *Abbey v. Petch* (*sup.*) is to the contrary, but it does not seem that the statute 2 W. & M. c. 5 was referred to either during the argument or in the judgment. That decision came again before the same court (the Court of Exchequer) in the case of *Frusher v. Lee* (10 M. & W. 709), when that court treated the question as still an open one, notwithstanding the previous decision in *Abbey v. Petch* (8 M. & W. 419), and referred to a case of *Jones v. Hamp*, tried before Patteson, J., as in conflict with that decision. In this state of the decisions the case of *Ridgway v. Lord Stafford* (6 Ex. 404; 20 L. J. 226, Ex.) came before the Court of Exchequer, raising the point which is now before us, and raising it so as to make that case a case on all fours with the present. The decision there is a direct authority for the proposition that a landlord cannot impose conditions such as those which he imposed here. The decisions being in conflict, we should have been entitled to follow the later decision, especially as it is a decision given by the same court as that which decided the earlier case. It is, however, suggested that the case of *Wilmot v. Rose* (3 E. & B. 563; 23 L. J. 281, Q. B.) throws doubts upon the case of *Ridgway v. Lord Stafford* (6 Ex. 404; 20 L. J. 226, Ex.). That case was not the case of a sale under a distress, but it was an ordinary sale off the premises by a tenant in fraud of the terms of his tenancy. The landlord there gave notice to the purchaser of the restrictive covenant contained in the tenant's lease, and the purchaser, in defiance, carried off what he had bought, but was afterwards held liable in the action to compensate the landlord. It was then argued in favour of the defendant that, as the title of the Act 5 Geo. 3, c. 50, referred only to execution, the general words in sect. 11, "any purchaser" must be held to mean "any purchaser under an execution." The Court of Queen's Bench held that this was not so, that the general words of the 11th section were not

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restricted by the preamble. According to the report given of the case in Ellis and Blackburn's Reports, Lord Campbell and Crompton, J. seem to say that *Ridgway v. Lord Stafford* would have been an authority in point had it not been for the fact that the 11th section of the statute 56 Geo. 3, c. 5, had not been brought before the court. It would then follow that those two great authorities did not regard *Ridgway v. Lord Stafford* as a binding decision, because it was a decision arrived at without full materials. There is, however, a plain distinction between *Rose v. Wilmot* and *Ridgway v. Lord Stafford*, and it is, as I have said, that in that case the purchase was from the tenant, and the statute enacts that all purchases from the tenant shall be subject to the conditions of the lease; whereas in *Ridgway v. Stafford* the purchase was not from the tenant, but from the landlord. In the *Law Journal* a more extended report is given of the case of *Wilmot v. Rose* (3 E. & B. 563; 23 L. J. 281, Q. B.), and from that it appears that the very distinction which I have indicated was taken by Crompton J., and was present to the mind of the court when deciding that case. The authorities, then, which are in point are all in favour of the view we take, with the exception of *Abbey v. Petch*, and that was overruled by the later case of *Ridgway v. Lord Stafford*. Upon authority, therefore, as well as upon the construction of the statutes, judgment must be for the plaintiff.

ARCHIBALD, J.—The question that arises in the present case is shortly this: Whether the statute 56 Geo. 3, c. 50 has so far qualified the statute 2 W. & M. c. 5 as to make the condition imposed by the defendants a reasonable and proper condition. The complaint or statement of claim alleges that the goods were not sold for the best price that could be gotten because of the imposition of an illegal condition, and the demurrer, treated as agreed by counsel, raises the question of whether, on the facts of the present case, such a condition is illegal. I agree with what my Lord has said as to the course and history of legislation. The statute 2 W. & M. c. 5 gives power to sell distresses, and provides that they are to be sold for the "best price that can be gotten" for them. In the absence of anything to qualify the enactment, this is binding on the landlord and his bailiff in the present case; but it is said on their behalf that the covenant in the lease to the plaintiff does qualify the force of the enactment, and enable the landlord to impose the condition which he has, in fact, imposed. Now, it seems to me that the Act 56 Geo. 3, c. 50, does not conflict with or qualify the earlier Act; it was passed for a totally different purpose, it refers only to sales by tenants, it has no reference to sales by landlords. The contention of the defence was that the words "any purchaser" included purchasers from landlords under a distress. Now it seems to me that, if we can, we ought to construe the later Act so as to harmonise with the earlier, and that, as it seems to me, we can do by taking the words "any purchaser" to relate only to purchasers from tenants, and not to purchasers from landlords. The cases have been fully gone into during the course of the argument and in my Lord's judgment, and the balance of authority is in favour of the view we take, and the reasoning of the decision in *Ridgway v. Lord Stafford* (6 Ex. 404; 20 L. J. 226, Ex.) shows how impossible it would be to

make such a condition binding upon a purchaser from a landlord under a distress. The case of *Ridgway v. Lord Stafford* is an authority upon the precise point before us, latest in point of time of any of the decisions upon the point, and the decision there was given by the court after consideration, and puts, in my opinion, the true construction upon the statutes; the result being that a landlord must sell a distress in the ordinary way, and cannot impose unusual or restrictive conditions. Some difficulty was said to arise from the case of *Wilmot v. Rose* (3 E. & B. 563; 23 L. J. 281, Q. B.). This supposed difficulty vanishes when the case is properly understood. The title of the Act 56 Geo. 3, c. 50, is "An Act to regulate the sale of farming stock taken in execution," and the preamble goes no further than the title, but it was argued that sect. 11, though apparently wider in its scope, was restricted by the preamble; this the Queen's Bench, in *Wilmot v. Rose*, held was not the case. They held that it included all purchasers from tenants, and not merely purchasers under an execution or assignees in bankruptcy. There is nothing whatever to show that the Court of Queen's Bench held that purchasers from a landlord under a distress could only deal with stock or produce as the tenant might have done. It seems to me, then, that the landlord is bound now, as he was before the passing of 56 Geo. 3, c. 50, to sell for the best price, in accordance with the terms of the statute 2 W. & M. c. 5.

LINDLEY, J.—I am of the same opinion. The action is brought against a landlord by his tenant for selling goods distrained for rent in a manner not authorised by the statute creating the right to sell distresses. Unless some statute has been passed to relieve the landlord from the conditions imposed by 2 W. & M. c. 5, the landlord must in selling observe those conditions, and sell in the way in which he is by that statute empowered to sell. The defendants rely on a covenant, and on the statute 56 Geo. 3, c. 50, s. 11. Now the covenant is a covenant by the tenant with the landlord, and for the landlord's benefit, which the landlord can enforce by action or injunction against the tenant or purchaser from the tenant, with notice of the covenant. The covenant, being for the benefit of the landlord, can be waived by the landlord. If, however, the landlord chooses to exercise the power to distrain and sell which he has, he must exercise it in accordance with the statute; he cannot sell otherwise than under the statute. If he exercises the statutory power of selling the distress, he waives the covenant, if the covenant conflicts with the statute. With regard to the Act 56 Geo. 3, c. 50, it has no language to show that there was any intention of interfering in any way with the law of distress, and the purpose for which that Act was passed was, as appears from the Act itself, wholly different. It seems, therefore, to me that the general words "any purchaser" must be construed with reference to the context, and the object of the Act itself, and so construed it would mean any purchaser from or claiming under the tenant, and would not include purchasers from the landlord. The authorities upon the point appear to be four in number; three of them are one way, one of them the other way. *Wilmot v. Rose* has, in my opinion, nothing to do with the present point. We have, then, in favour of the view we take, *Ridgway v. Lord Stafford* (6

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Ex. 404; 20 L. J. 226, Ex.), *Frusher v. Lee* (10 M. & W. 709), *Jones v. Hamp*, cited in *Frusher v. Lee*, and against that view the single case of *Abbey v. Petch* (8 M. & W. 419). Upon authority, then, as well as upon principle, judgment should, I think, be for the plaintiff.

Solicitors for plaintiff, *Walker and Martineau*.

Solicitors for defendants, *Ohurch and Clarke*.

EXCHEQUER DIVISION.

Jan. 20 and 21.

(Before BRAMWELL, AMPHLETT, and HUDDLESTON, BB.)

COHEN v. THE SOUTH-EASTERN RAILWAY COMPANY. (a)

Carrier—Railway company—Carriers by rail and steam vessel—Passengers' luggage—Liability for loss of—Special contract—Signature of by passengers—Conditions limiting liability.

The luggage of a passenger by railway comes within sect. 7 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), fixing the liability of railway companies for the loss of or injury to "any articles, goods, or things in the receiving, forwarding, or delivering thereof" and no condition therefore limiting the company's liability in respect of such luggage is binding, unless it be a "just and reasonable one," and be embodied in a special contract, signed by the passengers or the person delivering such luggage to the company for carriage.

By sect. 16 of the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), sect. 7 of the Railway and Canal Traffic Act is incorporated, and its provisions extended and made applicable to luggage conveyed by railway companies on board steam vessels used by them for the purpose of carrying on a communication between any towns or ports. *Stewart v. The London and North-Western Railway Company* (19 L. T. Rep. N.S. 302) discussed and distinguished.

By the first count of his declaration the plaintiff charged that the defendants were carriers of passengers and their luggage by sea from Boulogne, in the Republic of France, to Folkestone, and thence by land from Folkestone to London; and in consideration that the plaintiff caused his wife to become and be a passenger, to be carried, with her luggage, by sea from Boulogne to Folkestone, and thence by land from Folkestone to London aforesaid, for reward then paid by the plaintiff to the defendants in that behalf, the defendants promised the plaintiff to use all due and reasonable care in so carrying the plaintiff's wife and her said luggage; and all conditions were fulfilled, and all times elapsed necessary to entitle the plaintiff to have the defendants perform their said promise; yet the defendants did not use due and reasonable care in carrying the said luggage, but by the negligence of the defendants, while the said luggage was being carried by them by sea from Boulogne to Folkestone, a certain trunk, containing wearing apparel of the plaintiff's wife, and other things belonging to the plaintiff, being a part of the said luggage, fell into the sea, whereby the said trunk, and the contents thereof, were greatly injured, &c., and allegations of damage to the plaintiff.

By the second count the declaration charged

that the defendants were carriers of passengers and their luggage, as in the first count mentioned, for reward to the defendants, and the defendants, at the request of the plaintiff, received the plaintiff's wife as a passenger, with her luggage, including the trunk in the first count mentioned, to be by them, as such carriers, safely and securely carried by sea from Boulogne to Folkestone, and thence by land from Folkestone to London, for reward then paid by the plaintiff to the defendants; yet the defendants did not safely and securely carry the said trunk by sea from Boulogne to Folkestone, aforesaid, but while the said trunk was being so carried by them as aforesaid, it fell into the sea and was injured, and the plaintiff suffered the damage in the first count mentioned, and the plaintiff claims 100l.

For a fifth plea (amongst others), to the whole of the declaration the defendants say, that they are a railway company incorporated for the conveyance of passengers with their luggage within the United Kingdom, and upon lines of railway situated therein, and that Boulogne in the declaration, mentioned is a place or town in the Republic of France, and beyond the extent of the defendants' lines of railway; and that the said damage to the said luggage in the declaration mentioned, did not happen or occur whilst the said luggage was being carried or conveyed on the defendants' line or lines of railway; and that the plaintiff caused his said wife and her luggage to be received by the defendants, as the same were received by the defendants, to be carried as in the declaration mentioned; and under a special contract between the plaintiff's said wife, as agent for the plaintiff and the defendants, and subject to certain conditions contained in the said contract, and set out in a certain through ticket taken by the plaintiff's said wife, as agent for the plaintiff, from the defendants, one of which conditions was that the defendants would not be responsible for luggage if the value thereof exceeded 5l. And the defendants say that the said luggage of the plaintiff's wife, delivered to the defendants to be carried by them, as in the declaration mentioned, exceeded the value of 5l.

Replication to the said fifth plea, that the defendants are a railway company authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, and working steam vessels, for the purpose of carrying on a communication between the towns or ports, amongst others, of Folkestone and Boulogne aforesaid, and to take tolls in respect of such steam vessels, within the meaning of the 16th section of the Railways Regulation Act 1868; and that in carrying the plaintiff's wife and her luggage from Boulogne to Folkestone aforesaid the defendants were acting in pursuance of such authority, and the vessel on board of which the plaintiff's wife and her luggage was carried was a steam vessel, and the carrying of the plaintiff's wife and her luggage was a carrying of traffic within the meaning of the said section; and the matters and things in the declaration mentioned happened after the passing of the said Act, and all things were done and happened, and all times elapsed, so as to make the provisions of the Railway and Canal Traffic Act applicable to the matters and things in the declaration mentioned, and binding in all respects on the defendants. And that the alleged special contract in the said plea mentioned related to the receiving, forwarding, or delivering

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of articles, goods, or things within the meaning of the said section of the said last-mentioned Act, and that such special contract was not signed by the plaintiff.

The third replication repeated the allegations in the last replication contained, except the allegation that the contract was not signed by the plaintiff, and further alleged that the condition in the plea mentioned was not just or reasonable.

Demurrer and joinder in demurrer to the fifth plea on the ground that the special contract was within sect. 7 of the Railway and Canal Traffic Act, and was not alleged to have been signed by the plaintiff, and that the condition was not just and reasonable.

Demurrer and joinder in demurrer to the second and third replications, on the ground that they did not show that the contract alleged in the fifth plea was within the provisions of the Railway and Canal Traffic Act.

The plaintiff's points.—First, by virtue of the Railways Regulations Acts of 1868 and 1871, the provisions of the Railway and Canal Traffic Act are extended to goods and traffic carried by railway companies by sea, whether by their own vessels or otherwise; secondly, the luggage, the loss of which is complained of, is within the provisions of the 7th section of the Railway and Canal Traffic Act as so extended; thirdly, the special contract alleged in the fifth plea is a special contract within the meaning of the said section, and was not signed by the plaintiff or anyone on his behalf, and the condition is therefore void; fourthly, the condition that the company will not be liable in any case if the value of the luggage exceeds £1, is an unreasonable condition, and therefore void.

Points for the defendants.—First, the luggage, the loss of which is complained of, is not within the provisions of sect. 7 of the Railway and Canal Traffic Act; secondly, the provisions of the said section do not extend to the contract or duty declared upon; thirdly, that the special contract alleged in the fifth plea is not a special contract within the meaning of the said section; fourthly, the conditions of the said contract are reasonable.

The following sections of the several Acts of Parliament bearing on the question are material:

The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) enacts:

Sect. 7.—Every such company as aforesaid shall be liable for the loss of or for any injury done to any horse, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, every such notice, condition, or declaration being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said company from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. . . . Provided also that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage, &c.

The Regulation of Railways Act 1868 (31 & 32 Vict. c. 119)

By sect. 16 provides for the securing equality of treatment in respect of tolls in cases "where the company is authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into any arrangements for using, maintaining or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels," &c., and enacts that "the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby."

The Railway Regulation Amendment Act 1871 (34 & 35 Vict. c. 78) enacts:

Sect. 12.—Where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of . . . loss of or damage to "goods" in like manner and to the same extent as the railway company would be answerable if the vessel had belonged to the railway company, provided that such . . . loss or damage to such . . . goods happens to the . . . goods during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

Bray, for the plaintiff.—The question is whether passengers' luggage, when being conveyed by rail under the usual circumstances, does or not come within sect. 7 of the Railway and Canal Traffic Act of 1854; and it is contended, on the part of the plaintiff, that it does. In the case of *Zuns v. The South-Eastern Railway Company* (20 L. T. Rep. N. S. 873; 38 L. J. 209, Q. B.; L. Rep. 4 Q. B. 539), the Court of Queen's Bench indirectly, as it were, so decided. No doubt in the case of *Stewart v. The London and North-Western Railway Company* (10 L. T. Rep. N. S. 302; 3 H. & C. 135; 23 L. J. 199, Ex.; 10 Jur. N. S. 805), the Court of Exchequer held that the luggage of a passenger by an excursion train was not within the Act; but there a printed condition on the ticket stated that the luggage was "at passenger's own risk;" and it would appear from the judgments in the case that the decision would have been different in the case of passengers' luggage by an ordinary train. There can be no real difference in the company's liability with respect to the amount of luggage which they are bound and that which they agree to carry: (*Macrow v. The Great Western Railway Company*, 24 L. T. Rep. N. S. 618; L. Rep. 6, Q. B. 612; 40 L. J. 300, Q. B.) Sect. 7 is wide enough to comprise passengers' luggage under the words "articles, goods, or things," and such luggage is like other "goods" carried by the company, of which they are common carriers. The case of *Richards v. The London, Brighton, and South Coast Railway Company* (7 C. B. 839; 18 L. J. 251), is conclusive for the plaintiff on that point. The proposition contended for is clearly put in *Hodges' Law of Railways* (5th edit., by Manley Smith), at p. 570; and *Richards v. The London, Brighton, and South Coast Railway* is cited, with other cases, in support of the propositions there stated. [BRAMWELL, B.—It must be assumed, I think, that a passenger's luggage is in a position similar to goods sent for carriage alone.] Again, secondly, the provisions of sect. 7, and the liability of railway companies, have been extended by the 31 & 32 Vict. c. 119, s. 16, and 34 & 35 Vict. c. 78, s. 12, to traffic by steamboats, and, therefore, if luggage is included in the term "goods," it comes within sect. 7 of the Railway and Canal Traffic Act 1854, even when carried on board a

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steamboat: (*Moore v. The Midland Railway Company*, Ir. Rep. 8 C. L. 232.) Again, the condition limiting the liability to the value of 6*l.* is unreasonable. He cited also

Aldridge v. The Great Western Railway Company, 15 C. B., N. S., 532; 33 L. J. 161, C. P.;

Willis, for the defendants, *contra*.—The common law liability of the company as common carriers of the luggage is not disputed, but sect. 7 of the Railway and Canal Traffic Act is restricted in its application to ordinary merchandise conveyed as "goods" apart from passengers. If that is not so, the liability of a railway company can only be limited by obtaining the signature of every individual passenger to a special contract with regard to his luggage, which would be practically impossible. [BRAMWELL, B.—I think this Act has been misconstrued occasionally; the intention of its framers was, I believe, that the company under the first proviso might give a general notice limiting their liability, if only such limitation were just and reasonable, independently of any contract being signed. I think it a mistake to hold (although it has been so held) that such a condition would be void if it were not signed. The Act plainly means that notice should not limit the company's liability unless the conditions were reasonable; but the framers of it should have added a clause that the companies might make any condition they pleased, reasonable or otherwise, so long as it was signed by the other party. That is my construction of the Act, and it is, I know, that which was intended.] The 7th section, and the words therein, "receiving, forwarding, and delivering," are inapplicable to a passenger's luggage, but strictly applicable, and intended to be so, to "articles, goods, and things" sent as ordinary merchandise.

Stewart v. The London and North-Western Railway Company (*ubi sup.*), cited *contra*, is a decision directly in favour of the defendants, for there is no distinction, as regards liability for luggage, between an excursion train and an ordinary train. Pollock, C.B., in his judgment there, said the court were all of opinion that the case was not within the Act; but it cannot be said that the luggage there was not quite as much "received, forwarded, and delivered," as it was here. [BRAMWELL, B.—I am not over well satisfied with my judgment in that case. Not one of the judges there says directly that passengers' luggage is not within the Act.] In *The Great Western Railway Company v. Tally* (23 L. T. Rep. N. S. 413; L. Rep. 6 C. P. 44; 40 L. J. 9, C. P.) the passenger took charge of his luggage in the carriage with himself, and the court held that the company were not liable. Further, the 31 & 32 Vict. c. 119, and 34 & 35 Vict. c. 78, do not incorporate sect. 7, but only the first six sections of the Railway and Canal Traffic Act; and the word "traffic" does not occur in sect. 7. It was not intended that railway companies carrying by sea should be put on a different footing from other steamboat companies. Lastly, the contract was made in France, as stated in the declaration. [BRAMWELL, B.—The point does not arise, and it must be assumed, there being no allegation to the contrary, that the contract was made in England.]

Bray, in reply.—In *Stewart v. The London and North-Western Railway Company* (*ubi sup.*) nothing is said as to passengers' luggage not being within sect. 7. The ground of the decision there was that it was not an ordinary journey at

ordinary fares, and that there was a special contract between the company and the travellers.

BRAMWELL, B.—The second question raised by Mr. Willis in his argument on behalf of the defendants is, whether the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119) does or does not extend to and include the 7th section of the Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31). Mr. Willis contended that the first-mentioned Act of 1868 includes the first six sections, but does not include the 7th section of the last-mentioned Act of 1854. I think, however, that the best and short answer to that is that the 31 & 32 Vict. c. 119, by sect. 16 expressly says that "the provisions of the Railway and Canal Traffic Act 1854, so far as the same are applicable, shall extend to steam vessels and to the traffic carried on thereby." Mr. Willis wants us to read that section as if it had said "some of the provisions" of that Act "minus sect. 7 shall extend, &c.," but that we cannot do. Indeed, it is very obvious that if the Legislature had intended what Mr. Willis suggests, they would have said so; and therefore, unless by necessity, arising from some absurdity or incongruity on the face of it, we are obliged to say otherwise, we must read the section as it stands, as extending to the railway company's steam vessels, and the traffic carried on thereby; and I can see no incongruity or absurdity in the matter at all, nor any reason why sect. 7 should not so extend. There is too, I think, good reason for saying that that view of the case is corroborated by sect. 14 of the Act of 1868 referred to; and therefore, on the short ground that, in the absence of any absolute necessity for so doing, we ought not to limit the operation of the express language of sect. 16, which incorporates sect. 7, we are bound to hold that that section is included in the provisions of the Regulation of Railways Act 1868, and so therefore extends to the present case. That being so, the next question is, whether sect. 7 of this Act of 1854 applies to passengers' luggage. Now the words of it are, "Every such company, as aforesaid, shall be liable for the loss of, or for any injury to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants," and so forth. These things are goods—passengers' goods, or luggage; they are received by the company, forwarded by the company, and delivered by the company to the passenger at the termination of his journey. Again Mr. Willis wants us to put in certain words of exception, that is to say, "excepting passengers' luggage." The same reasoning, however, applies to this as to the former case. We ought not to put in an exception unless there would be an impossibility or some absurdity or incongruity in construing the section without it, or some inconvenience so great that we might be driven to suppose that the exception was intended by the Legislature. I do not, I confess, see that there is anything of the sort here. Mr. Willis says that it would be a very extraordinary thing if passengers were to be stopped and told by the company that their luggage could not be carried unless they signed a special contract. I do not myself see any insuperable difficulty in that—inasmuch as the result would probably be that if it were found to be inconvenient to the travelling public the matter would be very soon

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looked into and an Act of Parliament probably be passed for the purpose of relieving them from the inconvenience. But if the Act were construed as I think it ought to have been no difficulty at all would arise. I am of opinion, therefore, that we ought not to insert the proposed exception in sect. 7 excluding therefrom passengers' luggage. I think it is very important that we have ascertained from the arguments and admissions of the learned counsel in this case that the railway company are insurers of the luggage of their passengers. That being so, there is only one matter which I need notice, and that is how to deal with the case of *Stewart v. The London and North-Western Railway Company* (*ubi sup.*); and here let me observe that in the present case we have to deal with a plea setting up a special contract as to the carriage of these goods, to which there is a replication that such contract was not signed; and therefore that it is not a sufficiently signed contract under sect. 7. The question in *Stewart v. The London and North-Western Railway Company* did not arise in that way. It arose upon a plea that the defendants did not contract with the plaintiff as alleged; and it appeared, upon going into the facts, that it was not the ordinary case of a person paying the ordinary fare charged to a passenger for carrying him, which, as it has been properly said, comprehends a remuneration for carrying his luggage as a common carrier; but it was a case of a special excursion train, where the parties made a bargain, of the terms of which the plaintiff might have informed himself if he had thought fit to do so, but which he did not do. That bargain was, that the passenger should be taken upon special terms, one of which was that the company would not be liable for his luggage. I see that it was there said by Pollock, C.B., "We are all of opinion that this case is not within the Railway and Canal Traffic Act." And, if I may cite my own judgment, I said: "the Railway and Canal Traffic Act does not apply, and no question arises as to the reasonableness of the condition." And further on I said: "There was thus a plain bargain entered into by virtue of which the plaintiff obtained his ticket at about one-fourth of the ordinary fare, and for this accommodation he was content to take the risk of his luggage on himself." And Pigott, B., also said: "This was a special contract, and it was competent for the parties to make it." I have no wish to cast any doubt upon that case, but there are, it may be, some questionable expressions in it; for if it was a special contract, it was not a sufficient special contract under the Act because it was not signed. But I find that Mr. (now Mr. Justice) Brett, who argued that case for the plaintiff, never put it upon that ground at all; neither do I see in either of the judgments that any allusion or observation was made with respect to the contract not being within the meaning of the statute by reason of its not being signed. The only way in which, as it seems to me, the judgment in that case can be supported (and, as I said before, I have no wish to cast a doubt upon it) is by saying that the Railway and Canal Traffic Act applies to the ordinary taking of a passenger and his luggage for the ordinary remuneration, and does not apply to the case of a special bargain as to the carriage of the passenger of a different character from that which he would have a right to make by going to the company and tendering his fare and saying, "I require you to take me

upon such and such terms," in which case if they refused to take him, I rather think that he would have an action against them for such refusal. I think, therefore, that *Stewart v. The London and North-Western Railway Company* was not within the Railway and Canal Traffic Act; not because it was the case of a passenger and his luggage, but because it was the case of a special bargain between the passenger and the company for a particular journey to and fro in a certain time, and not the ordinary case of a passenger going into a carriage and being conveyed from one station to another as a matter of right. I think the present case is clear. *Stewart's* case, for the reasons I have mentioned, does not apply. I do not think, moreover, that any great injustice will be done to railway companies by our present decision. The companies, I have no doubt, will always guard themselves by making a condition that they will not be liable for passengers' luggage beyond the statutory weight unless it is weighed and paid for accordingly. But, as we all know, many people carry with them an amount of luggage in excess of the prescribed weight, and few people will ever weigh and pay for it. That would be a reasonable condition, and the consequence of it would be that the companies would be protected. However, be that so or not, I think the present case is clearly within the words of the Act, and that our judgment must be for the plaintiff.

AMPHLETT, B.—I am of the same opinion, and I shall not add anything to what my learned brother Bramwell has said with regard to these statutes of the 31 & 32 Vict. c. 119, or the 34 & 35 Vict. c. 78. I also agree, whatever be the construction of the 7th section of the Railway and Canal Traffic Act, that that section is made applicable by these later Acts to the case of steam packets and their traffic in the same way as to the company's ordinary trains running on their lines. Then the question comes—and it is a very important one, and I am only surprised that up to this present time there has been no authoritative decision upon it—the question, I say, comes, whether ordinary passenger's luggage is included in the terms "articles, goods, or things," which are mentioned in the 7th section of the Act of 1854. It would be very important, of course, to have the question decided whether or not railway companies are common carriers, and subject to the liabilities of common carriers with respect to passengers' luggage. That has been, for the purposes of the argument, very properly admitted by Mr. Willis to be so, and it really would be almost impossible to contest it at this time of day; because there are two positive decisions on the point—namely, *Richards v. The London, Brighton, and South Coast Railway Company* (7 C. B. 829; 18 L. J. 251), and *Le Conteur v. The London and South-Western Railway Company* (13 L. T. Rep. N. S. 325; L. Rep. 1 Q. B. 54; 35 L. J. 40, Q.B.; 12 Jur. N. S. 266.) In both of these cases it was decided that with regard to passengers' luggage railway companies are common carriers. There were some very weighty observations made against that view of the case in *Tally's* case, by Mr. Justice Willes; but those observations were not really necessary for the decision of that case. The matter was again brought before the Court of Queen's Bench in *Macrow v. The Great-Western Railway Company* (*ubi sup.*), where *Tally's* case

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was cited and fully discussed; and *Macrow's* case is also another clear decision on the point in question. The railway company, therefore, being clearly common carriers, and subject to liability as such, the question is whether upon any fair construction of the 7th section, any distinction can be drawn between "goods" carried by the company as luggage and "goods" carried by them in the ordinary way as merchandise. I confess that I can see none. Then Mr. Willis argued that the last proviso, which was that no special contract between the company and any other parties, as to the receiving, forwarding and delivering of any articles, &c., shall be binding upon or affect any such party, except the same be signed by him, or by the person delivering such articles, &c., meant and was only applicable to ordinary merchandise, or goods sent by commercial people in the ordinary way by goods trains; but, in my opinion, the words of this section apply equally to the case of luggage which we are now considering. Then we were pressed with the argument *ab inconvenienti*, that it would be excessively inconvenient and practically impossible for a passenger, at the moment of starting, to have to sign a special contract. I quite agree that it would be practically impossible; and that any company who insisted upon it would doubtless lose a vast deal of traffic, and would probably not long continue to insist on it. But is that really so? Parliament would say, "You, the railway company, practically have a monopoly in the carrying of passengers, and you must not be allowed to tell a passenger that you will not carry him unless he signs a special contract." Now, the Legislature has already said that if railway companies do not have a special contract with their passengers they shall be liable as common carriers; and although it may be as my learned brother has observed, that it is a slip in the Act of Parliament, and that it was never intended, I confess I cannot see that there is any very great hardship in a railway company being obliged to take a passenger's luggage as common carriers, or at all events that they should not be able to free themselves of a common carrier's liability unless they elect to do injury to their traffic by insisting upon their passengers signing a contract. I do not think, therefore, that the argument *ab inconvenienti* ought to prevail against the clear and distinct words of the statute; and we should be wrong to raise exceptions which really do not, and never were intended to, exist upon such grounds. Therefore our judgment must be for the plaintiff.

HUDDESTON, B.—For the reasons stated by my learned brothers I hold the same opinion as they have expressed on the matter, and think it is obvious that the provision at the end of sect. 16 of the Act of 1868 refers to the three sects. 14, 15, and 16. If, then, that be so, what is the meaning of the 7th section of the Act of 1854? Now I find that that section has undergone a judicial decision in the House of Lords. In the case of *Peek v. North Staffordshire Railway Company* in the House of Lords (8 L. T. Rep. N. S. 768; 10 H. of L. Cas. 473; 32 L. J. 241, Q. B.; 9 Jur. N. S. 914), Lords Westbury and Wensleydale adopted the decision of Jervis, C.J. in the case of *Simons v. The Great Western Railway Company* (18 C. B. 805; 26 L. J. 55, C. P.) and of Williams, J., delivering the judgment of the Court of Exchequer Chamber in the case of *McMantus v. The Lancashire and Yorkshire Railway Company* (4 H. & N. 327; 28 L. J. 353,

Ex.), and held that in fact "special contract" and "condition" in the statute were synonymous; whilst Lords Cranworth and Chelmsford, in the same case, held that they were two different things, and that a condition being a reasonable one need not be signed. Lord Westbury, L.C. there explained what he understood to be the meaning of the 7th section, and said (8 L. T. Rep. N. S. 770): "I think that the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person." (See 1 Smith's L. C. 7th edit., p. 236.) The words of the Act expressly state that any condition having for its object the relief of a railway company from liability for neglect or default of such company shall be null and void. If that be so, the question arises whether passengers' luggage is "goods" within the meaning of the 7th section? Mr. Willis tried to draw some distinction, and said, that that Act merely applied to "goods" which were sent, and not to luggage which was carried by the passengers; and he urged that that was so not only upon the words of the section themselves but also from their collocation. Now the words themselves seem to me to be very general, and quite to include passengers' luggage; and, with reference to the collocation, it seems to me that the section deals with two classes of matters, namely, first, "horses, cattle, or other animals," and then takes another class, namely, "articles, goods, or things," and it speaks of "the receiving, forwarding, or delivering thereof." Now is not passengers' luggage "goods" which are "received" at the company's station, and in the ordinary course of events "forwarded" thence by the company and "delivered" by them at the station of its destination? I apprehend that it clearly comes within the meaning of those words in the section in question. I find that in *Macrow v. The Great Western Railway Company* (*ubi sup.*), Cockburn, C.J., delivering the judgment of the Court of Queen's Bench in that case, deals with this question in the spirit in which my brother Amphlett has treated it on the present occasion. The learned Lord Chief Justice (at p. 619 of 24 L. T. Rep. N. S.) said, "The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller has led, from the earliest times, to the practice on the part of carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passengers. Under the older system of travelling by stage coaches, canal boats, or vessels, &c., the amount of luggage to be thus carried free of charge was commonly

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made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. The provision fixing the amount of luggage which the traveller shall be entitled to take with him free of charge, has a twofold object; first, that of securing to the traveller the conveyance of a reasonable amount of luggage; and, secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute. Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger so carrying luggage, which must be taken to mean the personal luggage of the traveller. The conveyance of the personal luggage of the passenger being obviously for his convenience, and therefore a necessary, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is—now too firmly settled to admit of being shaken—that the liability of common carriers in respect of articles carried as passengers' luggage is that of carrying "goods," as distinguished from that of carrying of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in *Tally v. The Great Western Railway Company* (*ubi sup.*), in which case other considerations arise." I think that that is conclusive. As to *Stewart v. The London and North-Western Railway Company*, on which the defendants here rely, I think that my brother Bramwell has very clearly distinguished that case from the present one. For these reasons I think that the replications are good, and that there must be judgment for the plaintiff.

Willis, for the defendants, applied for leave to add a plea to the effect that the contract was not made in England but in France, and was therefore not governed by English, but by French law.

BRAMWELL, B.—This is rather late, but it strikes me that the defendants ought to have the opportunity of doing it at their own cost, because, had they pleaded it before, it would have been argued now and at no greater expense. On payment, therefore, by the defendants, of all costs occasioned to the plaintiff by the plea not having been pleaded before, the defendants may add the desired plea, the plaintiff being at liberty to reply, take issue, and demur. The costs of the present demurrer to follow the event.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff, H. J. Coburn.

Solicitor for the defendants, W. R. Stevens.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

June 2 and 15.

(Before BRAMWELL, B. and GROVE, J.)

WILLIS v. MACLACHLAN. (a)

Registration court—Qualification of voter—Power of revising barrister to remove from court—Interruption of business—Stat. 28 & 29 Vict. c. 36, s. 16.

By 28 & 29 Vict. c. 36, s. 16, a revising barrister may order the removal of any person who interrupts the business of the court, or refuses to obey lawful orders in respect of the same.

At a court held in 1874, by the defendant, who was a revising barrister, the vote of W., plaintiff's brother, was objected to, on the ground that he claimed as a freeholder, but was only a copyholder. In 1875 W. claimed to be put on the list as a copyholder. The plaintiff then produced certain deeds to show that W. was a freeholder, and, in answer to the defendant, admitted that he was present in court in 1874, when W.'s right to have his name on the list as a freeholder was objected to, and had the deeds in his pocket, though he did not produce them. Thereupon the defendant, after censuring him, ordered him to leave the court, and gave instructions to the police to remove him if necessary. The plaintiff then left the court, and afterwards commenced an action in the County Court for false imprisonment. The defence was that the plaintiff was interrupting the business of the court. The judge nonsuited the plaintiff on the ground that the act complained of was done in the exercise of a judicial discretion.

Held (reversing the decision of the County Court Judge), that the nonsuit was wrong, inasmuch as the plaintiff was guilty of no interruption of the business of the court, as alleged by the defendant in his plea.

THIS was an action for false imprisonment, tried in the County Court of Sunderland.

The following were the material facts, as proved by the plaintiff: In Oct. 1875 the defendant, who was the revising barrister for the district at North Shields, held his court at that place for the purpose of revising the list of voters. Among others Robert Willis, brother to the plaintiff, claimed to have his name put on the list as a copyholder. The plaintiff then produced certain deeds which proved that Robert Willis was a freeholder. It appeared that at a court held in the previous year Robert Willis's name had been inserted in the list as a freeholder; but it was then objected that his claim could not be allowed, inasmuch as he was a copyholder and not a freeholder. Plaintiff admitted, in answer to questions put to him by the defendant, that he was present at the court held in 1874, when his brother's claim to a vote as a freeholder was disposed of, and that the deeds were at that time in his pocket, though he had not produced them. The defendant then severely censured the plaintiff for his conduct, ordered him at once to leave the court, and gave instructions to the police to remove him if necessary. The plaintiff then left the court, and brought his action for false imprisonment.

The notice of defence was that the defendant was a revising barrister holding his court, and

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

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that the plaintiff was interrupting the business of the court.

The learned County Court judge held that the act complained of was done by Mr. MacLachlan in the exercise of a judicial discretion, and that he was not liable; accordingly he nonsuited the plaintiff. A rule *nisi* was afterwards granted to set aside the nonsuit; against which

Butt, Q.C. and *John Edge*, showed cause.—The defendant has done nothing to render himself liable to an action for false imprisonment. By 28 & 29 Vict. c. 36, s. 16, it is enacted that "it shall be lawful for any revising barrister, whether revising the lists of a county, city, or borough, to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same." The conduct of the plaintiff was an abuse of the process of the court. Moreover, it is clear that the judge of any court doing an act within his jurisdiction, and having exercised his discretion, and ascertained facts, however wrong he may be, is not liable because that discretion is erroneously exercised. In *Garnett v. Ferrand* (6 B. & C. 626), Lord Tenterden, C.J., in delivering the judgment of the court, said: "Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction." [BRAMWELL, B.—Your argument comes to this—that a revising-barrister, having power to turn a man out of court for one reason, if he turns him out for another he is nevertheless not responsible. GROVE, J.—The *ratio decidendi* here was clearly not an interruption.] If the defendant had authority his decision cannot be challenged. [GROVE, J.—Not even if there was an admitted *mala fides*?] No; the cases go to that extent. In *Scott v. Stansfield* (L. Rep. 3 Ex. 220; 18 L. T. Rep. N.S. 572; 37 L. J. 155, Ex.) the defendant was a County Court judge, and the action was for slander in his capacity as such judge, and it was held that the action was not maintainable, though the words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of the defendant's duty as judge. All the cases on the subject are collected in *Kemp v. Neville* (10 C. B. N. S. 523; 4 L. T. Rep. N. S. 640; 31 L. J. 158, C.P.). Erle, C.J., says (p. 551): "Throughout these cases, and many others, the vital importance of securing independence for every judicial mind is earnestly recognised. . . . As the defendant had jurisdiction in respect of the matter, and the person, and the place, it does not appear to us to be essential to rely on his being a judge of a court of record." They likewise cited

Brittain v. Kinnaird, 1 B. & B. 482;
R. v. Bolton, 1 Q. B. Rep. 66; 10 L. J. 49, M.C.;
and

Broom's Legal Maxims, 5th edit. p. 87.

The *Solicitor-General* (Sir H. Giffard) and *Gainsford Bruce*, for the plaintiff, in support of the rule.—A great deal of the argument on the other side has turned on the question of jurisdiction, and might be applicable here if what was done had anything to do with the decision of votes. If the contention put forward on behalf of the plaintiff be correct, no action could be maintained against justices under *Jervis's Act*, because they believed they had authority to do something, although it turns out they had no authority. A

man cannot find a fact without at least some evidence to give jurisdiction. The jurisdiction here depends on interruption to the process of the court. [BRAMWELL, B.—Can you say whether, if the defendant has a right, you will inquire how it is exercised, that being the sole question here?] In order to have such a right the defendant must have before him something which he believes to be an interruption of the business of his court, and if there is any evidence to support such a belief he may perhaps then not be responsible. Jurisdiction to strike out the names of voters is one thing, to give into custody is another, though no doubt the one is sometimes incidental to the other. In *Houlden v. Smith* (14 Q. B. 841; 19 L. J. 170, Q. B.) it was expressly decided that a judge of record is answerable in an action for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends. In *Garnett v. Ferrand* (*ubi sup.*) the action was against a tenant for turning a person out of a room where he was about to take an inquisition, and the point taken was that the court of a coroner is a secret court. They also referred to

Smith v. Bouchier, 2 Str. 998; and
Pease v. Chaytor, 1 B. & S. 658; 31 L. J. 1, M. C.;

Butt replied.

Cur. adv. vult.

The following written judgments were delivered on June 15 :—

BRAMWELL, B.—I have no doubt that the learned defendant thought he had power to deal with the plaintiff as he did, and that in so doing he was making a proper use of that power. But whether he had or had not power to do what he did, in the sense of not being liable to be made responsible for it, there can be no doubt that he had no right to, and, in my judgment, was very wrong to do as he did, for the plaintiff was absolutely free from all blame on the occasion in question. I say nothing—I am incapable of forming any opinion—as to whether the plaintiff had on a former occasion done anything that deserved censure. But on the occasion in question he certainly had not. He had answered certain questions of the defendant—by what authority, I know not—and he answered them truthfully, and was turned out of court, not for his then conduct, but for that of a year back. No doubt there are cases in which it is desirable that judges and persons in the position of the defendant should express disapprobation of improper conduct, that it may not be supposed that silence gives consent; and I doubt not, as I have said, that the defendant thought he ought to do so on this occasion; but he could have no right to punish the plaintiff for former conduct by turning him out of court; and in this sense it cannot be denied that the defendant's act was wrong and unlawful. But it was urged before the able judge of the County Court, and repeated before us, that the defendant having power to turn the plaintiff out of court for some cause, must be deemed to have done so for such cause on the present occasion, that otherwise it would be impossible for the judges to do their duty with safety, as they would be subject to actions, the decision of which would rest with a jury, as to whether they acted under an authority they possessed, or on some other ground, and whether they were acting *bona fide*. The result of this argument would be, that because a revising bar-

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ristler could properly turn a person out of court for one reason—viz., when he was disturbing the business—he could do so with impunity for any or no reason when he was not, on the pretence that he was. This is somewhat startling, but the arguments in support of it are strong, and what was said by Lord Tenterden in *Garnett v. Ferrand* (*ubi sup.*) undoubtedly favours the contention. But I think the question does not arise. The defendant did not profess to turn the plaintiff out of court on the ground that he was disturbing the business. I do not say that any judgment should have been pronounced or minute of proceedings kept that the plaintiff was turned out of court for such a reason. What I do say is that that was not, and was not professed or stated to be, the reason for his expulsion. He was expelled as a punishment, or because he was unfit to be in court. It may be that a Revising Barrister has authority to expel others than those who are disturbing the business of the court. If the defendant here had pleaded that he deemed it right for the due conduct of the business of the court that the plaintiff should be expelled, the question of his right to do so would have arisen. But he has not so pleaded. He has pleaded that he expelled him because he was disturbing the court. That was not so, and the plea is not true. I do not mean that it is dishonestly untrue—no doubt it is supposed to be the true way of stating the defence; but it is, in fact, untrue. I think, therefore, there must be a new trial. It may be said that this will give rise to the same questions, which it is not desirable a judge should be subject to. But it does not. A judge has only to say that he adjudged it was desirable the party should be removed, if that is a defence. Besides, this argument must not be pressed too far. For, suppose the court was held at an inn, and about the time it was over the Revising Barrister ordered a guest to be turned out of a room. It cannot be doubted that an action would lie if the court was over, but in such action a question for a jury would arise, viz., whether the court was over. Anyhow, there can be no law which compels us to affirm what we know to be untrue, and say that the defendant expelled the plaintiff because he was disturbing the court. I repeat, I think there must be a new trial, no damages having been assessed. I say nothing about an amendment, setting up such a defence as I have supposed possible, except that I should regret to see it pleaded, as I feel sure that, in truth, the learned defendant did not turn the plaintiff out of court for any such reason, but to punish him. The defendant has very handsomely admitted that the act of turning the plaintiff out of court was his, and I should be glad if he would further admit that it was wrongful.

GROVE, J.—I agree, and will only add that, as for the purpose of this motion we are to take the newspaper report to be correct, it is clear the plaintiff was turned out of court, not for any disturbance, misconduct, or contempt, or for any reason which rendered his expulsion necessary for due decorum in the proceedings of the court, but for alleged past misconduct with reference to a voter, not with reference to the court; and the expulsion was in the nature of a sentence awarding punishment, and not in the nature of a summary committal essential to the maintenance of order in judicial proceedings. It was the exercise of a

jurisdiction which the defendant did not possess, and not an erroneous action or an excessive exercise of a jurisdiction which he did possess. Although nothing wrong was intended by the defendant, yet it seems to me that if his act were sanctioned by law, which I am of opinion it is not, the law would sanction an arbitrary usurpation of jurisdiction where there is none, and a defence of such usurpation which would not be true in fact, viz., that which states as the ground of the expulsion the exercise of a jurisdiction which the defendant rightly had and an act within it, as a justification for an act in the exercise of a jurisdiction which he clearly had not.

Judgment for the appellant. Nonsuit set aside, and new trial ordered.

Solicitor for appellant, G. J. Brownlow, agent for Henry Ritson, Sunderland.

Solicitor for respondent, Bowey, Sunderland.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Tuesday, May 16.

DAWSON AND ANOTHER v. FITZGERALD. (a)

Lease—Tenant's covenants to keep down ground game—Agreement to refer to arbitration—Construction of—Whether collateral or condition precedent to landlord's right to bring an action.

The defendant was lessee to the plaintiffs of a mansion and lands, with a right of shooting over the plaintiffs' manors, on the terms contained in covenants in the lease, that the defendant should keep such a number only of hares and rabbits as would do no injury to the plaintiffs' trees, &c., and that, in case the defendant should keep such a number of hares and rabbits as should injure the plaintiffs' trees, &c., the defendant should pay to the plaintiffs a fair and reasonable compensation for such injuries, the amount of compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators when chosen to nominate an umpire, and the decision of such umpire to be binding and conclusive upon the plaintiffs and the defendant.

The plaintiffs sued the defendant for injuries done to their trees, &c., by reason of the quantity of hares and rabbits kept by the defendant:

Held (reversing the decision of the Court of Exchequer), that the plaintiffs were entitled to maintain their action without having recourse to arbitration, as the covenant to refer was collateral and not a condition precedent to the right to sue at law.

This was an appeal from a decision of the Court of Exchequer, overruling a demurrer to one of the defendant's pleas.

The averments in the first count of the plaintiffs' declaration alleged that the defendant became and was tenant to the plaintiffs of a mansion house and lands, &c., called West Park, with liberty of sporting over certain manors and lands

(a) Reported by W. APFLETON, Esq., Barrister-at-Law.

of the plaintiffs, upon the terms (among other things), "That the defendant should and would at all times during his said tenancy, keep and cause to be kept or encouraged such a number only of hares and rabbits upon the said manors, or any part thereof, as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, and that in case the defendant should keep or encourage such a number of hares and rabbits upon the said manor, or any part thereof, as should injure the trees, &c., belonging to the plaintiffs or their growing crops, or the growing crops of any of their tenants or farmers, the defendants should, and would pay to the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injuries."

Breach: That the defendant kept such a number of rabbits as did great injury to the trees, &c., and growing crops on the manors, and that although frequently requested to do so, the defendant would not pay to the plaintiffs, or their tenants or farmers, or any of them, a fair and reasonable or any compensation, in accordance with his contract.

The defendant, by his third plea to so much of the first count as alleged that the defendant kept such a number of hares and rabbits on the said manors as did injury to trees, &c., and would not pay compensation to the plaintiffs, their tenants, &c., for such injury, said, "That one of the terms of the said tenancy was, that in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant;" and the defendant by his third plea further said, that a difference arose between the plaintiffs and the defendant as to the amount of the said compensation, as in the said count claimed; and "that no arbitrators have ever been appointed by the plaintiffs, nor has the defendant been requested by the plaintiffs to appoint an arbitrator, nor has an award ever been made deciding the amount of the said compensation, according to the terms of the said tenancy."

The plaintiffs demurred to this plea, on the ground that the agreement to refer was "collateral to, and not a condition precedent to," the right to sue on the agreement. The covenant to keep down ground game and to refer to arbitration contained in the lease were as set out in the plaintiffs' declaration and the defendant's plea. The declaration omits this clause providing for reference to arbitration, and the plea sets it out.

There was joinder in demurrer by the defendant, and the demurrer was argued in the Court of Exchequer on the 19th Nov. 1873.

The court (Kelly, C.B. and Pigott and Bramwell, BB.) took time to consider, and on the 21st Nov. delivered judgment for the defendant, Bramwell, B., dissenting, and delivering a separate judgment.

The plaintiffs now appealed from the decision of the majority of the court.

The case in the court below, with the arguments

and judgments, will be found fully reported 29 L. T. Rep. N. S. 778.

Kingdon, Q.C. and *A. Charles*, for the plaintiffs, adopted the judgment of Bramwell B. in the court below, and stated that they relied upon and could add nothing to the reasoning of that judgment. They mentioned *Roper v. Lendon* (28 L. J. 260, Q. B.) as an authority directly in the plaintiffs' favour, where the agreement to refer was in terms similar to those in the present case.

Manisty, Q.C. and *B. E. Turner*, for the defendant.—*Elliott v. The Royal Exchange Assurance Company* (16 L. T. Rep. N. S. 399; L. Rep. 2 Ex. 237) expresses the fair result of the authorities, that if the terms of the contract are that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he cannot maintain the action until those terms are complied with, but if the contract is to pay for the loss, or other matter in question, with a subsequent contract to refer to arbitration contained in a distinct clause collateral to the other, then the contract for reference is not to oust the jurisdiction of the courts, or deprive the party of his action. The simple question here, therefore, is whether upon the construction of the agreement there is a condition precedent to refer to arbitration, as in *Scott v. Avery* (5 H. of L. C. 811; 25 L. J. 308, Ex.). Here it is submitted that the covenant in the lease is to pay such damages, and such damages only, as may be ascertained by arbitration. [JESSEL, M.R.—Does not your contention amount to this, that the second covenant is really a licence to break the first? otherwise there is a breach of the first covenant at all events to which the plea is no answer.] No; the first covenant is not to do a particular thing, and the second is a covenant to pay in a particular manner if there is a breach of the first. The court will construe the agreement, if possible, according to the intention of the parties, and their obvious intention here was that they should not be bound by the verdict of a jury as to damages. The two covenants are merely two sentences connected by the word "and." The whole must be read as one covenant. In *Braunstein v. Accidental Death Insurance Company* (1 B. & S. 782; 31 L. J. 17, Q. B.) a condition to refer was held a condition precedent to the right of action, although not declared to be so in express terms, as it was in *Scott v. Avery* (*ubi sup.*). In the present case the intention was to make reference to arbitration a condition precedent.

JESSEL, M.R.—This is an appeal from a judgment of the Court of Exchequer, where two of the learned judges differed from the third, and the question we have to decide is whether the opinion of the majority was right or not. The law is really settled by a decision of the highest authority—the House of Lords—and it seems to be this: A plea like the present one can only be successful, (1) Where from the nature of the sum to be recovered there must be a reference to arbitration in order to ascertain what that sum is, and (2) Where it is, in express terms provided in the agreement that no action shall be brought until the matter has been referred. In every other case where there is a covenant to pay and a collateral covenant to refer, the plaintiff may avail himself of his right of action to sue on the first covenant, leaving the defendant to have recourse to sect. 11 of the Common Law Procedure Act

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1854, to stay the action until there has been an arbitration, and so a judge can, if he thinks it is a fair case for it, enforce a reference to arbitration, and prevent a jury trying the case. It is not incomprehensible that this agreement was entered into with reference to the powers of the parties under the Common Law Procedure Act 1854. I entirely concur in the judgment of Baron Bramwell, and I think, therefore, that the judgment of the court below should be reversed.

LORD COLERIDGE, C.J.—I also agree that the decision of the court below should be reversed. I do so both upon the reasons given by Baron Bramwell, and also upon the authority of the principles laid down in *Scott v. Avery* (*ubi sup.*) The dictum of Baron Bramwell in *Elliot v. Royal Exchange Assurance Company* (*ubi sup.*) well states what those principles are: "If two persons, whether in the same or a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott v. Avery*." I think the covenant in the present case falls within the former of the two classes of cases stated in that passage, and that the judgment below must therefore be reversed.

POLLOCK, B.—I am of the same opinion. In *Scott v. Avery* (*ubi sup.*) there was a distinct agreement that a reference to arbitration should be a condition precedent to the right of action. It is not so here, and the question is, what is the meaning of the words used by the parties. In *Tredwin v. Holman* (1 H. & C. at p. 79) it was said by Baron Bramwell, "If a tenant covenants that he will cultivate the demised land in a husbandlike manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained, but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them." No negative words to bring this case within the second alternative were used here, and it seems to me clear that the fair and reasonable construction of the agreement is that the reference to arbitration was not to be a condition precedent to the right of action. *Judgment below reversed.*

Solicitor for plaintiffs, P. A. Hanrott.

Solicitors for defendant, Markby, Wilde, and Barra.

Tuesday, June 20.

GADD v. HOUGHTON AND CO. (a)

Principal and agent—Goods sold "on account of" foreign principal—Agent's liability in respect of. The defendants, acting as brokers, contracted to sell and deliver a quantity of oranges to the plaintiff.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

By the "sold note" the defendants stated that they had sold the goods "on account of" a foreign principal.

Held (reversing the decision of the Exchequer Division), that the defendants were not liable in an action to recover damages for breach of the contract.

THIS was an appeal from the Exchequer Division.

The plaintiff's action was to recover damages for breach of a contract by the defendants to sell and deliver certain cases of oranges.

The plaintiff was a wholesale fruit salesman at Liverpool, and the defendants were a firm of fruit brokers at the same place.

In Nov. 1874, the salesman of the defendants called on the plaintiff at his place of business. The plaintiff wished to purchase 2000 cases of oranges, of the brand James Morand and Co., at 12s. 9d. the case. Whereupon the salesman drew out the following letter to the defendants for the plaintiff to sign:

Liverpool, 4th Nov. 1874.

Messrs. J. C. Houghton and Co.

Dear Sirs,—Please telegraph out an order on my account for 2000 cases of Valencia oranges, all 420's, of the brand "James Morand and Co." Shipment from commencement of season to not later than 7th Dec. next at 12s. 9d. per case f.o.b. Yours truly, GEORGE GADD.

On the same day the defendants telegraphed the plaintiff's offer to James Morand and Co. at Valencia, who replied by telegram:

If your offer is 12s. 9d. f.o.b. 2000 cases 420, we accept.

Upon receipt of this telegram the defendants sent the following "sold note" to the plaintiff:

Liverpool, 9th. Nov. 1874.

Mr. George Gadd.

We have this day sold to you, on account of James Morand and Co., Valencia, 2000 cases of Valencia oranges (all 420's) of the brand "James Morand and Co." at 12s. 9d. per case, free on board, shipment from commencement of season to not later than 7th of Dec. next. Payment as usual.

(Signed) J. C. HOUGHTON and Co.

All the cases were not shipped before the 7th Dec., and the plaintiff thereupon brought his action against the defendants for breach of contract to deliver the goods.

At the trial, before Pollock, B. at Liverpool Spring Assizes in 1875, a verdict was entered for the defendants, with leave for the plaintiff to move to enter it for him, damages (if necessary) to be assessed as agreed between the parties.

A rule was accordingly obtained in the Exchequer Division to enter the verdict for the plaintiff on the ground that the defendants were personally liable on the contract.

On cause being shown, the Exchequer Division (Kelly, C.B. and Pollock and Huddleston, BB.) made the rule absolute, and from this decision the defendants appealed.

The case in the court below will be found fully reported 33 L. T. Rep. N. S. 811.

Benjamin, Q.C. (with him Bigham) for the defendants.—The general usage of trade controls the contract, and the usage at Liverpool was proved on the trial to be that the liability, under circumstances similar to the present one, is on the principal and not on the broker. In *Cropper v. Cook* (L. Rep. 3 C. P. 194), where the sale was by an agent "for account of" a foreign principal, a similar usage to the one in this case was held to be properly admitted in evidence, and to be a proper usage. The decision in that case went upon the express ground that naming a prin-

principal would bind him, but when the principal's name was struck out the broker became personally responsible. *Paice v. Walker* (22 L. T. Rep. N. S. 547) (which will be relied on for the plaintiff) differs from this case. Here the sale is said, in the body of the contract of sale, to be "on account of James Morand and Co." Those words cannot be mere words of description, and there is no need that there should be a signature "as agent" in addition. In *Southwell v. Bowditch* (24 W. R. 838) the broker was held by the Court of Appeal not to be personally liable, even although the principal's name was not disclosed. The sold note there was "sold by your order and for your account to my principals."

Herschell, Q.C. and *McConnell*, for the plaintiff.—*Cropper v. Cook* (*ubi sup.*) differs from this case. There the usage of trade was set up for a different purpose, viz., to show that the broker had authority, as part of his employment, to enter into the contract and to bind his principal. It has been laid down strongly, by Lord Campbell and others, that where a person signs a contract in his own name without disclosing a principal he is personally liable even although it appears in the body of the instrument that he is an agent.

Parker v. Winlow, 7 E. & B. at p. 947;
See also *Smith's Leading Cases*, vol. 2, 6th edit., pp. 343, 4;

Lennard v. Robinson, 5 E. & B. p. 125;
Deslandes v. Gregory, 2 E. & B. 602.

If the defendants have made themselves personally liable usage cannot discharge them. If it could, the usage would go to contradict the legal construction of a written document. *Paice v. Walker* (*ubi sup.*) does not substantially differ from the present case. There the principal was a foreign one, and it is laid down as a general rule in *Storey on Agency*, sects. 400 and 401, that an agent is always personally liable where his principal is a foreign one. It is, at all events, a weighty element to consider in determining whether the agent is personally liable or not, because of the difficulty and inconvenience which there obviously is in enforcing contracts against foreign principals.

Benjamin, Q.C. was not called on to reply.

JAMES, L.J.—I am of opinion that in this case the judgment of the Court of Exchequer ought to be reversed. In the first place, I have observed that it is not, in my view of the case, in any way governed by *Paice v. Walker* (*ubi sup.*), for whatever may have been the difficulty in that case upon the words used "as agent for," the words used in the present case are not at all ambiguous, and it is impossible to make them words of description, and the *ratio decidendi* in the case of *Paice v. Walker* was that the words "as agent for," having regard to the contract and the circumstances of the case, might be considered as merely discriminating or intimating the fact that the man was an agent, and did not amount to a statement that he was making a bargain "on account of" someone else. Those are the very words used in this case, and where a man says that he is making a contract "on account of" someone else he seems to me to use the very strongest terms the English language is capable of affording that he is not binding himself, but that he is binding his principals, and I cannot hesitate or doubt that that is the effect of the words in this case. I am bound to say that I cannot myself conceive that the words "as agent" can be properly understood as implying merely a description, and I am bound

to say that I do not consider the decision in *Paice v. Walker* an authority in this case, and that if the words "as agent" in that case were now to be decided by me, I should hold that they had the same effect as "on account of" in this case. I think the *ratio decidendi* in *Paice v. Walker* was that a mere description would not make a man cease to be liable upon a contract which he had entered into by merely describing himself "as agent," but I cannot agree that where a man says he enters into a contract "as agent" that those words are mere matter of description.

MELLISH, L.J.—I am of the same opinion. The question is whether, upon the true construction of this contract, *Houghton and Co.*, who sold the goods, are themselves liable, or whether they have entered into a contract on behalf of *James Morand and Co.* This question is to be decided by interpreting the language which has been used according to the plain natural interpretation of the words. I agree with what was said by Lord Campbell in *Parker v. Winlow* (*ubi sup.*) and in the note to *Thompson v. Davenport*, in *Smith's Leading Cases*, (6th edit., vol. 2, 343), that *prima facie* where a man signs a contract in his own name he is a contracting party, and there must be something very strong on the face of the instrument to prevent that liability attaching to him. But I cannot understand why, under the circumstances of this case, where there are plain words to that effect in the contract, we are not to say that he is contracting on behalf of somebody else. I am of opinion that there is no difference between a person saying "I, as agent for C. D., have sold to you," and saying "I have sold to you," and signing that in his own name "for C. D." Where you find a person in the body of the instrument treating himself as the seller or charterer, no doubt it is different, and you can say that he intended to bind himself; but where there is nothing of that kind, and all that appears is that he has been making a contract on behalf of somebody else, it seems to necessarily follow that that somebody else is the person liable. Here they say, "We have this day sold to you on account of J. Morand and Co." How can the words "on account of" be inserted merely as a description? They do not describe who *Houghton and Co.* were at all, but they say on whose account the contract has been entered into. It is "*Houghton and Co. on account of J. Morand and Co.*" Meaning that J. Morand and Co. are really the people who have sold. It follows that the persons who signed the contract were merely the brokers, and were not liable. I also agree that the circumstances of the case of *Paice v. Walker* distinguish it from this case, and I think it is our duty to reverse the judgment of the Court of Exchequer.

BAGGALLAY, J.A.—I am of the same opinion, and for the same reasons that have already been stated by the court.

QUAIN, J.—The case appears to me to be one where the distinction between principal and agent is plainly shown. Here there is a clear expression that the agent is to make the contract "on account of" his principal. It is said, however, that he must state the same thing at the signature of the contract. I cannot see the necessity for that, where in the body of the document what he intends to do is plain. He could not add anything more to the signature than what has been already stated in the body of the contract, and he there-

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fore does not render himself personally liable for not doing so.

ARCHIBALD, J.—I am of the same opinion. A man can contract in such a way as to render himself personally liable, or only to bind his principal. The usual way in which a person saves himself from liability is by signing "as agent," but that is not the only thing that prevents his liability, because, if it is clear on the body of the contract that he has contracted as agent, that would save him. Now here the contract is, "Sold to you on account of Morand and Co." No words could be plainer than these as showing that he contracted only as agent. I also agree in thinking that the case of *Paice v. Walker* is to be distinguished from this case.

Judgment for defendants. Judgment below reversed.

Solicitors for respondent, *Johnson and Wetherall* (for *Snowball, Copenman, and Smith, Liverpool*).

Solicitor for appellants, *E. Byrne* (for *Whitley and Maddock, Liverpool*).

May 15 and 16.

THE ATTORNEY-GENERAL v. THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION (LIMITED). (a)

Inhabited house duty—Buildings let out in flats—Assessment—Valuation list—48 Geo. 3, c. 55, schedule B, rr. 4, 6, 14—The Valuation (Metropolis) Act 1869—32 & 33 Vict. c. 67, ss. 45, 76.

The defendant association are the owners of the Westminster Chambers, consisting of seven blocks of buildings, having seven principal entrances. Each block internally is structurally divided into different tenements or suites of rooms, which are let and occupied separately as offices or residences. Each suite of rooms contains within itself the usual conveniences of a house, and has an outer door opening on to a common staircase. There is no communication between the different suites except by this staircase. The outer door of each block is kept locked at night, and a porter, appointed by the defendants, and who lives in a distinct set of rooms in the basement of each block, has the care of, and access to, by means of a duplicate key, the suites of rooms therein, and acts as servant (free of charge) to the occupiers of the suites, under regulations made by the association. The Commissioners, under the Westminster Improvement Act 1853, of whom the defendant association are assignees of the seven blocks, have power to demise or sell any set of apartments separately. None of the suites of rooms have been sold, but the greater number have been demised for terms of years under agreements containing the following (amongst other) terms: The lessors are to pay all rates, &c. The lessees are to repair—not to commit waste, not to alter the arrangement of the premises, and not to underlet or assign, the lessors to have power to enter and view the interior of the premises, and a power of re-entry on non-payment of rent within twenty-one days after it becomes due, and for breach of covenant.

In the valuation list, prepared under the 32 & 33 Vict. c. 67, each suite of rooms was treated as a separate hereditament, and valued as such. In

assessing the property for the inhabited house duty, the seven blocks were treated as seven inhabited houses, and the duty was assessed upon the defendants as occupiers thereof under rule 6 48 Geo. 3, c. 55, schedule B, in the sum of 548l. 17s., that sum representing the aggregate amount of the values in the valuation list before mentioned, of the suites of rooms (117 in number) comprised in the seven blocks.

Held (affirming the judgment of a majority of the Court of Exchequer below), First, that the seven blocks of buildings were properly assessed to the inhabited house duty as seven separate inhabited houses, in the occupation of the defendant association itself. Secondly, that the value upon which this assessment was made was properly represented by the sum of the values, inserted in the valuation list for the time being in force under the Valuation Act (Metropolis) 1869, of the 117 separate tenements comprised in the seven blocks.

This was an appeal from a decision of the Court of Exchequer upon a case stated for their opinion as to the proper mode of charging on the defendant association house duty under the facts stated in this case. The Court of Exchequer (Bramwell and Cleasby, B.B., Kelly, C.B. dissenting) upheld the assessment made on the defendants, and from this decision they now appealed.

The case in the court below will be found fully reported, 33 L. T. Rep., N.S. 180.

The facts are sufficiently set out in the head note to this report, and in the judgments. The material sections and rules of Acts of Parliament referred to in argument are set out *in extenso* in the judgment (post) of Jessel, M.R.

Manisty, Q.C. and Poland, for the defendant association.—The seven buildings are not properly assessed as seven dwelling-houses belonging to the association as occupiers. They should have been assessed as 117 separate dwelling-houses in the occupation of the tenants. These suites of rooms are similar to chambers in one of the Inns of Court, which by rule 4 of Schedule B to 48 Geo. 3, c. 55, are subject to duty as inhabited houses, and the occupiers charged. [JESSEL, M.R.—That is a special provision inserted in the Act for the protection of particular objects. It does not do away with the other general provisions of the statute, if those are plain.] For the purposes of rating, voting, or settlement, actual occupation constitutes a separate dwelling-house. These suites are in fact separately occupied. [LORD COLERIDGE, C.J.—It does not follow that they are inhabited houses for the purpose of being charged with house duty.] Under the statute 43 Eliz., c. 2, which is the foundation of local taxation, it has been a universal construction that an occupier of a severed portion of a house is an occupier of a "house" within the meaning of the statute. Then, by 48 Geo. 3, c. 55, the Legislature intended to put the charge upon occupiers in respect to imperial in the same way as had been done in respect to local taxation. The Queen's Bench in *The Mutual Tontine Westminster Chambers Association (Limited) v. St. George's Union Assessment Committee* (25 L. T. Rep. N. S. 696; L. Rep. 7 Q. B. 90), have held that these very sets of rooms were "houses" for the purpose of being rated to the poor. It is submitted that they are also "houses" for the purposes of the inhabited house duty. [JESSEL, M. R.—Sect. 4 and rule 6 of 48 Geo. 3, c. 55, refer to a "tenement" and a "tenement in

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a house." How does a tenement in a house differ from these suites of rooms? I do not see any structural difference between one of these blocks and an ordinary dwelling-house.] Rule 6 means that the occupier of rooms let out separately is not rateable, not being the occupier of the house, and that the landlord is rateable. That being so, rule 14 becomes necessary to apply to a case like the present. These are "distinct properties" within the meaning of the rule; as to the construction which has been put upon the word "house," there is *Evans v. Finch*, (Cro. Rep. Car. 473), where it was held that chambers in the Temple were *domus mansionalis* of the occupier, and that burglary could be committed by breaking into them. In *Reg. v. Inhabitants of Usworth* (5 A. & E. 261), where one rented and occupied the middle floor of a house, it was held that the premises he so rented were "a separate and distinct dwelling-house" within the 5 Geo. 4, c. 57, for the purposes of settlement, and in *Henrette v. Booth* (15 C. B. 500), it was held that the occupation of "part of a house" might confer a right to vote for a borough under 2 Will. 4, c. 45, s. 27, if there was independent occupation and actual severance from the rest of the house. Secondly, under sect. 45 of the recent Valuation (Metropolis) Act, the valuation list made under that Act is to be conclusive evidence both of the gross and rateable value of the several hereditaments included therein, and of the fact that everything required to be inserted therein has been inserted. Then the 76th section says that where (amongst other things) for the purposes of the Acts relating to house duty, it is necessary to make a separate valuation of any hereditament by reason of its not having been separately valued in any valuation list, then the value of such hereditament is to be ascertained in the same manner as if the Act had not passed. In the valuation list for the poor rate each of these 117 sets of rooms has been valued as a separate hereditament, and the seven blocks of buildings are now assessed for house duty at the aggregate values of the 117 separate hereditaments. There has been no valuation of each block as "houses," and if they were so held to be, each block should be valued as a separate hereditament apart from the Valuation (Metropolis) Act. It is not a fair valuation as it stands. The decision in the *Mutual Tontine, &c. Society v. St. George's Union Assessment Committee* (*ubi sup.*) is simply that the owners of each flat are occupiers to be rated as such for the poor rate, not that the aggregate value of all the 117 flats is to be taken to be the value for all purposes of the blocks as houses.

The Solicitor-General (with him Pinder), for the Crown, was not called upon.

JESSEL, M.R.—This is an appeal from a judgment of a majority of the judges in the Court of Exchequer, deciding what is the true construction of the statute 48 Geo. 3, c. 55, as to the mode of charging duty upon inhabited houses. There is also involved the construction of the recent Valuation Act for the metropolis. The contention for the appellants is that certain flats or suites of apartments ought to be treated as separate houses, and valued and rated as such. The circumstances are peculiar. There are seven blocks of buildings, divided into flats, and built by the appellants, the Westminster Chambers Association. They differ, no doubt slightly in construction from an ordinary dwelling house, for although

they are externally exactly the same, internally they are divided in this way: Each set of apartments has one door opening on to a common staircase, and each suite of apartments is, as it were, self contained with all the necessary conveniences to enable persons to inhabit it as a place of business, but with these exceptions, and with the exception of its size, each block does not differ from an ordinary London building. The first point is, how would you, in ordinary language, describe one of these blocks? Without doubt or question you would call it a house. In either its legal or common sense there is no doubt about the meaning of the word "house," and it has not been contended either here or in the court below that either in its legal or ordinary sense the word house would not sufficiently describe one of these blocks. Now the rule is, that in construing a legal instrument, whether it is an Act of Parliament or not, it is the duty of the court to give every term used in the instrument its ordinary and legal meaning, unless there is something either in the contract, or in the nature of the subject matter of the instrument, to compel the court to alter that meaning. Therefore, it is for those who say that a term used in a particular Act or instrument ought not to be received in its ordinary or legal acceptance to show something bringing it within one of these grounds of exception. Now, so far from finding anything in the Act of Parliament we are considering to alter the ordinary and legal meaning of the word "house," I find a great deal to confirm my opinion that the word is there used in its ordinary sense. It was argued for the appellants that in construing other Acts of Parliament, and other legal instruments, the courts, with another context, and with a different subject matter, had attached a different meaning to the word "house," and had held that a separate occupation of a portion of a house, perhaps two rooms, might constitute a "house" within the meaning of those other Acts of Parliament or instruments; but it appears to me that, unless you show something in the instrument we have to construe now relating to or connected with those other instruments, you cannot construe "house" in this Act by reference to the construction which has been put on the word in other Acts. The argument was also weak on another ground. The authorities referred to only show that in some cases a portion of a "house" may be described as a house; but no authority was produced, nor does any exist to show that an entire building could not properly be described as a house, although a portion of it might also fulfil that description. The two propositions are not inconsistent; a part of a house is constantly described as a "house." In this Act of Parliament we find not only a dwelling-house, which is the main thing, but we find a "coach-house," and a "wash-house" and a "warehouse" and a "counting-house," all of which are, and have been considered by the framers of this Act of Parliament, not separate buildings, but portions of buildings, and to be treated as portions of a dwelling-house for the purposes of this Act. Therefore you may have the word "house" properly used, first of all, as describing the whole of a dwelling-house; and, secondly, some or one of its parts; and because you can describe part of the building as a "house," it does not follow that you may not describe properly the whole as a

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"house" also. There is another instance, familiar at all events to lawyers—each Inn of Court is called, as we all know, a "house," yet it includes a great many separate buildings and a great many separate houses. Take, again, the Charterhouse, which is still called the Charterhouse, although it includes many separate houses. The main fact, therefore, that a separate portion of a building may be called a "house," does not show anything for or against the aggregate or entire building being called so too. A good illustration of that is afforded by the old case cited for the appellants (*Evans v. Finch, ubi sup.*). There a man was indicted for having broken into *domum mansionalem Hugonis Audley*, and I suppose the question was, whether Audley's chambers in the Temple were correctly described as his dwelling-house, and it was decided that the description was correct. Nobody decided and nobody suggested that the premises might not have been as well described as a house in a Court of the Inner Temple. It was not suggested that the total number of the sets of chambers in the Inn might not have been described as a house. That was not the point; the only point was, whether the one set of chambers was sufficiently described, and it is quite plain that the other point was not thought of as arguable, because Audley's chambers are talked of as part of a house. They say, "but that divers persons were in the hall and in other places of the house." Whether that meant the hall of the Inner Temple, or the hall of the building which comprised the set of chambers, is uncertain, but they had described the chambers as the dwelling-house of Audley, and the only point was, whether they satisfied that description. That being so, it does not appear that the point suggested there has any direct bearing on the point we have to decide. The two Acts of Parliament referred to were, first, the well-known statute of Elizabeth relating, it must be remembered, to the rating of occupiers in respect of the rating, not only of "houses," but of "houses and land," the word land being a word of wide meaning in English law, and including not only any house, but any building which may stand on the land. The questions which have been decided, therefore, under that statute have been, whether or not there was a separate occupation. How far the land being in juxtaposition with the house influenced the judges in their decisions upon that statute, and how the fact of mere occupancy being the test point also influenced them, it is immaterial to inquire. It is enough to say that there you had a different subject-matter and a different context. A similar observation applies to the cases cited on the construction of the Settlement and Voting Acts. There a totally different set of words were used, words relating to severance and occupancy, and these words again received a different construction in reference to a different subject-matter and a different context. I now come to the real point we have to decide; what is the meaning of the word "house" in the statute before us, and is there any reason for altering the general meaning of the word with respect to this statute and these particular buildings? It may be that there is. It might be found that the Legislature had described these particular buildings in a different way, but the only legislative definition we can find relating to one of these buildings describes it as a "house." That definition is not wanted; because,

as I said before, you must construe the word in its ordinary and legal meaning, even without the legislative direction. These buildings are described in the Westminster Improvement Act, which is of course as much an Act of Parliament as any other, and about which there is this additional remark to be made, that the Act of Parliament being one promoted by the appellants' own association, it contains their own description of their own property, and it is a description which, therefore, cannot very well be refused by the appellants. The description is this: It is enacted "that where any house built on land of the commissioners shall be occupied or intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors, or assigns, may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house." Nothing can, therefore, be plainer than that, as regards these particular buildings, the Legislature has described each of them as a "house." It has described the apartments as part of the house which may be sold away separately from the rest of the house, and the commissioners themselves have so described the property in question, showing that they took the same view as to the meaning of the word applied to these buildings as I am disposed to do on the general principles of construction. Next, is there anything in the Act of Geo. 3 to cut down the meaning of these words? It seems to me to be all the other way. The first rule says that the duty shall "be charged annually on the occupier or occupiers for the time being of every such dwelling-house" in a certain way. The second is "every coach-house, stable, wash-house, laundry, wood-house, bake-house, dairy, and all other offices, &c., belonging to and occupied with any dwelling-house shall, in charging the said duties, be valued together with such dwelling-house, &c." Then several houses are mentioned which might be separate, and if held separately and occupied separately, then might be separately valued, but they are charged, according to the legal meaning of the words, "together with the dwelling-house." Then there is, at the end of r. 21, a restriction showing that the framers of the Act knew the meaning of the words: "Provided no more than one acre of such gardens and pleasure-grounds shall in any case be so valued;" a "house" in law including any land which is so found. Then there is this, "all shops and ware-houses which are attached to the dwelling-house, or have any communication therewith, shall, in charging such duties, be valued together with the dwelling-house." Certain exceptions follow, and the next rule (4) is "every chamber or apartment in any of the Inns of Court," &c., being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof." I do not think that bears very strongly either way; if it has any bearing at all, I think it tends to show that chambers, being expressly excepted, would not have been otherwise so charged. But the important rule in this case is rule 6: "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties, as if such house or tenement was inhabited by one person

or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties." Then there is a provision that in case he does not reside within the limits of the collector, the occupier shall be charged, and if the house or any part of it is actually let out in "different stories," the tenants are to deduct the duty from their rents. Now it is contended that these blocks of buildings are not, in the language of the Act, "let out in different stories, tenements, lodgings, or landings;" but I think that no words in the English language could better describe the case of these buildings. They are actually let out in "different stories." They are let out in "different tenements," and they are certainly let out to "two or more persons or families." It exactly bears out my view that each block is a large house let out in the way described in the Act. It is said to be a hardship so to construe the Act; without expressing an opinion upon that—and I have no right to do so—it is what the Legislature has directed to be done in the case put, where the house is let in different stories. If one story only is let out of a number, it is expressly enacted that payment is to be made for the whole house, even although five-sixths of it is uninhabited. Nothing can be plainer than that this is so, and it cannot be any greater hardship where the house is one house in every sense of the term, and is let in separate tenements, as is the case here. The hardship, if any, is the same in both cases, and it is plain that the Legislature intended, for fiscal reasons, that in some cases, although five-sixths of the house might be uninhabited, yet the whole tax should be paid. That, I think, is an answer to the suggestion of hardship made in argument. It is necessary to read the next rule (7) for another reason. The rule is, "No dwelling-house or other such premises as aforesaid, shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place." Then the 14th rule says, "Where any dwelling-house shall be divided into separate tenements, being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively." It was argued in the court below that this rule applied to the present case, although it was not so argued to-day, and I give the appellants the benefit of a repetition of the argument for whatever it may be worth. The meaning of rule 14 is, I think, very plain indeed. It says, "different tenements being distinct properties," and it therefore contemplates the possibility of there being tenements which are not distinct properties. Then the question is, Is one of these blocks a dwelling-house divided into "different tenements being distinct properties?" because, if it is, it should be otherwise rated. What is the meaning of "distinct properties?" Here again you apply the ordinary rule of construction. Distinct properties are the properties of different owners, but in the case before us it is plain that there are not different owners. There is only one landlord for every one of the tenements, and only one tenant below him for each of the tenements. The landlord lets directly to the tenant below him. What would have been the

case if a tenement had been sold I offer no opinion upon, nor do I say what would have happened if there had been a demise of one of them, because then the intermediate tenant might in a sense be said to be the intermediate owner. This, however, is not the case here. This is a single letting. It is plainly within the 6th rule, because it is plainly a letting in "different tenements." It is not within the 14th rule, because in no sense can these flats or suites of apartments be said to be distinct properties—there being but one landlord throughout. There is another suggestion as to "distinct properties," which I cannot quite follow. It has been suggested that the word "property" may be used, not in its ordinary sense as showing ownership, but as describing the structural character of the buildings. I do not think that can be the true meaning of the word, but if it were, looking at the words "divided" and "distinct," I should say that these tenements were not within the 14th rule. First of all, I cannot find that the houses were divided internally in the way of structural division, nor do I see that the properties are distinct in the sense of any physical severance which everyone could see. I am therefore of opinion, taking the Act of Parliament and these rules together, and for the reasons I have given, that these seven buildings are properly described and charged as houses within the stat. 48 Geo. 3, c. 55. Then comes the second question. The tenements have been rated to the relief of the poor under the Valuation (Metropolis) Act as separate tenements. The separate value is set upon each, so that there are 117 annual values; and now comes the question, how are you to estimate the value for the purpose of the house tax? That must depend upon the Valuation Act, and the object and meaning of that Act is plain; it is to make one assessment for local taxation as far as possible. Therefore, that being the object aimed at by the Legislature, you are not to go out of your way to defeat that object. The words of sect. 45 are, "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act, and the Acts incorporated therewith, and shall, for all or any of the purposes in this section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted." So that if the valuation stood upon that section alone it would be conclusive. The valuation list is to be conclusive for the purpose of the house, not only of the value, but of the fact that everything required to be inserted therein has been inserted therein. Then the 76th section says, "Where, for the purposes of the Acts relating to the duty on inhabited houses, &c., it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not passed." It is said that under those words, inasmuch as you have to value the house, and the house itself as such is not valued, though each tenement comprising the house is valued, that it is necessary to make a separate valuation of the house as one hereditament which is not separately valued in the valuation list. Of course, one answer to that would be that the words "separately valued" mean that when you cannot otherwise ascertain its separate value you must do so from

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the valuation list, by adding up the value of all the tenements. That seems to have been the view adopted by Mr. Justice Blackburn, that it is for this purpose to be separately valued, because, without going beyond the list, you can ascertain the total separate valuation of the hereditament. That is one answer, but there is another pointed out by the Lord Chief Justice, which to my mind is quite conclusive. Rule 7 of the 48 Geo. 3 c. 55 is that "No dwelling-house or other such premises as aforesaid" shall be valued at less than the poor-rate value. Now the poor-rate value of this house is the total value of all the tenements, and that has been decided by the Queen's Bench. The meaning of the 7th rule, then, is that whatever value you put on the house for the purpose of this Act, it shall not be less than the poor-rate value; and it is admitted by the appellants that the poor-rate value is not too little. They complain, on the contrary, that it is too much. It is not, therefore, necessary to make the separate valuation for the purpose of the house duty, because, having the poor-rate value ascertained, that must be sufficient to enable you to assess the house tax, which is all that you are required to do. I am of opinion, therefore, on both points, that the decision of the majority of the judges in the court below was right, and must be affirmed.

Lord COLERIDGE, C.J.—This case has been so fully discussed by the Master of the Rolls that I have little to add to his judgment. I will simply say that the point is substantially whether a house being let in different flats, stories, or suites, the 6th rule of Schedule B, of 48 Geo. 3, c. 55, does or does not apply to the subject-matter of the rating. The question appears to me to be conclusively answered by reference to sect. 69 of the Act by which the appellant society were created, and under which they hold their premises, because that section enables them to do certain things with a "house" erected on their land, and occupied or intended to be occupied, in different sets of apartments by different persons. The appellants, therefore, have an Act of Parliament under which they erect what the Act itself calls a house occupied by different persons in distinct sets of apartments. That Act was passed in 1853, and the question is, are we to construe the words there in any different sense from those used in 1808 (Geo. 3, c. 55), "house let in different stories, tenements, lodgings, or landings?" The words, though certainly not quite identical, are as nearly so as words can well be, and I think that where the construction of the appellants' Act is plainly that in referring to houses occupied by different persons in distinct sets of apartments, the very subject matter of the rating is meant, we cannot torture words in the Act of 1808, and make them mean something entirely different from what they mean in the Act of 1853, which is the Act under which these blocks of buildings were erected. The Master of the Rolls has clearly put what seems to me the right answer to the second point, and I have nothing to add upon it. I will just say, however, that the case quoted from Croke's Reports (*ubi sup.*) does not appear to me to have any bearing one way or the other on the present case. It only decides that the offence of burglary can be committed in chambers in the Temple, and I do not see how in any way it decides what is a "dwelling house" for the purposes of this case.

POLLOCK, B.—Giving every effect to the appellants' argument, I cannot come to any other con-

clusion than that the decision of the court below was right and must be affirmed. I was impressed with Mr. Manisty's argument that where there is a series of statutes *in pari materia*, it is extremely desirable to give them the same construction as far as possible, but in this argument I think two points have been overlooked. In the first place I am not certain that the statutes are *in pari materia* in the sense that the Legislature may not have intended to make the incidence of taxation fall differently with regard to one imperial tax than with regard to another. But I think it is erroneous, when a series of Acts of Parliament have been passed, to necessarily apply the same construction of language to both the earlier and the later Acts. I believe the true rule of construing Acts of Parliament to be that which the Master of the Rolls has stated to-day, and which was first laid down by Mr. Justice Burton, in Ireland, and has repeatedly been spoken of with commendation. Therefore, in dealing with the first Act of Geo. 3, and taking into account the knowledge the Legislature then possessed, I find the word "house" first used in the enacting part of sect. 1, where the words are, "and upon inhabited houses as set forth in the schedule to this Act." Now, no one at that time could have had any doubt what an "inhabited house" meant generally. Then, taking rule 6, upon which this case almost entirely turns, the words are, "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by one or more persons or families." These seem to me to be the proper and fit words in which to describe a house let as this one is let, and the same language is imported into the appellants' own Act. I have nothing to add upon the second point. Rule 7 appears to me to exactly meet the present case.

Judgment for the respondent; Judgment below affirmed.

Solicitor for the appellants, Burchell.

Solicitor for the respondent, The Solicitor to the Inland Revenue.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Thursday, March 2.

HIRSCH v. JONAS. (a)

Trade mark—Interim injunction.

The plaintiff, a cigar merchant in London, adopted a label with a device, and the words "Gloria de Inglaterra," which he registered at Stationers' Hall. This label was sent to a manufacturer of cigars in Havannah, who supplied the plaintiff, with instructions to affix the same to each box of cigars consigned to the plaintiff. The label, with the addition of the manufacturer's name and address, were accordingly placed on all boxes of cigars supplied to the plaintiff.

In an action against the London agent of the manufacturer for selling cigars under the same label, a motion for an interim injunction was made:

There being no evidence of a contract binding the manufacturer not to supply cigars under this

(a) Reported by G. W. KING, Esq., Barrister-at-Law.

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label to anyone else but the plaintiff, an interim injunction refused.

THIS was a motion for an interim injunction to restrain an alleged infringement of a trade mark, under the following circumstances:

The plaintiff was a cigar merchant in London, who for some time prior to the year 1869 purchased his cigars from a manufacturer in Havannah, named Joseph Genir.

In 1869 the plaintiff adopted a label having a drawing of Britannia, and the words "Gloria de Inglaterra," which he registered at Stationers' Hall, and he sent it to Genir with instructions to affix it to all the boxes of cigars with which Genir should supply him.

From July 1869 Genir placed this label with the addition of some words in Spanish to the effect that the cigars were the cigars of Joseph Genir, manufacturer of cigars, of Havannah, on all the boxes of cigars supplied by him to the plaintiff.

It appeared from the plaintiff's evidence that cigars of the brand "Gloria de Inglaterra" had, until shortly before the commencement of this action, been manufactured by Genir for the plaintiff exclusively, and that on one occasion Genir wrote to the plaintiff saying that some one else had asked him to supply cigars with this brand at an advanced price, which he had refused to do on the ground of the brand being "engaged." There was no evidence of any contract binding Genir to sell cigars to the plaintiff, or not to sell cigars of this brand to any other person.

The defendants were the London agents of Genir, and this action was brought upon the plaintiff discovering that they were selling "Gloria de Inglaterra" cigars under the label which he alleged he had the exclusive right to use.

Chitty, Q.C. and Wilkinson, for the plaintiff.

Edward Cutler, for the defendant, was not called upon.

JESSEL, M.R.—This is not a case in which I shall interfere by interlocutory injunction. It is a case of great singularity. It is the first case of the kind in which a serious attempt has been made to obtain an injunction at this stage of the cause in my court. The case is this: A merchant in London, of the name of Hirsch, sells cigars, like any other merchant. He has a correspondent named Genir in Havannah, who is a manufacturer of cigars, and Mr. Hirsch is in the habit of buying cigars of him. That is the only connection between them. In the year 1869 Mr. Hirsch employed an artist to make a drawing of a lady with a trident and a lion and so forth, and to put on the drawing "Gloria de Inglaterra." He then wrote to his correspondent in Havannah, asking him to adopt the design as a label for the cigars to be consigned to Mr. Hirsch in future, and also telling him that he had secured it in some mysterious manner in England, so that no one else could use it. He had, in fact, registered it at Stationers' Hall. Thereupon the manufacturer in Havannah puts this picture both inside and outside the boxes of his cigars, having in addition "Gloria de Inglaterra of Genir of Havannah" on the top and the side of each box. All the public can see is that the cigars are the cigars of Genir, of Havannah. That is the only representation on the box, as it appears to me. Mr. Hirsch says that Mr. Genir wrote a letter to him to say that some one else had asked him to supply cigars with

this label, and he had declined to do so. But there is no contract that Genir will not supply cigars under this label to any one else. If there be such a contract it must be alleged and proved. I cannot find, on the part of the plaintiff, any evidence of any contract with Genir to supply the cigars in question to the plaintiff. As I understand the case, the plaintiff simply buys cigars of Genir when Genir chooses to sell them. There is no contract to secure the supply of such cigars to the plaintiff if Genir should choose not to supply them. I find nothing to show that the plaintiff will be injured by what the defendants are alleged to be doing. The plaintiff does not tell us he has got any stock of these cigars on hand. If I do not restrain the defendants I do not see how it will injure the plaintiff. The defence is: "It is my trade mark. No doubt it was suggested by the plaintiff, but I have always used it as mine. I am the agent of Genir." The cigars complained of are genuine cigars of the quality in question. The public will not be deceived, nor will the plaintiff be injured. On what principle am I to restrain the defendants, at this stage of the action, from selling them? I am utterly at a loss to find out. As for the question of trade mark, the trade mark of manufactured goods ought to mean, I suppose, that the goods are manufactured by the person whose trade mark it purports to be. The manufacturer in this case is Genir. I can understand a man saying "I am not the manufacturer of certain goods but the selector. My reputation for cleverness and selection is so great that goods marked with a mark to show that they have been selected and approved by me will fetch a higher price in the market." If Mr. Hirsch had put on his boxes "Gloria de Inglaterra, Havannah cigars selected by Mr. Hirsch," he might have a case to prevent other people from imitating that. It would show that the cigars were approved by him. If he got a great reputation in that way I can understand he would have a right of protection for the mark that indicated to the public that the cigars were selected and approved by him. But that is not Mr. Hirsch's case. There is nothing on the boxes to show anything about Hirsch at all. All he says is that the trade knew the label as denoting cigars sold by him, which I dare say it does. It appears to me that at present he has no case whatever, and there is no use my granting an interim injunction. I do not know whether he may make out a contract hereafter. In refusing the motion I make the costs costs in the cause.

Solicitors: Allin and Greenop; Lumley and Lumley.

Thursday, April 6.

Re THE INTERNATIONAL PATENT PULP AND PAPER COMPANY (LIMITED.) (a)

Winding-up of company by court in England—Motion to restrain proceedings in Ireland—Companies Act 1862 s. 37.

The court in England, which has made an order for winding-up a company, has jurisdiction, under the 37th section of the Companies Act, 1862, to restrain a creditor in Ireland from continuing proceedings in the Irish courts against the company. THE International Patent Pulp and Paper Company was registered under the Companies Act

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1862, having its registered office in London, but its business was carried on partly in Ireland. In Dec. 1875 an order was made by the Master of the Rolls for winding-up the company. A motion was now made on behalf of the official liquidator for an injunction restraining a person named Gorman, who was resident in Ireland, from continuing certain proceedings in the Irish courts. It appeared that in May 1875 Gorman commenced a suit in the Court of Chancery in Ireland against the company for specific performance of an alleged agreement for a lease; and also that, having a registered judgment against the company, he had acquired a charge on the company's property in Ireland, and in Nov. 1875 he obtained an order for sale in the Landlord Estates Court.

Davey, Q.C. and *Methold* for the official liquidator, asked for an order restraining Gorman from further prosecuting the specific performance suit and from selling the company's property.

B. B. Rogers, for Gorman, who appeared under protest, contended that this court had no jurisdiction to restrain the proceedings in Ireland.

JESSEL, M.R.—This question is one of considerable importance, and the only wonder is that it has never been raised before. First of all it is necessary to consider the frame of the Act, and ask what was the Act meant to do? As I read the Act, it was an Act passed for establishing companies in the United Kingdom, not in one particular part of the United Kingdom, but "to carry on business in the United Kingdom or any part thereof." The frame of the Act shows distinctly that it relates to the whole of the United Kingdom, and is not limited to either England, Scotland, or Ireland. The 4th section says that no company shall carry on business except on complying with certain conditions. Then the 6th section applies to registration. By the 8th section, which establishes limited liability companies, the memorandum of association is to contain among other things "(1) The name of the proposed company, with the addition of the word 'limited' as the last word in such name. (2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate." That is, perfect registration must be made only where the office is, which may be in any part of the United Kingdom, but one part must be selected, for reasons which are obvious upon a further consideration of the Act, but the company may carry on its business anywhere in the United Kingdom. The same words may be found in the 9th section. The 11th section says "The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland. Therefore, up to that point, we see clearly that the companies may carry on business in any part of the United Kingdom, but they must be registered in one part having a registered office. When we turn to the sections relating to the winding-up of companies, we shall see the reason of that. The 81st section says that the expression "the court" used in that part of the Act relating to the winding-up of companies shall mean, "In the case of a company registered in England, that is not engaged in working any such mine as aforesaid,—the High Court of Chancery." And in the case of a company registered in Ire-

land, it means the Court of Chancery in Ireland. Thus it is shown that the reason for the registration is to ascertain the court which is to have the power of winding-up the company. That makes the whole consistent. A company may carry on business in any part of the United Kingdom, but a place must be fixed upon for its registered office, in order to fix the court which can wind it up. Now, what is the object of winding-up? It is to distribute the assets of the company rateably amongst its creditors, and enforce contributions against its shareholders or contributories, and make them pay what they are liable to pay with a view of liquidating the affairs of the company. That is the object of the Act. How is that object effected? By stopping all actions or suits brought against the company when it comes to be wound-up, so as to compel the creditors to share rateably in the assets. It would be a very strange result, therefore, if the Legislature, whilst contemplating companies formed to carry on business in any part of the United Kingdom, or in the whole of the United Kingdom, should allow creditors to go on with their actions in one part of the United Kingdom and not in another part, it being entirely against the spirit and meaning of the Act. Therefore *a priori* we should expect that in whatever part of the United Kingdom the court which wound up the company was situate, that court would have jurisdiction throughout the United Kingdom over creditors and contributories to effect the liquidation. That is what we should expect to find when we look at the purview of the Act. That being so, let us look at the words of the Act. The 85th section says this: "The court may at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit." The 87th section provides that after the winding up order has been made, no action, suit, or proceeding, shall go on without the leave of the court. It has been decided that the mode of applying that provision is by applying to the court having the control of the winding up to stay the action either by injunction, or whatever the form may be which is adopted in that part of the United Kingdom where the court is situated which has jurisdiction. The result, therefore, is that at any time after the presentation of a petition, either before the winding up, or when the order is made, no creditor is allowed to prosecute his action against the company without the leave of the court. The words are general, "action, suit, or other proceeding." Why should I limit them? Those who say that I am to impose a limit upon those general words must show a reason for my so doing. I cannot find any reason for limiting them except this—that the court has no power to enforce its order. I agree that if a creditor in Turkey, Russia, or any other purely foreign country, were to bring an action, although it would be desirable in the interests of the persons concerned in the litigation to make that creditor come in with the rest, yet the court cannot restrain the action from want of power—not from want of will or want of provisions in the Act of Parliament, but simply that the Act of Parliament cannot give this court

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jurisdiction over Turkey, Russia, or any other purely foreign country. That is the only reason. But it has been decided in several cases that these words are general, and it has also been decided that the court not only can, but ought to, grant an injunction to restrain a creditor within the jurisdiction from proceeding with an action out of the jurisdiction. The only authority to be found in the Act are the sections to which I have referred. It shows therefore that the words "action, suit, or proceeding," must be read generally, otherwise there would be no means of restraining an action commenced abroad. The words also show that the power ought to be exercised over actions commenced abroad when the court has jurisdiction to enforce it, that is, jurisdiction over creditors. This creditor is in Ireland, and I could not enforce it against him without the special authority of the Act. The 122nd section gives that special authority. The 123rd section gets rid of the difficulty of enforcing the order of this court in the case of a creditor not within the jurisdiction of this court bringing an action as in this case, by giving a process by which this court can enforce its order in Ireland, that is, that the person getting the order can record it in an Irish court, and then enforce it in Ireland. It appears to me, therefore, following the principle of the decisions which call upon the court to restrain a creditor within the English jurisdiction from bringing an action abroad, whether in Ireland, or in any foreign country, that I ought to restrain a creditor in Ireland, when I can do so, from proceeding with his action in Ireland. Therefore I hold that I have not only the right to exercise the jurisdiction, but having regard to the meaning of the Act of Parliament, that I am bound to exercise it in a proper way.

Solicitors: Webster and Graham, Tatham, Curling, and Pym.

Wednesday, April 26.

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY v. LONDON, LIVERPOOL, AND GLOBE INSURANCE COMPANY. (a)

Double insurance—Wharfingers' policies—Merchants' policies by way of indemnity—Loss by fire—Liability of insurers.

A firm of wharfingers, who were liable to their customers for the safe keeping from fire of the grain warehoused with them, insured the grain and seed in their granaries with several Insurance Companies, for 151,000*l.*, the insurances being expressed to be effected on grain and seed, "the assured's own, in trust, or on commission for which they are responsible." Messrs. R. and Co., merchants, having grain of the value of about 42,000*l.* warehoused in these granaries, effected insurances amounting to 60,000*l.* on their grain, by way of indemnifying themselves in case of the insolvency of the wharfingers in the event of a fire. All the policies contained the usual conditions of average, and also a condition as follows: "If at the time of any loss or damage by fire happening to any property hereby insured, there be other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute

more than its rateable proportion of such loss or damage." A fire occurred in the granaries, and the total loss of grain was about 115,000*l.*

In a suit instituted for the purpose of ascertaining the amounts payable by the several Insurance Companies in respect of the loss,

Held, that the grantors of the merchants' policies were not liable to contribute towards the payment of the loss, but that the whole loss was to be made good by the grantors of the wharfingers' policies.

THIS suit was instituted for the purpose of ascertaining the amounts payable by several Insurance Companies in respect of a loss arising from a fire at the King and Queen Granaries, Rotherhithe, on the 14th Dec. 1871. The owners of the granaries were Messrs. Barnett and Co., Wharfingers, who had effected insurances upon the grain in these granaries with the plaintiff company and the defendant companies, except the Royal, to the amount of 151,000*l.* The policies so granted (called for the sake of distinction the wharfingers' policies) were expressed to be effected upon grain and seed, "the assured's own, in trust, or on commission for which they are responsible." At the time of the fire, these policies were in force, and the value of the grain destroyed amounted to 127,459*l.*, of which, grain of the value of about 42,000*l.* belonged to Messrs. Rodocanachi, who had warehoused the same with Messrs. Barnett and Co. Messrs. Rodocanachi, in order to secure themselves in the event of Messrs. Barnett and Co. making default in indemnifying them against loss by fire, effected insurances with the plaintiff company and the Royal Insurance Company to the amount of 60,000*l.* upon their grain in Messrs. Barnett and Co.'s granary, and also in St. Saviour's granary. These policies were distinguished as the Merchants' policies. All the policies effected both by the wharfingers and the merchants contained the usual conditions of average and also the following condition: "9. If at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage."

The total loss arising from the fire, after deducting the net salvage, was about 115,000*l.*, and the question to be determined in the suit was whether the grantors of the wharfingers' policies were liable thereunder to make good the whole loss, or whether, having regard to the conditions of the policies, the grantors of the merchants' policies were bound to contribute rateably with the insurers granting the wharfingers' policies.

The grain was warehoused with Messrs. Barnett upon the condition, amongst others, that they should be responsible to the respective owners for the safe keeping of the grain against fire, whether caused by the negligence of Messrs. Barnett or not, and the rate charged for warehousing the grain was calculated on that basis.

H. Matthews, Q.C., Davey, Q.C., and Holl for the plaintiff company.—The wharfingers' policies being more specific than the merchants' policies, the conditions of average do not apply. Messrs. Barnett are primarily liable to make good the loss (*Mason v. Sainsbury*, 3 Doug. 61), and that liability is available either for Messrs. Rodocanachi or for Messrs. Barnett.

(a) Reported by G. W. KING, Esq., Barrister-at-Law.

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canachi, or for their insurers if they paid the loss, and the grantors of the merchants' policies are not ultimately liable for anything; *Commercial Union Assurance Company v. Lister* (L. Rep. 9 Ch. 483). The word "property" in the 9th condition does not mean the chattels or goods, but the interest of the person insuring. The 9th condition is a contrivance by which the insurance offices seek to avoid the effect of the ordinary rule of law in a case either of double insurance or of over insurance, as, by the law of England, if the owner of property is insured in several insurance offices, he may claim the whole of his loss against any one of his insurers, and leave that insurer to get contribution from the other insurers.

Benjamin, Q.C., Bagshawe, Q.C., and Bevir for the Royal Insurance Company.

Southgate, Q.C., Fry, Q.C., Cohen, Q.C., and Kekewich for the other defendant companies.—There being two insurances upon the same property and two insurances of the same property, the insurers should contribute rateably in proportion to the amount of their policies. The word "property" in the 9th condition means the goods described in the policy. Even if the 9th condition does not apply, there being two independent contracts of indemnity with Messrs. Rodocanachi by Messrs. Barnett and the grantors of the merchants' policies, each of those has a right of contribution against the other so as between them to make up the entire loss, and whatever Messrs. Barnett pay, the grantors of the wharfingers' policies repay him; and being subrogated to Messrs. Barnetts' place, they are entitled to stand in their shoes, and have the same right against the grantors of the merchants' policies.

JESSEL, M.R.—I must say I am very glad to hear from the counsel for the defendants that they do not allege that if I should be of opinion that Messrs. Barnett are liable for anything, I am to construe the words in these policies so as to throw the liability upon them in exoneration of the insurance companies. I should have been very loath to decide the case upon this ground; but it is quite obvious to any one acquainted with the nature of the indemnity sought by Messrs. Barnett from the insurance companies, that nothing of the kind could have been in the contemplation of the parties. As I understand the matter, and as it appears to me plainly proved by the evidence, a wharfinger by the custom, I suppose, of the City of London, but at all events, by the custom of the trade, is in exactly the same position as a common carrier—that is, he is liable, in the absence of express stipulation, for the safe custody of the goods entrusted to his care; and if those goods are destroyed by fire he is liable in law for breach of duty, in not so carefully attending to the goods that no fire could destroy them. It is no answer on his part to say, "I was not guilty of negligence," because it is negligence not to have prevented accident, and for this purpose it is not necessary to show that he was guilty of actual negligence or actual default; he is liable for not properly taking care of the goods. That being so, a wharfinger makes a charge to his customer of a sum sufficient to remunerate him, not only for his expenses, but for the risks attending his trade, and of course a fair margin of profit. Whether that is charged under the name of wharfage or lighterage, rent, or consolidated rate, is

wholly immaterial for this purpose; it is a charge he makes to his customer for undertaking those duties and liabilities, amongst others. That was the position of Messrs. Barnett and Co. in the case in question. There was a large quantity of grain stored in their warehouse, for which they were liable to their customers as warehouse keepers or wharfingers, and they had also property of their own in their warehouses. Some of the customers of Messrs. Barnett, rightly or wrongly, thought it wise and prudent to provide for the possibility of Messrs. Barnett and Co. not being able to meet the large demand of loss which would be incurred in case of a fire happening in their premises. In the one case the loss would have been, and as it turned out to be, to a single merchant 42,000*l.*; and two of these merchants themselves insured their own grain with two insurance companies, the North British and the Royal. They therefore had the pecuniary liability of the wharfinger or warehouse keeper, but they also had a subsequent contract of indemnity entered into by these two insurance companies, in case they should sustain loss by reason of fire. Now Messrs. Barnett and Co., wishing to indemnify themselves against the consequences of loss by fire, effected insurances with the Liverpool, London, and Globe, and other insurance companies, which have been called the wharfingers' policies, to distinguish them from the customers' policies, which have been called the merchants' policies. It is admitted that the object of these policies was to indemnify Messrs. Barnett against any loss occasioned by fire, not only in respect of their own goods, but in respect of their customers' goods. A fire having occurred, and a very large loss of over 100,000*l.* having been occasioned by the fire, the question I have to decide is, whether the insurance companies, who are liable on the merchants' policies, are liable to contribute anything to the amount of that loss, that amount being less than the amount insured by the wharfingers' policies alone; so that if there had been no merchants' policies, it is quite plain that the wharfingers' policies would have been more than sufficient to cover the loss. In other words, the insurance companies who have granted the wharfingers' policies allege that by reason of the act of the merchants in insuring gratuitously, as far as the wharfingers are concerned, the grain in question, their liabilities have been diminished to an amount proportionate to the amount insured by the merchants' policies. Now, the first point to be considered is, what was the true position in law of the companies granting the merchants' policies, as regards the merchants and as regards the wharfingers? It appears to me that the wharfingers, not being any parties to the contract of indemnity entered into by the merchants with the insurance companies, could not derive any benefit from that contract as between them and the merchants, and if a fire had occurred, as it did occur, and the merchants had sued the wharfingers, the wharfingers must have paid under their admitted liability the whole amount lost by fire. But the merchants might have taken another course, they might at their own will and pleasure have preferred to sue on the contract for indemnity, that is, on the merchants' policies. It cannot be denied, if they had taken that course, that the insurance companies who had granted the merchants' policies must have paid the amount of the insurances

effected by these policies, notwithstanding that the merchants had a remedy against the wharfingers. But if the merchants had taken the first course, it is alleged by the defendants and denied by the plaintiffs, that the wharfingers would have had a right of contribution against the insurance companies who had granted the merchants' policies. On the other hand, it is alleged by the plaintiffs that not only would there have been no such right of contribution, but in case the merchants had adopted another course, and had elected to sue the grantors of the merchants' policies in the first instance, those grantors would have had a right to sue the wharfingers in the names of the merchants and to recover the amount against those persons. It appears to me, both on principle and authority, that the contention of the plaintiffs is the true one. The contract with the grantors of the merchants' policies is undoubtedly a contract of indemnity, and indemnity only. It is to indemnify the merchants against loss by fire. They had a right to sue the wharfingers for breach of duty. Whether it is a breach of duty or of custom which is local law, whether it is a breach of duty imposed by the general law, or whether it is a breach of duty imposed by the contract in not carefully keeping the goods, the insurance companies would have had a right to say to the merchants, the wharfingers being solvent, "You lose nothing, and our contract is simply a contract of indemnity, and, therefore, if you have chosen to sue us and make us pay, which is your caprice"—and it would have been mere caprice if the wharfingers are solvent"—we are entitled to stand in your place as against the wharfingers, and to be put in the same position as if you had pursued your proper remedy and had made those primarily liable to you pay the amount of the loss." If that is so, there is nothing further to argue, because it is agreed that if Messrs. Barnett were liable, no claim would be set up by the insurance companies, whatever view I should take of the wording of the policies. But there was a very important question raised as to the wording of the policies, and whether my opinion be or be not worth anything, I think it right to give it for the guidance of persons who may be interested in these matters on future occasions. I must say that, in my opinion, the policies are not well worded. In saying this, I do not impute any blame to the framers of them. No one knows better than a lawyer that the defects in the framing of legal instruments are rarely discovered, except after the event has happened which occasions the discussion upon which comments are made. It is quite impossible, as a rule, to anticipate every event of life, or to provide for it, however skilful or however careful the framer of the instrument may be, and, therefore, in saying this, I impute no blame whatever to the framers of these policies or of the elaborate conditions on the back of them. But I cannot conceive that the event which has happened was the event, or one of the events, contemplated by the framers of the instrument, and, therefore, the court is in this position, which is a position in which a court of construction is very often placed, it has to decide on the meaning and applicability of the language to a state of things not contemplated by the original framers of it; and under those circumstances, of course, it is not unlikely to be discovered that the words do not exactly fit. In that state of things, I think it is the duty of the court to adopt that

which is a reasonable construction, as contrasted with that which, if not an absurd, would be a very unlikely construction. Now this is a policy effected by persons who it was known at the time were wharfingers. The policy in its terms not only covers the insurer's own property, but property held in trust or on commission, for which they were held responsible. It was, therefore, intended to apply to property not their own, but property entrusted to them for safe custody only; and that must be borne in mind in construing the terms of the conditions. The framers of the conditions had probably not thought of that at all. These words I see are inserted in writing; the conditions are in print, and I should imagine, although I am guessing, that the framers of the conditions had in view merely and simply a case of a person insuring goods which were his own absolute property. As to that case, no question would arise. The case of a person having a limited interest in property does not seem to have presented itself at all to the framers of the conditions, and I think if it had, it would have been separately and differently provided for. But, this being the case, I must say it appears to me impossible to read the conditions in every respect in the same way as regards the same words. That is a conclusion to be avoided if possible, but I think in this case it is not possible. It is plain, for instance, that the word upon which I am now about to comment, the word "property," ought not to have in all the condition clauses of the instrument the same meaning. Take the first condition of the conditions of average: "It is hereby declared and agreed, that whenever a sum insured is declared to be subject to the conditions of average, if the property so covered shall at the breaking out of any fire be collectively of greater value than the sum insured thereon, then this company shall pay or make good such a proportion only of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when such fire shall first happen." Now, if I read the word "property" to mean the goods themselves, an extraordinary result will follow. Suppose the person insured has a limited interest—say that he is a person who has a commission of five per cent.—and goods on commission are mentioned in the policy, so that he would insure for one-twentieth part of the value of the property in all; that is, if the property were worth 20,000*l.* he would insure for 1000*l.*, being the whole value of his interest, seeing the total loss would be 20,000*l.*, they would only pay the 1000*l.* in proportion to the 20,000*l.*, or one-twentieth part of it. In other words he would get 50*l.*, although his interest was insured for 1000*l.* and was worth 1000*l.* Of course no such case would be contemplated. The man had insured all the interest he had in the property; and if I read that literally and read the word "property" as meaning the goods only and not the interest of the insurer, or in some cases the liabilities of the insurer, (for there is another case contemplated in the policy, that of goods for which the insurer is responsible, and in which he has no interest) that is the extent of the liability he is insured against, surely the word "property" must mean the interest in the property which is insured whether it is a limited interest in the nature of a commission or in the nature of a life interest. To take the case I put in the course of the argument, suppose a man insured some plate

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of which he was tenant for life, the value of which as a life interest was worth one-third of the property, the property being worth say 3,000*l.* and he insured it for 1000*l.*, no one would dream that this clause was intended to apply so as to deprive him of two-thirds of his insurance, in case the property was destroyed by fire. Obviously, when a limited interest, and a liability being insured against without interest, are mentioned, both of which cases are in the policy, I must consider the word "property" there to mean an interest in the property. But that is clearly what they want to guard against. They want to make the insured insure for the full amount of his interest, and the meaning of that clause is this, that if he insures for half the amount he shall not get paid the whole amount of the insurance, but only half. Therefore, in so construing it, I am carrying out what was the real intention of the parties in reading it as meaning the interest of the insured in the property. The next clauses for the present purpose do not make any difference. But when we come to the clauses on the back, I must say that it is equally impossible to read the word "property" in the way I have read it in the conditions of average. The first is: "Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which property to be so insured is contained," &c., renders the policy void. Of course there the word "property" is evidently a material substance, and must mean the goods themselves as distinguished from any interest in them. Then the second is "If after the risk has been undertaken by the company, anything whereby the risk is increased be done to the property hereby insured, or to, upon, or in, any building hereby insured, or any building or place in which the property hereby insured is contained," &c. There again it is quite plain the word "property" must mean the chattels or goods themselves. The third is "This policy does not cover property held in trust or on commission unless expressly described as such"—there again it shows that it may apply, as it does in these policies, to property not the insurers' own—"nor china, glass, looking glass, jewels, clocks, watches, trinkets, medals, curiosities, manuscript, government stamps, prints, paintings, drawings, sculpture, musical, mathematical or philosophical instruments, patterns, models, and moulds, unless specially mentioned in the policy, nor deeds, bonds, bills of exchange, promissory notes, money, securities for money, or books of account, nor gunpowder; nor loss or damage by fire to property occasioned by or happening through its own spontaneous fermentation or heating, or by or through invasion"—there again the word "property" must mean material substance. The fourth is "This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person, otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed hereon by or on behalf of the company." Now here it appears to me that the word "property" must mean interest in the property. What is to pass from the insured to any other person does not mean the material substance but the legal right. It may be a limited interest, he may have had a limited interest only originally, and it would

pass by this clause because he has ceased to have any interest. It is impossible, as it seems to me, to read the word "property" there, as meaning the actual chattel or material substance, it must mean the legal right or title, transferring what we call property in the chattel. That is the legal notion of ownership, and there I think the word "property" must be so dealt with. Then the fifth is ambiguous, "On the happening of any loss or damage by fire to any of the property hereby insured, the insured is forthwith to give notice in writing thereof to the company, and within fifteen days at latest to deliver to the company as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire, with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and in support thereof to give all and such vouchers, proofs, and explanations as may be reasonably required, together with, if required, a statutory declaration of the truth of the account; and in default thereof, no claim in support of such loss or damage shall be payable until such notice, account, proofs, and explanations, respectively, are given and produced, and such statutory declaration, if required, is made." There it does not appear exactly what the word "property" means, but I have no doubt it means a material substance because it is "loss or damage by fire." The sixth and seventh are not material, except that the seventh and also the eighth show that "property" is used in the sense of a material substance. Then the ninth is this, "If at the time of any loss or damage by fire, happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." Now what is the meaning of the words "covering the same property?" I have no doubt, following the reasoning which I have adopted in the other clauses, that it cannot mean the actual chattel. You would have the most absurd consequences if you read the words "same property" in that sense. If a tenant for life insured his interest only, and the reversioner did not insure, he would get the whole amount; but if the reversioner also insured his interest, as he would insure in a sense the same chattels, although he did it under the description of his reversion, the tenant for life would get only a proportionate part of the amount insured. But it could not possibly be meant in that sense, there being two separate policies of two separate interests. It will be observed that this is not an insurance of the property *per se*, but of property held in trust or on commission which is insured; that is not property of the man who insured it, but property for which he is responsible, and it is a most extraordinary notion that the person who has nothing whatever to do with it should by so insuring destroy the right of the insurer, or affect his interest in any way. A number of instances might be given of the remarkable results which I have mentioned, and might be multiplied indefinitely. Suppose the insurer was a co-adventurer, with a right to five per cent. of profits, and he insured for the amount of his interest, and the other co-adventurer who had ninety-five per cent. did not insure at all, according to that theory he would recover the whole and if the other did insure he

would get one-twentieth part of his insurance. It is a wonderful result if that is to be so. Another instance might be put. The lessee of a house for a short term insures the house, and the next lessee for ninety-nine years insures also for ten times the amount—in that case the first lessee, insuring under this clause, would lose nine-tenths of his insurance money, it being wholly immaterial to the company whether or not the second insurance was effected. I am satisfied that the clause was put in to apply to cases where it is the same owner of the same property, that is, where the subject matter of the insurance and the interest are the same. It never could have been meant to apply to the case I mentioned, and when you find those cases actually mentioned in the policy, and indeed contemplated by the third condition, you must read it in a sensible way, and not assume that these great companies intended to entrap their insurers, and to destroy the value of the contract of indemnity by reason of the accidental contract of somebody else which had no connection whatever with the subject matter of the contract, or with the price paid for the insurance, and I so hold. It does not appear to me to be creditable to the contracting parties even to think that they intended to do anything so absurd as would be the result of my holding otherwise, although I admit that the words are not as clear as they might be, and although it does compel me to put a different meaning on the same words in different parts of the instrument, I think it my duty to make it rational, and to make it a contract such as persons in the City of London would be likely to enter into, and not one which would be an utter absurdity. Now take the case which we have before us: the insurance company are to indemnify Messrs. Barnett. Assume, for the moment, I am right in the view I take of the law, that Messrs. Barnett are primarily liable, and assume that Messrs. Rodocanachi had insured for the total amount, and the only goods in the warehouse were their goods, the result would be this, if I am to read the condition literally, there being two insurances of equal amount on the goods, the insurance company which had insured Messrs. Barnett against liability—for they have only insured them for goods held in trust for which they are responsible, and it being therefore an insurance in terms against liability—would only have insured against half the liability, the liability remaining the same. It shows that that could not by any possibility be the meaning of the parties. Of course, if Messrs. Barnett were entitled to contribution against the insurance company, their liability to that extent would be diminished, and to that extent, no doubt, the contract of indemnity would be affected by being reduced to a mere liability against which Messrs. Barnett were to be insured, but in no other way does it appear to me that the wording of the condition ought to interfere with what I consider to be the true contract between the parties. I am at a loss to see any foundation, either on principle or authority for the argument that Messrs. Barnett, whose position was taken upon themselves by the North British Company, so that they had no occasion to be made parties to the suit, could recover any contribution against the Royal or the North British Company. It does not appear to me that their position is in any way that which has been represented, namely, the position of a

separate insurance company who have entered into a contract of indemnity. It appears to me that there is no ground whatever for exempting the grantors of what have been called the wharfingers policies from their liability to pay the whole amount. I must say that, in construing this instrument, my mind has been very much influenced not only by a consideration of the unreasonableness of the contract as suggested on the part of the defendants if it were carried into effect, but also by what does appear to my mind to be the utter dishonesty of such an attempt, if it had been made. It was not made, because the defendants' counsel said that if I came to the conclusion that Messrs. Barnett were liable, they did not seek to take the benefit of it in throwing that liability upon them. But still it must not be left out of consideration in considering whether or not it is a reasonable view of the contract. The mere fact of the company not wishing to insist upon the contract, if that were its legal meaning, cannot at all alter the effect of the argument as a reason for inducing the court to come to the conclusion that it is not its proper meaning. That is the reason I discussed the case upon the assumption that the meaning was suggested by that which I have mentioned, and applied it to the case actually before me. There will be a declaration that the Plaintiff Company and the Royal are not liable to contribute in respect of the merchants policies.

Solicitors: Sir W. Drake; G. L. P. Eyre and Co.; Dawes, Sons, and Rolph.

(Before Vice-Chancellor BACON).

Wednesday, July 26.

FINCH v. FINCH. (a)

Will—Construction—“Appurtenances”—Administration suit—Decree—Indian creditor—Statute of Limitations—Lex Fori—The Act for India, No. XIV. of 1859, s. 1, §. 9.

A testator devised and bequeathed his indigo factory in India, “with the zemindaries, villages, and lands therewith held and used, and the appurtenances,” to A., for life, with remainder over.

At the death of the testator, the “outstandings” of the factory business comprised loans secured by bonds of native landowners to obtain leases of lands for the cultivation of indigo and advances made to sub-lessees to secure the supply of indigo to the factory. These loans and advances were always considered part of the concern which, in fact, could not have been carried on but for such arrangements.

Held, that the outstandings did not pass under the specific devise of the factory, either as “appurtenances” or otherwise.

At the time of his death the testator was indebted to L., a Hindoo banker, for advances made for the purposes of the business, such advances carrying interest at 12 per cent.

In 1861 the testator died, and in 1865 the usual administration decree was made in an administration suit instituted in England by a legatee. The Indian Statute of Limitations provides that no suit for the recovery of money lent or interest shall be maintained in any court within the

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British territories in India unless the same be instituted within three years from the time when the debt became due. In 1870 L. carried in a claim for the balance and principal due to him in 1861, with interest at 12 per cent. On summons to disallow the claim,

*Held, that the question must be governed by the *lex fori*, and that, as the decree had operated as a judgment in favour of creditors to the extent of preventing the time limited by the English statute from running, the claim must be allowed, but with interest only at 4 per cent.*

JUSTIN FINCH by his will dated the 25th March, 1857, after divers specific and pecuniary bequests, devised and bequeathed his indigo and saltpetre works at Tirhoot, called or known by the name of the Shahpore Oondes Factory, with the zemindaries, villages, and lands therewith held and used, and the appurtenances, unto his brother Frederick Finch and his assigns for his life, with remainder for the male descendants of his late father, Joseph Finch, bearing the name of Finch, who should be living at the time of the decease of his said brother in such manner and shares as his said brother should by deed or will appoint; and the testator devised and bequeathed the residue of his real and personal property to the said Frederick Finch absolutely, and appointed the said Frederick Finch, Edward Cowell (who died in his lifetime), and Matilda Finch, to be trustees and executors of his said will.

The testator died on 7th March, 1861, and Frederick Finch entered into possession as tenant for life, and carried on and managed the factory down to the time of his death on the 24th Sept. 1863.

Frederick Finch, by his will dated 26th July, 1862, after appointing Antoine Goutiere, Matilda Finch, and Jane Caroline Finch, executors and trustees thereof, and after reciting the will of Justin Finch, and stating there were only two possible lines of male descendants of his late father, Joseph Finch, bearing the name of Finch, namely, his own sons and the three sons of his brother Joseph Finch, in exercise of the said power, appointed that the said factory, with the zemindaries, villages, and lands therewith held and used, and the appurtenances should be held upon trust as to 6-16ths thereof in trust for his son Joseph Burnett Finch, as to 4-16ths thereof in trust (in the events which happened) for his son Frederick Emmanuel Finch, as to 2-16ths thereof in trust for his nephew William Finch, as to 2-16ths thereof in trust for his nephew Simon Finch, and as to the remaining 2-16ths thereof in trust for his nephew Jeffrey Finch. And the testator bequeathed his real and personal estate to his said two sons.

In May 1865 this suit was instituted for the administration of the estate of Justin Finch, and in July 1865 a decree was made directing the usual accounts and inquiries as to debts, incumbrances, and otherwise.

The "outstandings" of the Shahpore Factory at the time of the decease of Justin Finch amounted to Rs. 107,577-7-7, and consisting of loans secured by bonds of zemindars (native landowners) to obtain leases of lands for the cultivation of indigo, and advances made to sub-lessees, generally natives, to secure the sale and supply of the indigo to the factory. These loans and advances were always treated and considered as part of the factory

concern, which in fact could not have been carried on but for such arrangements.

In December 1870, a claim was carried in against the estate by the representatives of Monohur Lall, a Hindoo banker, to the extent of Rs. 10,055-15-3, for principal, with Rs. 16,959-2-1 for interest thereon, at the rate of 12 per cent., from 1861 to the date of the chief clerk's certificate. The claim was for the balance of principal due from Justin Finch at the time of his death to the banker in respect of advances made from time to time for the purposes of the factory business, such advances carrying interest at 12 per cent. The chief clerk allowed the claim, and thereupon summonses were taken out by the several parties beneficially interested under the will of Justin Finch, to vary the chief clerk's certificate by disallowing the claim *in toto*, or that, if not wholly disallowed, then that the debt should carry interest at 4 per cent. per annum only. These summonses were adjourned into court and came on for hearing with the further consideration of the cause.

Marten, Q.C. and F. C. Millar, for the plaintiff, Joseph Burnett Finch, contended that the debt was subject to the Indian Statute of Limitations, and was therefore barred before the decree was made in the suit; that if not subject to the Indian statute it was subject to the English Statute of Limitations, and was also barred because more than six years had elapsed since the death of the testator, and the time when the claim was first made; and that, as the suit was instituted by legatees, the decree did not enure for the benefit of creditors, so as to prevent the statute from running. They cited

Act XIV. of India (1859), ss. 1-9; (a)

Peat's Trusts, L. Rep. 7 Eq. 302;

Berrington v. Evans, 1 Yo. & Coll. 436.

Kay, Q.C. and J. D. Bell, R. Cust, and Romer, for parties in the same interest, also argued in support of the summonses.

Ince, Q.C. and J. Cutler, for the representative of Monohur Lall, argued *contra*, that the question must be decided by the *lex fori* where the claim was made and, as the administration suit had been instituted here, depended upon the English Statute of Limitations; and that as the decree was made within six years of the death of the testator it operated, although made in a legatee's suit, as a judgment at law against the executor of the testator for the benefit of the creditors of the estate. They referred to

Huber v. Steiner, 2 Bing. N. C. 202;

Ruckmaboy v. Mottichund, 8 Moo. P. C. 4;

Leroux v. Brown, 12 C. B. 801;

British Linen Company v. Drummond, 10 B. & C. 903;

Williams v. Jones, 13 East. 439;

Sterndale v. Hankins, 1 Sim. 393;

Birmingham v. Burke, 2 J. & L. Touche, 710;

Clarke v. Earl of Ormonde, Jac. 108.

Marten, Q.C. in reply.—Even if the claim be admitted, the English rate of interest, 4 per cent.,

(a) The Act XIV. of India, 1859, sect. 1, sub-sect. 9, provides that "no suit shall be maintained in any Court of Judicature within any part of the British territories in India in which the Act shall be in force to recover money lent, or interest, or for the breach of any contract, unless instituted within three years from the time when the debt became due, or when the breach of contract took place, unless there is a written engagement to pay the money lent, or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorised agent."

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alone can be allowed. (*Bennett v. Bernard*, 12 Ir. Eq. Rep., was also referred to.)

The VICE-CHANCELLOR.—In my opinion the question whether this debt of the testator is barred by lapse of time depends upon and must be governed by the *lex fori*. Therefore, as the claim was brought in this country and carried in under a decree made in an administration suit instituted in this country, the English and not the Indian Statute of Limitations applies. I think also that the decree, which was made within six years of the death of the testator and which directs the usual inquiries as to the debts of the testator and gives directions for payment, operated as a judgment in favour of such creditors as could substantiate their claims to the extent of preventing the time limited by the statute from running against such debts. The claim must, therefore, be allowed, but as at the death of the testator it became a debt against persons who were not subject to Indian law, and were not in any way bound to pay the Indian rate of interest, the interest must be computed at 4 per cent. only from that time.

The cause was then heard on further consideration, a question being raised whether the "outstandings" of the Shapohore Factory, which had been got in partly by Frederick Finch, and partly by his executors, passed under the specific devise of the factory and went to the appointees of Frederick Finch, or formed part of the residuary estate of Justin Finch, and therefore belonged to Frederick Finch absolutely.

Marten, Q. C. and *F. C. Millar*, for the plaintiff, and *Cust* for the defendant Frederick Emmanuel Finch, claimed the "outstandings" as part of the residuary estate of Justin Finch.

Kay, Q. C. and *J. D. Bell*, for the surviving executor of Frederick Finch.

Romer, for the nephews *S. Finch*, *W. Finch*, and *J. Finch*, submitted that such outstandings were an integral part of the factory concern, and passed as "appurtenances" under the specific devise.

The VICE-CHANCELLOR after some preliminary remarks, said:—The testator gives his indigo and saltpetre works at Tirhoot, known as the Shapohore Oondee Factory, with the zemindaries, villages, and lands therewith held and used and the appurtenances to his brother. The evidence shows that the outstandings are entirely separate in their nature although they are connected with the carrying on of the concern. The debts which are due to the testator belong and passed to the residuary legatees. I cannot ascribe any other intention to the words in this will than they express. The words do not point in terms to any of those things which are mentioned in the affidavits. The facts stated in those affidavits are perfectly true and not disputed. Those facts being perfectly true, I am asked to read into the will the facts which the witnesses state, and when the testator speaks of his factory, "with the zemindaries, villages, and lands, therewith held and used, and the appurtenances," I am to conclude that he meant also certain mortgage and other debts which were due in respect of the advances which were made to promote the cultivation of the estate. In the nature of things that is not at all necessary, because it is very easy to carry these advances to a separate account and yet leave distinct the factory, zemindaries, villages,

lands, and appurtenances. I cannot find one word in the will, which is my sole guide in this matter, which could justify me in saying that these debts which were due to the testator passed together with this going concern. There must be a declaration to that effect.

Solicitors for the plaintiffs, *Waltons, Bubb, and Walton*.

Solicitors for the several defendants, *W. D. Oehme; Summerhays; J. S. and A. P. Judge*.

Solicitor for the creditor, *G. H. Barton*.

QUEEN'S BENCH DIVISION.

May 23 and 26.

THOMAS v. BROWN. (a)

Statute of Frauds, sect. 4—Sale of leasehold shop—Memorandum of agreement—"Vendor" insufficient description of party to contract—Recovery of deposit—Estoppel in pais.

Plaintiff had deposited a certain sum on a contract for the sale of a leasehold shop. The agreement was signed by the auctioneer "as agent for the vendor," and by the plaintiff as purchaser; subsequently the plaintiff obtained an abstract of the title, which was examined by her solicitors, who made certain requisitions as to title "without prejudice to any question which may arise as to the contract for the purchase of the premises." Afterwards plaintiff declined to complete the purchase on the ground that the contract was void, as the parties to it were not sufficiently described.

Held, that although the memorandum might be insufficient under the Statute of Frauds, yet, as the plaintiff had paid the deposit and received the abstract of title, well knowing that the vendor's name did not appear in the memorandum, and while the vendor was ready to complete the contract, she was estopped from recovering her deposit.

THIS was an action for the recovery from an auctioneer of a sum of money deposited by the plaintiff upon a contract for the purchase of a leasehold shop.

The auctioneer interpleaded and Mr. Justice Lush directed that an issue should be tried upon the following case stated for the opinion of the court.

1. The defendant Joseph Brown, previously to the 10th May 1875, had advertised a leasehold shop and premises, situate at Hornsey Rise, Middlesex, to be sold by auction by Mr. E. Croucher, at the Mart, in the City of London, on the 10th May 1875, under printed particulars and conditions of sale. Previous to the day of sale, the plaintiff was in communication with the auctioneer as to the purchase of the said premises, and received from him the particulars and conditions. In the particulars the property was described as "held under a lease, dated 5th Dec. 1856, for an unexpired term of 80½ years, and as leased to Mr. Miles, a draper, for the term of twenty-one years, from 26th March 1871."

2. On the 10th May 1875, the plaintiff did not attend the sale at the Mart, but she afterwards signed a contract partly printed and partly in writing, on the back of one of the printed particulars and conditions of sale, of which the following is a copy:

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

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Memorandum.

I, the undersigned, Hannah Thomas, of 3, Peter's-lane, West Smithfield, do hereby acknowledge that I have this day purchased the property described in the within particulars subject to the foregoing conditions of sale, at the price of seven hundred pounds, and that I have paid into the hands of the auctioneer the sum of seventy pounds as a deposit, and in part payment of the said purchase-money, and I hereby agree with the vendor to pay the remainder of the said purchase-money to complete the purchase according to the within conditions of sale.

As witness my hand the 10th day of May 1875.

Signed H. THOMAS.

Purchase-money	£700	0	0
Deposit money paid	70	0	0

Remaining to be paid £630 0 0

As agent for the vendor, I ratify this sale, and as auctioneer acknowledge the receipt of the deposit.

EDW. E. CROUCHER.

Witness, A. N. Stuttard.

3. On or about the 15th May 1875, the letter of which the following is a copy, and the abstract herein referred to were received by Messrs. Keen and Rogers, the plaintiff's solicitors:

14th May 1875.

Dear Sir,—4, City-terrace, Hornsey-road.—Herewith I send abstract of title. The deeds may be examined at my office at any time you may appoint. Yours truly,
JNO. FRASER.

4. In reply to this letter, Messrs. Keen and Rogers wrote the letter of which the following is a copy:

24, Knight Rider-street, Doctor's Commons,

15th May 1875.

Dear Sir,—4, City-terrace, Hornsey-road.—Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next, at 2 o'clock, to examine abstract of title with deeds on behalf of Mrs. Thomas.—Yours truly.

KEEN AND ROGERS.

5. From the abstract of title referred to in the letter hereinbefore set forth, it for the first time appeared that the defendant was the owner of the property which formed the subject matter of the said contract of the 10th May 1875.

6. Messrs. Keen and Rogers having examined the abstract with the title deeds, on the 21st May 1875, wrote the following letter to the defendant's solicitor:

No. 4, City-terrace.

We forward you herewith a few requisitions on the title, and shall be glad to receive your replies at your early convenience.

Accompanying and at the foot of the requisitions above mentioned was a note as follows.

The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises.

7. On the 22nd May 1875, the defendant's solicitor wrote to the plaintiff's solicitors as follows: Herewith I return requisitions with answers.

8. On the 2nd July, the plaintiff's solicitor wrote to the defendant's solicitors as follows:

4, City-terrace.—Please let me have draft assignment at your early convenience.

And on the 9th July the defendant's solicitor wrote to the plaintiff's solicitors as follows:

16, Farnival's Inn, 9th July 1875.

Dear Sir,—Brown and Thomas.—I have just been informed by Mr. Croucher that your client does not intend to complete her purchase. Please let me know whether my information is correct. If it is, I shall immediately instruct counsel to draw a bill for specific performance.—Yours truly,
JNO. FRASER.

Messrs. Keen and Rogers.

9. The plaintiff's solicitors repudiated the said contract of 10th May 1875, and on 23rd July com-

menced an action against the said E. E. Croucher for the recovery of the £70 which had been paid to him by the plaintiff on the signing of the said contract.

10. The said defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the above contract, and no question has been raised on the answers to the requisitions, but one of the grounds of the said repudiation was that the said contract of May 10th 1875 did not disclose the name of the vendor.

The questions for the opinion of the court are:

1. Whether the said contract of 10th May 1875 is a valid contract. If the court shall be of opinion in the affirmative the judgment shall be entered for the defendant.

2. If the court shall be of opinion in the negative, then whether the plaintiff is entitled to recover back the deposit paid under the above circumstances.

Fullarton (Holl with him) for the plaintiff.—It may be said that this memorandum was sufficiently signed by the contracting parties within the decision in *Williams v. Lake* (2 E. & E. 349; 29 L. J. 1, Q. B.; 1 L. T. Rep. N. S. 56), but our objection is not to the signature, but that the name of one of the contracting parties does not appear at all upon the documents. The court cannot decide against the plaintiff without overruling *Potter v. Duffield* (L. Rep. 18 Eq. 4) where the Master of the Rolls says: "The counsel for the plaintiff contends that you may describe one of the parties as the 'vendor' of the estate, but the statute cannot mean that." This is a later judgment than that in *Sale v. Lambert* (L. Rep. 18 Eq. 1) where the same authority held that the word "proprietor" was a sufficient description. [QUAIN, J.—I fail to see the distinction between "vendor" and "proprietor" with regard to the statute.] *Williams v. Byrnes* (9 Jur. N. S., 363; 8 L. T. Rep. N. S. 69) is also in my favour. The second question is whether the name of the vendor appearing in the abstract makes any difference as to the validity of the contract. *Bourdillon v. Collins* (24 L. T. Rep. N. S. 344) is the strongest case against me, but that is not inconsistent with my contention as to this case, for here there was no abstract in existence at the time so as to be incorporated by the mention of it in the contract. The letters do not affect our position, even omitting the words "without prejudice." In *Bourdillon v. Collins* (*ubi sup.*) there was a full memorandum signed by the agent of the person to be charged, and the requisitions are headed "Bourdillon and Another to Collins." In *Hood v. Lord Barrington* (L. Rep. 6 Eq. 218) the vendors were described as the executors of a person named. [MELLOR, J.—We are sitting now as a court of equity. The plaintiff could only receive the abstract upon a contract, otherwise he ought to have repudiated it. QUAIN, J.—The abstract is sent in pursuance of a contract, and plaintiff does not repudiate it, but instead thereof asked for a meeting. How can it lie in his mouth to object to the contract after that?] That is to say there is an *estoppel in pais* arising from plaintiff's subsequent conduct. [MELLOR, J.—Yes.] That implies that her conduct must be so unreasonable as to prevent her taking advantage of her legal rights.

J. Thomson (Scott with him) for defendant.—With reference to the last point, the 8th paragraph of the case shows that for two months the

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defendant had no knowledge of the plaintiff's intention to repudiate. Ohitty on Contracts (p. 581, 10th edit. cites *Sweet v. Lee* (3 M. & G. 452; 4 Scott, N. R. 77, 90) to show that there where a party has paid money under a contract which he cannot enforce, because of its non-compliance with the Statute of Frauds, he cannot recover the same as on a failure of consideration. Here a substantial loss has been sustained by defendant in consequence of plaintiff's invitation to send abstract, &c. There is no default on vendor's part. [MELLOR, J.—All the cases seem to refer to failure on the part of the vendor. QUAIN, J. cited Dart's Vendors and Purchasers, p. 192, 5th edit.] That is upon *Casson v. Roberts* (31 Beav. 613; 8 Jur. N.S. 1199; 7 L. T. Rep. N. S. 588) which is the only case to be found of failure on the part of the purchaser. In *Depree v. Bedford* (4 Giff. 479; 9 L. T. Rep. N. S. 532; 9 Jur. N. S. 1317) Vice-Chancellor Stuart says: "How the person who is in default can, upon that default, and in consequence of that default, acquire any right to the money which was parted with as a security that there should be no default it is difficult to conceive." In *Ex parte Burrell, re Parnell* (L. Rep. 10 Ch. App. 512) Mellish, L.J. says: "It appears to me clear that even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default." I accept the principle laid down by the Master of the Rolls in *Potter v. Duffield* (*ubi sup.*) and in *Commins v. Scott* (L. Rep. 20 Eq. 11; 32 L. T. Rep. N. S. 420) that the parties must appear by name, description, or reference, and in this case the vendor is referred to in the abstract furnished according to one of the conditions of the sale, so that *Bourdillon v. Collins* (*ubi sup.*) is an express authority in my favour.

Fullarton in reply.—The cases cited show that there must be some description of the vendors. It is not sufficient, in answer to the question who are the vendors, to say merely the "vendors."

Our adv. vult.

May 26.—MELLOR, J. briefly stated the facts as before set out, and proceeded: I am of opinion that our judgment should be for the defendant. Many cases bearing upon the point in dispute have been cited during the argument, and considerable stress has been laid upon two cases decided by the Master of the Rolls, *Sale v. Lambert* and *Potter v. Duffield* (*ubi sup.*) In the first of these cases the vendor was held bound by the memorandum of agreement, though he was not described, except by the word "proprietor," and the Master of the Rolls, basing his decision upon the meaning of the word "proprietor," held that the description was sufficient to satisfy the Statute of Frauds. I am much inclined to doubt this decision, however, and the more so when I compare it with the second of these cases. I find the same learned judge, under precisely similar circumstances, deciding that the description "the vendors" was not sufficient. I feel bound by the last of these decisions that the words "the vendors" were not a sufficient description. It appears to me that there is no real distinction in principle between the two cases, for in both, as far as my judgment goes, the description was insufficient, for both let in the mischief that the statute was framed to obviate. The names of the parties ought to appear in the agreement, and if they do not the description should be so full as to

clearly identify the parties, so that there may be no necessity whatever for resorting to parol evidence. But I do not think, with regard to this case, that it is necessary for us to decide that point, for although the description is insufficient, still I consider that the defendant is entitled to the judgment on two grounds. The main issue here is as to the party entitled to the 70l. paid on deposit. The case that has been cited from 31 Beav. (*Casson v. Roberts*) is a case in most respects very like this one, and there the Master of the Rolls held that the plaintiff was entitled to a return of his deposit. The contract in question there, it is true, could not be enforced, yet the attendant circumstances in the present case differ very considerably. Here there are two answers to the application for the money to be paid back to the vendee. In the first place, there is the circumstance that after the sale she signed the memorandum on the back of the conditions and paid the money, knowing that the vendor's name did not otherwise appear upon the form. She was perfectly willing to pay upon the mere title of "vendor" under the conditions of sale with clear knowledge that the defendant's name was not disclosed. She voluntarily paid it upon a contract of that description, so she cannot recover it. In the second place, in accordance with one of the conditions of sale, an abstract of title was to be sent to the solicitor of the vendee within seven days, and accordingly, after the contract was signed, an abstract was sent to the solicitors of the vendee who were described at the foot of the contract. If, then, their client intended to insist that there was no sufficient memorandum of agreement, it was their duty to send back the abstract and to say there was no valid contract, as there was nothing to bind the vendor. But they accepted the abstract with the letter accompanying it; they reply on May 15th, not denying that there is a contract, but stating that their letter is "without prejudice." They carry on the matter as if there was an admitted binding contract—anything more incorrect than that a solicitor should allow the deeds to be examined if there were no contract I cannot imagine. Afterwards the solicitors examined the abstract, and the name of the vendor appeared. The plaintiff only regarded the question of title. They send requisitions, but raise no question on the contract, and they clearly lead the other side to understand that the only question between them is one of title. The words of the letter sent by plaintiff's solicitors are "without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next, at two o'clock, to examine abstract of title with deeds on behalf of Mrs. Thomas." The only meaning of that was not that the contract had no existence, but that something as to the title was not waived. The business proceeded in due course until the 9th July, when the defendant's solicitor wrote to the plaintiff's solicitors asking whether it was correct that they intended to repudiate the contract. On the 10th July plaintiff's solicitors replied, repudiating the contract. The case appears to me clearly to come under the rule laid down by the Lord Chief Baron in *Cornish v. Abington* (4 H. & N. 549; 33 L. T. Rep. O. S. 126): "If any person by course of conduct or by actual expressions so conducts himself that another may reasonably infer the existence of an agreement

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whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." That is an express authority in point here, and on the principles of estoppel as to matters of fact, it does not lie in the mouth of the vendee here to say that there was no contract. We could not say that for the purposes of this case the contract was invalid. On the question of the claim for money had and received, it is a well-established doctrine that such a claim can only be maintained when the money has been paid in ignorance of facts, which if known, would have left to the party the option whether he would pay or not. *Patterson, J. in Duke de Cadaral v. Collins* (4 Ad. & Ell. 858), says, "Where there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." Then is there anything unconscionable in defendant's keeping this money? I think not. The vendor was and is ready to complete the consideration as contemplated by the plaintiff when she parted with her money; the plaintiff has got what she bargained for, as I think she sets up the Statute of Frauds too late. It would be monstrous if she could say I repudiate my bargain and claim my 70%. Having got all she expected she cannot recover.

QUAIN, J.—I am of the same opinion. I do not propose to discuss the cases cited, nor do I profess to reconcile the decisions of the Master of the Rolls. I will only say that there appears to me to have been a great deal of unnecessary refinement in some of the cases on this subject. Here an unwilling purchaser seeks to recover money paid to a willing vendor as part of the purchase-money of this property, and not for a valid contract under the Statute of Frauds. There has been no failure of consideration, the defendant is perfectly willing to give what the plaintiff paid her money for, so there is no reason to return the money to her. She cannot recover unless the vendor refuses to carry out the bargain. With regard to the correspondence, it shows that the purchaser received and kept the abstract of title, examined it, made requisitions upon it, received answers, and compared the deeds, all acts recognising the contract, and putting the vendor to considerable expense, and yet the plaintiff tries to turn round and recover her deposit on the ground that the contract was invalid, and that all that was subsequently done was "without prejudice;" but those words mean without prejudice to any question that may arise as to the carrying out of the contract, and cannot possibly be meant to refer to any question as to the existence of the contract. No solicitor would ever suppose such a thing possible. After putting the vendor to this expense in endeavouring to carry out the contract, the plaintiff cannot now turn round and say that under the Statute of Frauds there is no binding agreement. I say that the decision in *Casson v. Roberts* (*ubi sup.*) appears to me not to be satisfactory. I think neither the conclusion arrived at nor the reasons given for it are satisfactory, and that the cases cited in the judgment have no bearing on the question.

Judgment for defendant.

Solicitors for the plaintiff, *Keen and Rogers.*

Solicitor for the defendant, *John Fraser.*

Friday, May 12.

HARRIS v. JAMES AND SENHOUSE. (a)

Landlord and tenant—Nuisance—Necessary result of demise—Liability of landlord.

A landlord who lets premises for a fixed and definite purpose is liable for any nuisance that arises naturally and of necessity from the use of such premises as contemplated by the demise.

Rich v. Basterfield (9 L. T. Rep. 356; 4 C. B. 783) commented upon.

THIS case came before the court upon a demurrer to two paragraphs in the statement of claim.

It appeared that the defendant, William Senhouse, is the owner of a field called Kirkcross, in the parish of Brigham, in Cumberland, which is full of limestone, and has been let to the defendant, Ferdinand James, by the defendant, William Senhouse, for the purpose of being worked as a lime quarry, and upon this field Ferdinand James has erected limekilns for the purpose of burning limestone taken from the said field.

The 5th and 6th paragraphs of the statement of claim which were demurred to by the defendant, William Senhouse, were as follows.

5. The smoke and vapours arising from this kiln spread over the lands of the plaintiff, and have injured the herbage and lessened the value of the land. This injury is partly the natural and necessary result of limekilns being used in the said field called Kirkcross, and partly the result of the improper manner in which the kiln has been worked.

6. The said quarry is worked by means of blasting, and in the process of blasting quantities of dirt and stone are from time to time thrown on the plaintiff's lands, whereby it is unsafe for the plaintiff or his men to work on the said lands. This is partly the necessary result of working a quarry in the said field, and partly of the negligent and improper manner in which the quarry has been worked by the said defendant Ferdinand James.

Crompton, in support of the demurrer, argued that as Senhouse was only the reversioner, he could not be held liable for a nuisance, and cited *Rich v. Basterfield* (*ubi sup.*), the marginal note to which was as follows: "Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession." In giving judgment in that case, it seems clearly to have been considered that the landlord was only liable for any nuisance existing at the time of the demise. This judgment is cited in *Gandy v. Jubber* in the Exchequer Chamber (9 L. T. Rep. N. S. 801; 5 B. & S. 485), and in a judgment that was prepared by the judges but never delivered (9 B. & S. 15), where *Rich* and *Basterfield* is considered. The case of *Roe v. Pedley* (1 A. & E. 822) is there discussed, and *Cresswell, J.*, in delivering judgment, p. 804, states his view of Lord Denman's judgment, then of that of *Littledale, J.*, and he says that learned judge "seems to have rested his judgment on the principle that the landlord was not to let the land with the nuisance upon it; and he proceeds, 'here the periods are short, so that there has been a

(a) Reported by E. H. AMPLETT, Esq., Barrister-at-Law.

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reletting, and that has taken place after the user of the buildings had created the nuisance. He, therefore, assumes that there was an existing nuisance at the time of the letting which had not afterwards been removed.' To his judgment on that ground we entirely assent." Then on p. 805, he proceeds, "If *Rea v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance, we think the judgment right. . . . But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." The same view appears to have been taken by Blackburn, J., in the Court of Queen's Bench in *Gandy v. Jubber* (9 L. T. Rep. N. S. 801; 5 B. & S. 91), where he says, "It must be shown that there has been a demise or redemption of the land with the nuisance existing upon it; and the nuisance must be, if I may so term it, a normal one—not such, for instance, as a cellar with a flap, which may or may not be a nuisance." He then goes on to refer to *Rich v. Basterfield* (*ubi sup.*) [BLACKBURN, J.—That case appears to have been not quite correctly reported in Best and Smith, for I seem to speak of *Rich v. Basterfield* as being a sensible judgment, whereas for long before that time I was of opinion it was desperately refined.] It would seem a sound principle of law that the landlord should only be liable for a nuisance existing at the time of demise, otherwise he would be at the mercy of his tenant. Here he authorises the tenant to build limekilns, but he does not authorise him to commit a wrong against anyone else; no nuisance existed when the premises were let, and therefore the landlord can be in no wise liable.

Bompas, contra, was not called upon.

BLACKBURN, J.—The question we have to decide is raised by the 5th paragraph of the statement of claim. Now, where one person authorises and requests a person to do certain things, he is liable for any consequences that arise therefrom. If the authority is given in a lease, the person who gives that authority is no less liable on that account. I do not think the lessor can be said to require everything the occupier may do; for example, if a man devises certain land on an agricultural lease, and requires that it should be cultivated in the best manner possible, and the tenant, exercising his discretion, brings on to the farm an enormous quantity of most odorous manure so as to create a nuisance to the neighbourhood, I don't think in a case of that kind that the landlord would be liable, because I do not think that he could be said in any way to request or authorise what had been done. So, too, in the case of a lease of building land, the lessee might so build as to obstruct a neighbour's lights, but the lessor would not be liable, for although he may have enabled the lessee so to build, he did not request him to do it. But in the case before us the lime field was let for the very purpose of burning lime. No doubt, for any mischief arising from a careless or negligent use of the field, the landlord would not be liable, but for any mischief that arises from the natural and necessary result of what the landlord authorised and required, or even authorised

and did not require, I think the landlord must be held liable. In *Rich v. Basterfield* (*ubi sup.*) the Court of Common Pleas came to a conclusion of fact which, if true, justifies their decision. It was an action for alleged nuisance arising from a certain chimney, and it appeared that when the fires were lighted, as the tenant did light them, then the nuisance arose, but evidence was given that a previous tenant made the fires of coals, and when that was the case there was no nuisance, and in their judgment the court proceed to say, "It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was in any sense the servant or agent of the defendant in doing the acts complained of. The utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased." Assuming that that evidence was correct, the nuisance there was not the necessary result of the tenancy. But in this case there is a demise for the express purpose of burning lime, and the natural result of that burning lime is the nuisance complained of. On this point the demurrer cannot be upheld. As to the 6th paragraph, I do not think the landlord is responsible for what has been negligently and improperly done. If the demise of the quarry is on such terms that the tenant must work it by blasting, that should be stated. The plaintiff may amend that paragraph, and we give him leave so to do.

LUSH, J.—I am of the same opinion. I have always looked upon the judgment in *Rich v. Basterfield* (*ubi sup.*) as one of great refinement. There the premises were let to be used as a coffee shop. I therefore think it must have been contemplated that the tenant should burn ordinary fuel, and that I think would have rendered the landlord liable. This case is different, however, for here the defendant lets land for the erection of limekilns, from which smoke must of necessity rise; so the act of the tenant is clearly that of the landlord.

Demurrer to 5th paragraph over-ruled. Leave given to plaintiff to amend 6th paragraph.

Solicitors for plaintiff, *Bischoff, Bompas, and Bischoff*, for E. and E. L. Waugh, Cockermouth.

Solicitors for defendant, *Speechly and Co.*

Wednesday, May 10.

REG. (on the prosecution of J. B. Saunders) v. THE POSTMASTER-GENERAL. (a)

Telegraph Act 1868 (31 & 32 Vict. c. 110, s. 8)—*Purchase by Postmaster-General of a Telegraph Company—Compensation to officers—Annual Emolument.*

By 31 & 32 Vict. c. 110, s. 18, sub-sect. 7, it is provided that every officer and clerk of any company, the undertaking of which may be purchased, who has been not less than five years in the service of telegraph companies, and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies, and is in receipt of remuneration at a rate of not less than 50l. a year, shall, if he receives no offer of an

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

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appointment by the Postmaster-General in the telegraphic department of equal value to the appointment held by him under any company, receivable by way of compensation an annuity, payable half-yearly, equal to a certain proportion therein named of the annual emolument derived by him from his office.

The prosecutor was Superintendent of the Western and South Wales District of a telegraph company, whose undertaking had been purchased by the Government, and had been in receipt of a yearly salary for a sufficient time to bring him within the provisions of 31 & 32 Vict. c. 110. Part of his duty was to travel for the purpose of inspecting telegraph wires and posts. When so travelling he received, in addition to his ordinary salary, certain regular rates of allowance, varying according to the length of time he was absent from home. These, the Postmaster-General contended, were intended simply as an indemnity against the extra personal expenditure incurred or assumed to be incurred by him while so travelling upon the business of the company, and formed no part of the "annual emolument of his office," so as to entitle him to compensation:

Held (per Blackburn and Quain, JJ.), that the term "emolument" meant any profit or advantage, and that the payments made for travelling expenses were to be taken into consideration in trying to ascertain what was the annual profit and advantage which the prosecutor derived from his office.

This case came upon demurrer in answer to a *mandamus* and also to a plea, and was an application upon the part of Mr. Saunders to compel the Postmaster-General to pay him compensation, under the Telegraph Act 1868 (31 & 32 Vict. c. 110, s. 8, sub-sect. 7). (a)

Mr. Saunders resided at Taunton, and was Superintendent of the Western and South Wales District of a Telegraph Company, whose undertaking had been purchased by the Government, under the Telegraph Act 1868. He was in receipt of a yearly salary, and had been in the service of the company some twenty years. Part of his duty was to inspect telegraph wires and posts, and for this purpose he had frequently to travel considerable distances. Whenever he was travelling he received certain fixed sums for his expenses in addition to his salary, as follows: If away more than twenty-four hours, at the rate of 12s. 6d. per

day; if less than twenty-four hours, at the rate of 5s. a day.

In his return to the writ the Postmaster-General alleged that the rates of allowance paid to officers whilst travelling were "an indemnity against the extra personal expenditure incurred or assumed to be incurred by the officers while engaged in travelling upon the business of the company beyond their ordinary expenditure when so engaged in travelling, and that the allowances from time to time made and paid to the officers in accordance with the rates did not at any time form any part of the yearly salary or remuneration of the officers, but were from time to time made and paid by the company for the purpose and with the object of indemnifying the officers against their said extra personal expenditure incurred or assumed to be incurred in manner aforesaid, and for no other purpose or object, and on no other terms and for no other consideration whatsoever."

Mr. Saunders, however, averred in his plea that the said allowances were not made or paid as an indemnity only against the extra personal expenditure incurred or assumed to be incurred by the officers whilst engaged in travelling on the business of the company beyond their ordinary expenditure when not so engaged in travelling, but were made or paid to the officers in all cases when travelling on the company's business, whether any actual extra expenditure was incurred by them or not, and were fixed payments made or paid to the officers when travelling on the company's business. And the officers were always employed in each year of their service for a large portion of the year in travelling upon the business of the company, and during the time they were so employed they were always paid the said allowances and saved the moneys, or a large part of the moneys they would otherwise have expended upon food, board, and lodgings at home, and that the allowances were part of the annual emolument of the officers."

The question, therefore, came on to be argued whether these payments were to be taken into account as forming part of the annual emoluments received by Mr. Saunders from his office.

Sir H. James, Q.C. and A. Charles, for the prosecutor.—It is admitted that, so far as regards salary and time of service, this case comes within 30 & 31 Vict. c. 110, s. 8; the only question therefore is, as to what is the meaning of the word "emolument." The additional sum that was paid to Mr. Saunders for travelling expenses was distinctly by way of emolument. His position was similar to that of a commercial traveller who receives so much a day for his expenses. He was able to take part of the money, and even if the money were all expended he was relieved from his home expenditure. The word "emolument" includes something beyond a salary and remuneration. If a person receives a salary, with board and lodging, and he is deprived of the board and lodging, he is also deprived of an emolument. It is equally an emolument whether paid in money or in meal. [BLACKBURN, J.—If you put a servant on board wages, you certainly give him a good deal more than if you only pay his wages and give him his board.] Take the case of a clerk who chooses to live at an hotel and pays so much a day for accommodation and food. If he was travelling all the year round, he would never have to pay any—

(a) Every officer and clerk of any company, the undertaking of which may be purchased, who has been not less than five years in the service of telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies, and is in receipt of remuneration at a rate of not less than 50l. a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, which shall be deemed by an arbitrator appointed by agreement, or failing agreement, appointed by the Recorder of London for the time being, to be of equal value to the appointment held by him under any company, receive during his life from the Postmaster-General, by way of compensation for the loss of his office from the time at which the Government takes possession of the company's telegraph, an annuity payable half yearly, equal, if he shall have been in the service of the telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th day of June 1868, and in respect to any such persons who have been in such service less than twenty years, the said annuity shall be diminished at the rate of one-twentieth for every year less than twenty years during which he has been in such service.

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thing, he would get 12s. 6d. paid in money, simply for the purpose of finding himself in board and food. Is not that in the way of remuneration? [BLACKBURN, J.—That is doubtful. I should suppose emolument would be better than remuneration.] Certainly, he is getting that in money and in kind which, if he had received a lump sum as salary and had stayed at home and paid for his board and lodging, he would not be relieved from paying for.

S. C. S. Bowen and Casserley (with them the Attorney-General), for the Postmaster-General.—Two different classes of company's officers were intended to be compensated under the statute, the nature of whose remuneration is described distinctly in respect to each. The first class is the class of servants who are in receipt of yearly salaries, and as they are persons who may be presumed to be in a higher grade, and to have greater responsibility than those who have a less salary, they are only required to be five years in the service of the company purchased by the Government; the second class consists of those who have not yearly salaries, but who have remuneration which amounts to a given sum, and as they probably belong to a lower rank, they must be in the service of the company for seven years. [BLACKBURN, J.—May there not be a man who unites the two; that is to say, who is in receipt of a fixed salary, and who also receives that which amounts to remuneration? QUAIN, J.—Suppose, for instance, he had a per centage upon all the messages he sent out during the day, as well as a salary.] Possibly in some cases there may be persons who fall under both categories, but it is unnecessary to argue that point now. The Legislature intended to give people compensation for salary or remuneration, the salary or remuneration in either case being the salary given, and the remuneration given for services. This allowance is neither part of his salary nor part of his remuneration. [BLACKBURN, J.—Why not part of his remuneration? QUAIN, J.—Take the case of a commercial traveller who had a guinea a day allowed for travelling expenses; I think he would be very much astonished if he was told that the guinea a day was no part of his remuneration.] This was an indemnity and not a remuneration; it was never intended there should be any profit, but only to prevent his suffering any loss. Again, the statute speaks of an "annual emolument derived by him from his office," and cannot apply to any saving such as this which is not derived by him from his office.

Charles replied.

BLACKBURN, J.—I think in this case the judgment ought to be technically for the Crown, though in reality it is against the Crown, as the Postmaster-General is the defendant, and that the compensation should be assessed. What the amount of that assessment is to be becomes a different question altogether, and is not now before us. The sub-sect. of the Act on which it all turns is, "That every officer and clerk of any company, the undertaking of which may be purchased, who has been not less than five years in the service of telegraph companies, and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies, and is in receipt of remuneration at a rate of not less than 50l. a year, shall be entitled to compensation." Now, the first question is what

is meant by that word "remuneration" in the second clause? Mr. Bowen argues it is contrasted with a yearly salary, and means a man who has been in receipt of a salary of 50l. a year for five years; he is to have compensation; and if he has been in receipt of a salary paid by weeks or months, but yet many months which in the aggregate amount to not less than 50l. a year, but that it applies to no other case. I think the word "remuneration" is a wide term, which means a *quid pro quo*. If a man gives his services and gives, that *quid pro quo*, and gives it for whatever the *quo* is, whatever consideration he gets for giving his services seems to me a remuneration for his services. Consequently, I think if a person was in the receipt of a payment, or in the receipt of a per centage or any mode of payment which would be an actual money payment, the amount he would receive annually in respect of that would be remuneration, and consequently I think that this statute in the early part of it must be construed to extend not only to money payments but to any payment given in exchange for it, as a remuneration for his services in the office. That being so, he is to have an annual compensation which is to be a certain proportion of the annual emolument derived from his office. The facts appear to be in this case that the officer in question has been in the habit of giving his services, partly staying at home and partly travelling; and when he travelled his ordinary salary ran on, as I understand, but his board and lodging, that is, his expenses when travelling, were paid by the company, and instead of making him bring an account of all he expended and then repaying him, they agree he should receive a certain fixed sum for that while so travelling. The first question is, is there any emolument derived from that? I should say myself, if the fact be that the 12s. 6d. the amount allowed him, exactly compensated him for his expenses, which, of course, is a possible fact, that he did not make either profit or loss by it, or as very probably, if it comes to the Recorder, the Recorder may say: "Having acted together, you and your employer, on the principle that you received a sum for expenses, it must be taken as against you that it was an exact 'remuneration,' and if you did make a profit you ought not to have done so." In either of those views the Recorder may say he is to get nothing for the profit that he has made out of the 12s. 6d. that was paid. But I am quite unable to perceive that when he was taken away, and when, most clearly, something would be reduced in his own expenses, inasmuch as, whatever it was, he did pay for his butcher and baker at home, that during the time he was travelling would be saved, that he did not receive some remuneration. I likened it to the case of a domestic servant, who received a salary and wages at a certain rate and also board and lodging as part of the remuneration; and if he was dismissed improperly and unlawfully, the measure of damages would not only be the money paid to him, but the money and money's worth in remuneration of his services which he would have received if the contract had been carried out, and to that extent there is something—it may be little or it may be much—which would come within the term "remuneration." I think the emolument means all he has benefited in either of the cases where he has a fixed salary, or in the case where he has a remuneration for his services; the emola-

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ment may be what he profited thereby and which has been taken away from him by the Government purchasing it. I say no more upon it than that that is the principle in my mind on which the person who has ultimately to assess the damages will have to act.

QUAIN, J.—I am of the same opinion. In my judgment it turns upon the meaning of the expression “annual emolument,” and I find on looking at Johnson that “emolument” is defined to be “profit or advantage,” and, therefore, it means the annual profit or advantage which he has derived from the office. Surely it cannot be doubted for a moment that in trying so ascertain what is the annual profit and advantage that he derived from his office, you must take into consideration the sum paid him for travelling expenses. Taking the whole of that into consideration, does he derive an annual profit or advantage from it? If he does that, he is entitled to have compensation, and that must be taken into consideration in calculating the amount. It appears to me to turn on the word remuneration in the earlier part of the section.

Judgment for prosecutor.

Solicitors: *Childs and Batten*, agents for *John Taunton*, Taunton, for the defendant; for the prosecutor, *W. H. Ashurst*.

May 27 and 28.

WILBY v. MIDLAND RAILWAY COMPANY. (a)

Railway Company—Passenger using improper crossing—Invitation by servants—Negligence.

Plaintiff was in the habit of travelling by the last train from K. to L., which departs from the up platform. Adjoining the down platform at the K. station is a booking office and waiting room; but there is no office or room or any shelter whatever on the up platform. In the middle of the station opposite the booking office the ground between the rails was covered with wood for the width of several feet, over which passengers used to cross when there was no train standing in the station. Near the south end of the station there is also a covered wooden bridge over the rails, the steps leading to which open on to the causeway of a highway, so that any person who wished to cross over from one platform to another by the bridge would have to go from the station to the high road, ascend the steps, cross the bridge, descend again to the high road, and then re-enter the station. On the 1st May 1875, the plaintiff arrived in good time for his train, and went to the waiting room. Shortly before his train approached the up platform a porter called out, “All the other side for L.” At that time there was no train in the station, so that passengers could safely use the middle crossing. The plaintiff, however, had not then taken his ticket, and by the time he had done so a train had entered the station, and was standing on the down line, thereby blocking up the middle crossing. The plaintiff, therefore, being in a hurry to catch his train, did not cross over the rails by the bridge, but walked along towards the end of the platform, and then jumped on to the rails for the purpose of reaching the up platform. In doing so he sustained considerable injury, the ground between

the rails at that point having been excavated, and the ballast removed. At the trial several witnesses were called to prove that when the middle crossing was blocked they were in the habit of getting across from one platform to the other as best they could, and did not make use of the bridge. The company's officials denied, however, that they had ever sanctioned such a proceeding. The jury found a verdict for the plaintiff, but a rule was afterwards granted to set it aside, on the ground that there was no evidence of any negligence on the part of the company.

Held, that as a proper place had been provided for crossing, of which the plaintiff was aware, and there was no evidence of an invitation on the part of any servant of the railway company to cross where he did, the defendants were not liable for the injuries which the plaintiff had sustained.

This was an action tried before Baron Bramwell at the Leeds Spring Assizes 1876, when a verdict was found for the plaintiff for 50*l.* damages.

The material facts are as follows. The plaintiff was a furniture broker and general dealer, carrying on business at Leeds, and was in the habit of attending Keighley for business purposes on market and fair days. It was his practice to go to Keighley by an early train every Saturday morning, and to return at night by the last train. On the 1st May 1875 he went to Keighley as usual, and on his return arrived at the station in good time for the up train, which was due to leave Keighley at 11.25 p.m., but which was not unfrequently late. At Keighley station there is a booking office and waiting room which adjoin the down platform, but there are no offices or rooms or any shelter on the up platform. The practice of the plaintiff and of passengers generally was to wait in the waiting room or on the down platform until advised by porters of the arrival or approach of the train, and then to cross the rails to the up platform. There is no direct means of getting across from one platform to the other in the station without crossing the rails. There is, however, a covered wooden foot bridge over the rails near the south end of the station, but there is no communication between the bridge and the platform. The steps leading to the bridge open on to the causeway of the high road between Keighley and Bradford (which crosses the rails on the level) immediately on the south side of the station. Any passenger, therefore, who used that bridge would have to go from the station on to the high road, ascend the steps, cross the bridge, descend again on to the highroad, and re-enter the station. It was proved that in the middle of the station opposite the booking office, the ground between the rails was covered with wood for the width of several feet, and over this passengers coming out of the booking office and wishing to cross, pass when there is no train standing in the station. On the night in question the plaintiff waited in the waiting-room until warned that it was time to cross. Shortly before the train approached a porter cried out, “All the other side for Leeds way,” and the plaintiff thereupon, not having taken his ticket, sent a companion to the booking-office for that purpose, and waited for him on the down platform. At the time the porter gave the passengers notice to cross over there was no train in the station, so that passengers might have crossed safely over. By the time, however, that the plaintiff's companion had obtained the tickets,

(a) Reported by B. H. ANFLETT, Esq., Barrister-at-Law.

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there was a train standing on the down line. The plaintiff, thereupon, being in a hurry to catch the train, did not pass over the rails by the southern crossing, but walked along the platform to the tail of the train and then stepped on to the rails and crossed over. In doing this he stepped into a hole dug between the rails of the up line and was thrown with considerable force with his head on to the furthest rail. It appeared on examination that the ground between the two rails of the up line was excavated for a considerable distance along the station, and the ballast removed. At the trial the plaintiff called several witnesses to prove that when this middle crossing was blocked by a train standing in the station, they were in the habit of getting across from one platform to the other as best they could, and never went round by the highway and so across the bridge; the company's officials, however, denied that they had ever sanctioned such a practice. The jury found for the plaintiff, but a rule nisi was afterwards obtained to set aside such verdict on the ground that there was no evidence of any negligence on the part of the defendants.

Mauls, Q. C. and V. T. Thompson, on behalf of the plaintiff, now showed cause against the rule, and cited

Holmes v. North-Eastern Railway, 20 L. T. Rep. N. S. 616; L. Rep. 4 Ex. 254; 38 L. J. 161, Ex.;
Nicholson v. Lancashire and Yorkshire Railway, 12 L. T. Rep. N. S. 391; 3 H. & C. Ex. 534.
Robson v. North-Eastern Railway, 32 L. T. Rep. N. S. 551; L. Rep. 10 Q. B. 271; H. & L. 44 L. J. 112, Q. B.

FitzJames Stephen, Q. C. and J. Wheelham, supported the rule.

COCKBURN, C.J.—I don't think we need trouble you any further, Mr. Stephen. I hope (I only express my own opinion, because I am not sure that my learned brothers will agree with all I say) I shall not in any way be understood as expressing an opinion that a railway company, where they invite a passenger to cross a line at a particular spot may not be liable, even though there may be no necessity for crossing the line at that spot. But here the real question is, was there any invitation at all to cross? If there has been an invitation, then I think it was clearly the duty of the company to take care either that there is a particular place at which the passenger may cross with safety, or to keep their line in such a condition that he may get over anywhere without danger. Here a crossing was provided. I will go still further, and say that not only are the company bound to have a fit place for crossing, but are also bound to give their passengers reasonable notice of the place where they are expected to cross, or reasonable means of discovering where the crossing is. I don't at all mean to say that if the place of crossing is visible, and can plainly be seen during the daytime, and is well lighted up at night, that the railway company must call the express attention of a passenger to it. In that case it is the passenger's duty to avail himself of the opportunities afforded him, and to use the crossing which has been provided. On the other hand, it is not enough for a company to say, "We have provided a crossing," unless some means have been taken by which the fact that such a place exists is brought to the notice of the passenger. I lay that down as a proposition which I think ought to govern a case like the present; still, although a

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company may not themselves have brought to the notice of a passenger the position of a crossing, still, if he has acquired the knowledge *aliunde*, it comes practically to the same thing as if the company had brought it under his notice. The question here is whether or not the plaintiff was aware of the proper place for crossing; and it seems to me that he was, and instead of availing himself of the opportunity of crossing in safety which was afforded him, he chose to neglect such opportunity, and so brought on himself this misfortune.

MELLOR, J.—I agree with what has been said by the Lord Chief Justice. A railway company who conduct an enormous traffic are bound to afford reasonable facilities to their passengers, and to take reasonable care in conveying them. I can see no evidence here of an invitation by the company to act as the plaintiff acted. It appears that proper crossings were provided, and that the plaintiff was aware of their existence, so that really there can be no imputation whatever against the company.

LUSH, J.—I am of the same opinion. A railway company are bound to afford proper means of crossing, either by a bridge or across the line. Here such means existed. The platform sloped off to a place that was boarded, and the plaintiff knew of it. Instead of going four yards further on, he chose to jump down on the line, and so fell into a hole, and sustained injury. This, it seems to me, was entirely his own fault; there is no evidence of any invitation by a servant of the company to cross the line where he did; all they said was, "passengers going to Leeds must cross the line." The only evidence that can be twisted into an invitation is that the servants of the company knew that people were sometimes in the habit of jumping down. But the company were not bound to provide a level crossing all along the platform, and the mischief that happened here was caused by the plaintiff's own fault. There must, therefore, be a new trial.

Rule absolute.

Solicitors: *Newstead and Wilson*, Leeds, for the plaintiff; *Bell, Broderick, and Co.*, for *Rawson and Best* for the defendants.

Friday, May 5.

GATENBY AND OTHERS v. MORGAN AND OTHERS. (a)
Will before Wills Act 1837—Words carrying fee—Partial executory devise.

A general devise in fee, subject to a partial executory devise over, remains in force after the expiration of the partial devise.

A testator, who died in 1811, devised real property to his son and his heirs; but if the son died without issue, to the testator's granddaughter and her heirs; but if she died without issue, to the nine children of testator's son-in-law, to be equally divided among them, share and share alike. The testator's son was residuary devisee. The son and granddaughter both died without issue, the latter surviving the former.

Held, that after the death of all the nine children of the son-in-law, some of whom survived the granddaughter, the defendants, who claimed in right of the granddaughter, were entitled to the premises in fee simple.

(a) Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

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This was a demurrer to a statement of claim, which alleged as follows:—

1. Paul Cook, late of Whitby, in the county of York, duly executed his last will, dated 5th April, 1811, and thereby (amongst other things) devised unto his wife, so long as she remained his widow and unmarried, a dwelling-house, with the gardens and appurtenances (then in the testator's occupation) situate in Flowergate, in Whitby aforesaid; and devised all his messuages, farms, lands, and hereditaments, called Mortar Pits, situate in Goathland, in the parish of Pickering, in the county of York, and from and immediately after his said wife's decease, the above-mentioned dwelling-house, with the gardens and appurtenances, unto and to the use of his son Paul Cook and his heirs. But if it so happened that his son Paul Cook departed this life without leaving any issue lawfully begotten at his death living, then and in that case, from and immediately after his said son's decease, the testator devised the said Mortar Pits and the said dwelling-house with the gardens and appurtenances unto, and to the use of his granddaughter, Eleanor Cook, and her heirs. But if it so happened that his said granddaughter departed this life without leaving any issue lawfully begotten at her death living, then and in that case, immediately after his said granddaughter's decease, the testator devised the said Mortar Pits and the said dwelling-house, with the gardens and appurtenances, unto and to the use of the nine children then living of his son-in-law, John Atkinson, to be equally divided among them, share and share alike. And by the same will the testator devised and gave all the rest, residue, and remainder of his estate and effects whatsoever, after payment of his just debts, funeral, and testamentary expenses, unto his said son, Paul Cook, and appointed him executor of his said will.

2. The testator died on the 20th July 1811, and his said will was proved by the executor in the Exchequer Court of York on the 13th Aug. 1811.

3. The testator was at the time of his death seised in fee of the said dwelling house with the gardens and appurtenances and the said Mortar Pits.

4. The said Isabella Cook remained the widow of the testator and unmarried until her death, which happened on the 1st Nov. 1825.

5. The said Paul Cook, the son of the testator, departed this life on the 10th Feb. 1834, without leaving any issue lawfully begotten at his death living.

6. He duly executed his last will, dated 21st April 1831, and thereby devised all his real and personal estate unto and to the use of his wife Emma Cook, her heirs, executors, administrators, and assigns, and appointed her the executrix thereof.

7. The said will was proved by the said Emma Cook in the Exchequer Court of York on the 15th May 1834.

8. The said Emma Cook duly executed her last will dated 17th Aug. 1849, and thereby devised the said Mortar Pits and the said dwelling house with the gardens and appurtenances unto and to the use of the plaintiff Catherine Cook Gatenby, her heirs, executors, administrators, and assigns absolutely, and appointed her executrix thereof.

9. The said Emma Cook died on the 30th March 1852, and her said will was proved by the said

Catherine Cook Gatenby in the Exchequer and Prerogative Court of York on the 13th April 1852.

10. The said granddaughter Eleanor Cook intermarried with Edward Ridley, and departed this life without leaving any issue lawfully begotten at her death living on the 30th Sept. 1868.

11. The nine children of the testator's son-in-law John Atkinson mentioned in the said will were respectively named (1) Catherine, (2) Sarah, (3) Mary, (4) John, (5) Paul, (6) Ann, (7) Richard, (8) Margaret, and (9) Jane.

12. (1) Catherine Atkinson was never married, and died on the 27th May 1833.

13. (2) Sarah Atkinson intermarried with William Mercer, but there was no issue of the marriage, and she died on the 1st May 1872.

14. (3) Mary Atkinson intermarried with William Mercer, and died intestate on the 12th April 1823; she left issue by the said marriage the plaintiff John Mercer, who is still living and is the heir-at-law of the said Mary.

15. (4) John Atkinson died intestate and without issue on the 7th April 1815.

16. (5) Paul Atkinson died on the 6th Nov. 1830, leaving lawful issue one daughter, who intermarried with John Swales, and died intestate on the 11th April 1854, leaving lawful issue the plaintiff Ralph Swales, who is her heir-at-law.

17. (6) Ann Atkinson intermarried with David Simpson, and died intestate on the 24th July 1859, leaving lawful issue by the said marriage the plaintiff Thomas Simpson, who is her heir-at-law.

18. (7) Richard Atkinson died intestate on the 16th Nov. 1860, leaving lawful issue one daughter, the plaintiff, Mary Ann Brown, and is the heiress-at-law of the said Richard Atkinson.

19. (8) Margaret Atkinson died intestate and without having been married on the 15th Dec. 1832.

20. (9) Jane Atkinson intermarried with Fishburn Shaw, and died intestate on the 20th Nov. 1822, leaving lawful issue of the marriage the plaintiff Mary Jane Hargreaves, who had intermarried with John Hargreaves, and is the heiress-at-law of Jane Atkinson.

21. The defendants Wm. Morgan, Thomas Hill, and Paul Atkinson were, at the death of the said Eleanor Ridley, and still are, in possession of the said Mortar Pits, and have refused to give them up to the plaintiffs or any of them.

22. The defendants Matthew Gray and Henry Barrick entered into possession of the said dwelling house, with the gardens and appurtenances, after the death of the said Eleanor Ridley, and have refused to give up the same to the plaintiffs or any of them.

The plaintiff Catherine Cook Gatenby claims (1) possession of the said Mortar Pits and the said dwelling house, with the gardens and appurtenances, as the devisees of Emma Cook mentioned in the 6th, 8th, and 9th paragraphs of this statement of claim; and (2) 700*l.* for mesne profits of the premises from the death of the granddaughter of the said Eleanor Ridley till such possession shall be given.

The other five plaintiffs claim (1) possession of the said premises under the devise to the nine children of the said John Atkinson mentioned in the will of the first testator Paul Cook; and (2) 700*l.* for the like mesne profits of the said premises.

The defendants demurred to this statement of

claim, and said that the same was bad in law on the ground that the statement does not show any title to the premises claimed or any part thereof in the plaintiffs or any of them; and on other grounds sufficient in law to sustain this demurrer.

The following were the plaintiffs' points:

Upon the argument of this demurrer the plaintiff Catherine Cook Gatenby will contend that she is entitled to recover the property in question as the devisee of Emma Cook.

The above named plaintiffs; other than the plaintiff Catherine Cook Gatenby, will contend that they are entitled to recover the property in question under the devise to the nine children of John Atkinson, mentioned in the will of the first testator, Paul Cook, referred to in the first paragraph of the statement of claim.

The following were the defendants' points:

1. The defendants on the argument of the demurrer herein will contend that the devised estates are now vested in the representatives of Eleanor Cook.

2. That the plaintiff, Catherine Cook Gatenby, has no title to the said estates, because upon the death of Paul Cook, the son, without leaving any issue at his death living, the same became vested in fee simple in Eleanor Cook.

3. That the plaintiffs, other than the plaintiff Catherine Cook Gatenby, have no title because the children of John Atkinson took estates as tenants in common for life only.

4. That the executory devise to the said John Atkinson's children only effected the estate in fee given to the said Eleanor Cook to the extent of such life estates, and that subject to such life estates the property remained in her and is now in her representatives.

5. That a general devise in fee subject to a partial executory devise over remains in force after the expiration of the partial devise.

Manisty, Q.C. (with him *Forbes*), argued for the defendants.—The claim of the plaintiff Catherine Cook Gatenby, depends upon the condition attached to the devise to Paul Cook and his heirs, viz., in case of Paul Cook's death without issue, to the use of his granddaughter, Eleanor Cook and her heirs. The other plaintiffs claim upon the failure both of the devise to Paul Cook, and the conditional devise to Eleanor Cook, but it depends upon the effect of the condition attached to the devise to Eleanor Cook and her heirs, viz., in case of Eleanor Cook's death without issue, to the use of the nine children then living of John Atkinson, to be equally divided among them, share and share alike. This last condition, however, according to the law before the Wills Act, gives merely a life estate to the nine children; and upon the death of the last of them, right of possession reverts to the heirs of Eleanor Cook under the conditional devise to her of the fee simple. [LUSH, J.—Did not the words, "to be equally divided among them, share and share alike," carry the fee simple, even before the Wills Act? *Herschell*, Q.C., for the plaintiffs. That is the effect of *Oates v. Brydon* (3 Burrow's Reps. 1895.) That case is not mentioned in Jarman on Wills. [FIELD, J.—Nor is it in Watkins on Conveyancing. LUSH, J.—And I observe that Jarman's edition of Powell on Devises (vol. 2, p. 379) says, it is virtually overruled by a great multitude of decisions.] Moreover, Lord Mansfield there interprets the devise to mean a direction that the premises must be sold and the produce

divided; he then proceeds, p. 1898, "We are of opinion that upon the whole of this will there is enough to show that the testatrix intended the value of this house and stable to be divided amongst the seven children." That authority, even if unquestioned, could not bind the interpretation of the will in this case. Jarman on Wills (2nd vol., p. 252, edit. of 1861) says, "It is also abundantly clear that where an indefinite devise is to take effect in derogation of or in substitution for a previous devise in fee (being the converse of the cases just mentioned), no enlargement of estate takes place. Thus, if lands are devised to A. and his heirs, and in the event of his dying under the age of twenty-one and without issue, to B., B. will take an estate for life only;" for this are cited amongst other cases:

Middleton v. Swain, 3 Sinn. 339;

Roe v. Holmes, 2 Wils. 80.

In vol. 1, at p. 823,

Hanbury v. Cockrell, 1 Roll. Ab. 835;

Jackson v. Noble, 2 Keo. 590,

are cited as affirming the point that an estate originally devised is affected only to the extent necessary for the introduction of the life interest, and subject thereto remains in the prior devisee. This principle was also acted upon in *Watkins v. Weston* (3 De G., Jo. & Sm. 434).

Beresford (with him *Herschell*, Q.C.) argued for the plaintiffs.—The first question to be considered is whether the Atkinsons take under the will the fee simple or only a life estate. The only authority exactly in point is *Oates v. Brydon*, and although that case has been questioned as to the general principles assumed by it, the reasons given by Lord Mansfield are most applicable to this case, and, at all events, it is in accordance with common sense that when premises of this kind are directed to be divided between several persons, the inference should be that they are to be sold for that purpose. The second question is whether they are not all executory devises, so that upon the conclusion of all the life interests the estate goes to residue. In *Roe v. Holmes* (2 Wills, 80) the testator by his will devised copyholds to his daughter Jane, her heirs and assigns for ever, "but in case my said daughter dies before she attains the age of twenty-one years, and have no issue, then my will is that my nephew, John Hardisty, shall have my said copyhold lands and tenements." The whole court were clearly of opinion, amongst other things, "that there were no express words in the will that gave the nephew a fee, nor any manifest intention to do so, or to disinherit the heir-at-law." There is no clearer intention here to disinherit the heir-at-law, under the circumstances which have occurred; therefore the plaintiff, Catherine Cook Gatenby, is entitled to recover the premises under the residuary devise. There is no distinct authority against the plaintiffs on either question.

Manisty, Q.C. was not heard in reply.

BLACKBURN, J.—I think when we come to understand the point at issue there can be no doubt the defendants are right; the statement of claim does not show any title to the premises claimed in the plaintiffs or any of them. In feudal times the heir was not to be divested of his inheritance except by the express terms of a will, and the interpretation of such instruments came to be strained in support of that principle. The Legislature by the Wills Act reversed this rule to a certain extent, but we must interpret the will

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before us, which is dated in 1811, according to the old law. Is there anything in the words of the devise to Atkinson's nine children, which, under the old rules of interpretation, should give them more than a life estate? The testator devised the premises upon the death of his granddaughter without issue, unto and to the use of the nine children then living of his son-in-law John Atkinson, to be equally divided among them, share and share alike. Certainly the words are almost exactly like those of the devise in *Oates v. Brydon* (3 Burr. 1895), viz., "after his decease I give the said house and stable with the appurtenances, unto the said children of my cousins, Thomas Brownhill and Samuel Walter, or such of them as shall be then living, share and share alike." Lord Mansfield, in delivering the opinion of the court, said, "As to the construction of the will, the question is whether this house and stable were given to the seven children only during their lives, or as tenants in common. The whole value is only 100*l*. There must be something by way of limitation to show the intention of the testatrix, otherwise it is for life only. But few ordinary people make the distinction between land and personal property. As this rule of law often operates against the intention of the testator it shall be construed to carry a fee, where there are words of limitation, and the testator's intention appears (*sic*). This is a house and stable. They are given to the husband for life expressly, so they are to the brother. If she had meant the like to the children, she would have done the like. But she gives to the seven children after the two lives a wasting property, share and share alike. Besides she directs the house and stable to be divided amongst the seven children in case her brother dies before her husband; that is, they must be sold, and the produce divided. We are of opinion that upon the whole of this will there is enough to show that the testatrix intended the value of this house and stable to be divided amongst the seven children." I do not follow this reasoning, and I cannot but think that the conclusion is wrong. I find strong confirmation for this opinion in what Lord Kenyon said of this case in *Goodtitle v. Edmonds* (7 T. Rep. 635, 640); after observing that the decision at the time gave dissatisfaction to the profession, he added "But I believe that in subsequent cases Lord Mansfield doubted whether in the decision of that case he had proceeded on substantial grounds." We must take it, therefore, that the devise to the nine children of Atkinson gave an estate for life only; and these children being now all dead, there is nothing left of the devise over upon Eleanor Cook's death without issue. The next question is whether Eleanor Cook's devise in fee then revives or whether the premises go with the ultimate devise of the residue to Paul Cook's heirs. First, however, we should determine the effect of the earlier devise to Paul Cook, but this is not disputed, and we may assume as admitted that the fee simple was divested from Paul Cook upon his death without issue. As to the devise over upon that event to Eleanor Cook and her heirs, but in the event of her death without issue to the nine Atkinsons for life, we have the authority of *Jackson v. Noble* (2 Kee. 590); there the testator gave real and personal estate to his daughter A., and to two other persons, upon trust, to permit A. to receive the rents and interest for life for her separate use, and after her decease

in trust to convey to her heirs, executors, &c.; but in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children. It was held that A. took an absolute equitable interest with an executory gift over to D. and his children; and D. having died in the lifetime of A., leaving no children, A. was absolutely entitled to the property. Here in the same way Eleanor Cook took an estate in fee simple with an executory gift over upon her death without issue. In Mrs. Noble's case, the gift over failed before her death; but although some of the Atkinsons survived Eleanor Cook, their estate for life has now come to an end, and Eleanor Cook's heirs are entitled to the premises. The gift to the Atkinsons was an executory devise over upon Eleanor Cook's death without issue which cut down her estate in fee only for the period of the gift over. "To this important rule (says Powell on Devises by Jarman, vol. 2, p. 241), viz., that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced, is the total absence of direct authority for it, for the books do not furnish a single example of its application. The decision of *Hanbury v. Cockrell* (1 Roll. Ab. 835), cited by Mr. Preston, certainly involves no such doctrine, since it simply affirms the validity of the executory limitation to the survivor for life in the events that had happened, and it leaves the question as to the destination of the ulterior interest quite untouched. . . . That the point does not admit of any doubt upon principle is readily conceded, for as it is clear that under a devise to A. and his heirs, and if he shall die under twenty-one, or living B., to B. for life, A. would by the first part of the devise take an estate in fee simple in the lands so given, to the complete disinherison of the heir, and as the only operation of the subsequent executory limitation is to take out of him, in a certain event, an estate for the life of B., the fee *ultra* that life interest necessarily remains in A." We have therefore the high authority not only of Messrs. Powell and Jarman, but also of Mr. Preston in favour of the defendants' contention in this case; that authority is sufficient in the absence of any direct decision to the contrary. Although Mr. Fearn states a proposition somewhat inconsistent with this view (Cont. Rem. 251 & 530), I find he cites no case against it, and counsel for the defendants has failed to discover any such case. I think, therefore, that upon the weight of authority I have mentioned, and in the absence of anything directly conflicting with it, we ought to say that Eleanor Cook took an estate in these premises in fee simple, subject only to the executory limitation during the lives of the nine children of John Atkinson. Those children being all dead, the defendants who claim by right of Eleanor Cook are entitled to our judgment.

LUSH, J.—I am of the same opinion. The rules of construction applied to wills before the Wills Act required that the devise should be interpreted for life only, if no express words were used extending that estate. Here, therefore, the devise over to the nine children of John Atkinson carried only an estate for their lives, and the question then arises, who was entitled after their death? If Eleanor Cook, in whom was the estate

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in fee subject to this executory devise over, had survived all the lives for which the devise was made, then *Jackson v. Noble* would be a distinct authority in favour of her estate in fee: it would be a singular result of the will if the ultimate gift to the heirs of Eleanor or Paul Cook should depend upon the relative periods of the lives of Eleanor Cook and the Atkinsons. I agree that the defendants are entitled to our judgment.

FIELD, J.—I am of the same opinion and upon the same grounds. *Judgment for defendants.*

Solicitors for plaintiffs, *Shum, Crossman, and Crossman* (for *Thomas Stephenson, Whitby*).

Solicitors for defendants, *Bell, Brodrick, and Gray.*

May 3 and 6.

REG. v. FOX (a)

Turnpike trustees—Sale of toll-house—Improvement of road—Discretion—The Annual Turnpike Acts Continuance Act 1866 (29 & 30 Vict., c. 105), s. 2.

Defendant was indicted for obstructing a highway, having purchased and kept standing a toll-house, not required for the purposes of the road, from the trustees of the turnpike, under 29 & 30 Vict. c. 105, s. 2.

This toll-house was situated in the middle of a wide part of the road at the junction with another road. The addition of the site would have been a slight improvement to the road for the purpose of persons driving a particular way, but it would have been of no material benefit or advantage for the chief part of the traffic; and the price paid for the house was 120l.

Held, upon a special verdict, that assuming the court to have jurisdiction to review the propriety of the sale, the trustees must have a practical discretion under the said section; and that, the price of the house being far beyond the value of the improvement, the trustees were justified in selling the house instead of adding the site to the road.

THIS was an indictment preferred against the defendants for the obstruction of a highway. The defendants pleaded that they were not guilty.

The indictment came on to be tried before Blackburn, J., at the Summer Assizes of 1872, held at Leeds, in and for the West Riding of the County of York, when a verdict was taken for the Crown, subject to the opinion of the court on the following case: This indictment was preferred by the Local Board of Health for the Borough of Wakefield, as and being surveyors of highways within the said borough for an alleged obstruction to the highway, which runs from Leeds to Wakefield, and which was formerly the Wakefield and Leeds turnpike road.

The obstruction consisted in the maintenance by the defendants of a house which had formerly been used as a toll-house under the circumstances hereinafter mentioned.

Mr. Fox, one of the defendants, is a gentleman of property in the neighbourhood, and the other defendant is his tenant, occupying the said house. Before, and in the year, 1758, there was an ancient Queen's highway for all purposes, leading from Leeds through Newton to Wakefield. The course of this highway between Newton and Wakefield was shown upon a plan which accompanied and

formed part of this case. There was also before and in the same year another ancient Queen's highway for all purposes leading from Bradford to Wakefield, which last mentioned highway joined the first mentioned highway between Newton and Wakefield. The course of this highway, where it joined the highway from Leeds to Wakefield, was also shown upon the said plan. The road running from Wakefield branched off at the particular spot in question into these two ancient highways leading to Leeds and Bradford respectively. In the 31st section of Geo. 2 1758, an Act was passed entitled "An Act for Repairing the Road from Leeds to Sheffield, in the County of York." By that Act, after reciting that the road leading from Leeds through Wakefield and Barnsley to Sheffield (of which the said ancient highway from Leeds to Wakefield formed part) had become deep and ruinous, trustees were appointed for enlarging, amending, and repairing the said road and keeping the same in repair, and were authorised to erect turnpikes, toll gates, and toll houses in, upon, or across the said road, and to take tolls thereat. By the said Act the right and property of the said turnpikes and toll houses were vested in the trustees, who were thereby authorised and empowered to dispose thereof as they should think proper. By the said Act the trustees were also authorised and empowered to widen any of the narrow parts of the said highway or road by opening, clearing, and laying into the said highway or road any grounds of any persons lying contiguous thereto, making reasonable satisfaction to the owners or occupiers of such ground; and it was enacted that such grounds, so as to be taken in, when the same should be ditched and fenced, should to all intents and purposes whatsoever from henceforth become and be and should be deemed and taken to be a public and common highway, and be from thenceforth a part of the said road, not only during the continuance of that Act but for every after. By another Act passed in the 10th Geo. 3 (1770), the term of the former Act was enlarged and the trustees were thereby authorised and empowered to continue, remove, take down, erect, and set up such gates, turnpikes and toll houses respectively in, across, or on the side of any part of the said road, and the sole right and property of, in, and to all and every the turnpikes toll gate and toll houses erected, built, or continued by virtue of that or the former Act were vested in the trustees, who were thereby empowered to dispose thereof respectively as they should think proper and requisite.

By other Acts passed in the 32nd and 43rd of Geo. 3, the term of the two above-mentioned Acts was further enlarged.

Immediately after the passing of the first-mentioned Act the trustees had erected a tollgate and tollhouse at the point in the said plan marked "Old Toll Bar," and the same was continued down to the year 1804.

In 1804 that part of the road which lay between Newton and Wakefield was widened by the trustees by certain parts of the ground adjoining thereto being taken into the said road.

Some time before 1804 the highway from Bradford to Wakefield had been constituted a turnpike road, and the trustees thereof under the powers of their Acts had altered the direction of the said road, and in 1808 the said alterations had been completed, and were ready to be open to the public.

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In 1808 the trustees of the Wakefield and Leeds turnpike road resolved to remove the old toll-house and gate hereinbefore referred to and to erect a new tollgate and tollhouse; and in pursuance of their local Acts and of the public Acts then in force they duly, in 1808, erected a new tollgate and tollhouse. The site of such new tollhouse was denoted in the said plan by the words "present toll bar;" and, as there appears, it was in fact built upon the site of the ancient highway from Leeds to Wakefield. Its position was at the junction of these two highways mentioned, and at a part of the road about 80ft. wide, the road immediately becoming much narrower both nearer to and further from Wakefield. When the new tollhouse had been completed the old tollhouse was removed, and the new tollhouse, which is the subject of the present indictment, was thenceforward and until the year 1870 used as the tollhouse for collecting the tolls on the said Wakefield and Leeds turnpike road by the trustees of that road, and was known as the Newton tollhouse.

Until the sale of the said last-mentioned tollhouse as hereinafter-mentioned the said tollhouse continued to be the property of the said last-mentioned trustees; and no alteration has been made in the road since the said tollhouse was so built as aforesaid.

In the year 1821 an Act of 2 Geo. 4 was passed by which the earlier Acts of the Wakefield and Leeds turnpike hereinafter referred to were repealed and other provisions substituted. By this Act the right and property of, in, and to all the tollgates, turnpikes, and tollhouses then being upon the said road were vested in the trustees thereby appointed. This and the earlier Acts are to be taken to form part of this case.

The trusts of the said Wakefield and Leeds turnpike road expired on the 30th June 1870, in which year and shortly before which date the trustees of that road, for the sum of 120*l.*, sold and conveyed the said toll house, and the site on which it stood, to the defendant George Lane Fox, who then was, and still is, the owner of the adjoining land, from which the land on which the said tollhouse was built is separated by an ancient fence.

If on the facts herein stated, the court should be of opinion that the question can be raised whether in point of fact the Wakefield and Leeds road would have been improved by the addition thereto of any part of the site of the said tollhouse under the provisions of sect. 2 of The Annual Turnpike Act Continuance Act 1866 (29 & 30 Vict. c. 105), the following statement contained in this paragraph is to be taken as part of the case. For carriages using the Wakefield and Leeds road without turning when going from the direction of Leeds off the Wakefield and Leeds road on to the branch which connects that road with the Bradford and Wakefield road, or without turning when going in the direction of Leeds from the said branch on to the Wakefield and Leeds road, the removal of the said tollhouse and the addition of the site thereof to the Wakefield and Leeds road would not have been of any material benefit or advantage. But for carriages passing when going in the direction of Leeds from the said branch on to the Wakefield and Leeds road, or passing when going from the direction of Leeds

from the Wakefield and Leeds road on to the said branch, the removal of the said tollhouse and the addition of the site thereof to the Wakefield and Leeds road would have been a material benefit and advantage.

Since the aforesaid sale to Mr. Fox, the said tollhouse has been maintained by the defendants, and they still maintain it upon the site upon which it was originally built; but it has not been used for any purposes connected with any of the said roads or for the benefit thereof.

It was contended, on the part of the prosecution, that the trustees of the said Wakefield and Leeds turnpike road had no power to sell the said tollhouse or the site thereof to the defendant, George Lane Fox, and that the said tollhouse, not being required for the purposes for which it was originally built, is an obstruction to the highway of which the old road, on part of which the said tollhouse was built, as hereinbefore stated, now forms a part.

The court is to be at liberty to draw any inference of fact which in the opinion of the court a jury ought to have drawn.

The question for the opinion of the court is, whether the defendants are guilty of obstructing the said highway by maintaining the said tollhouse; and if the court should be of opinion that the defendants are so guilty, then the verdict for the Crown is to stand; but if the court shall be of a contrary opinion, then a verdict of not guilty is to be entered.

May 3.—Waddy, Q.C., argued for the prosecution.

Cave, Q.C., for the defendants.

Cur. adv. vult.

May 6.—BLACKBURN, J.—It appears that about 1808, a branch from the Bradford and Wakefield road, made to open into the Leeds and Wakefield road, was constituted a turnpike, and at the point of junction the two roads together covered a space between the hedges of some 70ft. or 80ft. wide. Except at this spot, in the middle of which was built the tollhouse now alleged to be an obstruction, the road was much narrower in all the three directions. There is a clear passage on each side of the house for vehicles going from Wakefield on one side to Leeds, and on the other into the branch road leading to the Bradford road; and similarly for traffic in the opposite directions. For neither of these purposes would the road be improved by the addition of the site of this tollhouse, but persons have the right to turn into this branch road to Bradford when driving from the Leeds direction towards Wakefield, and so in the opposite way towards Leeds from the branch road; in so doing they have to make a further curve round the toll house than they would have to do if the house were not there; but no one could thereby be put to great inconvenience, and the improvement to the road by pulling it down would be very slight. At all events, in 1870, when the trust came to an end, in which the toll house was included, the trustees sold this toll house and the site on which it stood to the defendant Mr. Fox. Under the old statute (4 Geo. 4 c. 95 s. 57), when a toll house became useless and was no longer required for the purposes of such road, the trustees or commissioners could not sell or dispose of the house, but they could only cause the house to be pulled down; and the site of such house, together with the garden and appurtenances thereunto belong-

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ing, might be sold in the same manner as land or ground not wanted for the purposes of the road might be sold under the regulations of a previous Act. Then followed on this subject the Annual Turnpike Acts Continuance Act 1866 (29 & 30 Vict. c. 105) which in the second section recited the above provision of 4 Geo. 4 c. 95, and enacted as follows in two sub-divisions of the section:

(1.) If the road would be improved by the addition thereto of the whole or any part of the site of the toll house or of any garden or land belonging thereto, then the trustees or commissioners of the road shall, instead of selling the whole or such part (as the case may require) cause the same to be added to the road, and shall cause any building standing on the ground so added to be pulled down and the materials thereof to be sold and removed: (2) Where the trustees or commissioners of a turnpike road are authorised to sell the site of a toll house they may, notwithstanding anything contained in the last mentioned Act, sell the toll house and other buildings standing on such site, unless required to pull them down by the person to whom a right of pre-emption is given by any Acts relating to turnpike roads. Subject, as aforesaid, the provisions of the said Act relating to the selling of toll houses shall be of the same force as if this Act had not passed.

In this case the right of pre-emption belonged to the defendant Mr. Fox, and the trustees sold him this toll-house standing for 120*l*. The question raised is whether under the circumstances the trustees of the turnpikes were entitled to sell as they did, or whether they were not compelled by this first sub-section to cause the site of the toll-house to be added to the road. It has been assumed on the argument that this is a right means of raising the question of the propriety of the sale, and without expressing any opinion as to our jurisdiction to decide the other way, we have come to the conclusion that it is a matter within the reasonable discretion of the trustees whether the addition of such a site will improve a turnpike road. It cannot be intended by sub-section 1 of this enactment to render the destruction of a toll-house absolutely necessary, when only a very slight improvement to the road can be derived from the addition of the site. The provision must be applied practically; and when a substantial value can be obtained for such a house, a real improvement should be secured before it is required to be pulled down. The proper tribunal to review the matter, whatever it may be, ought to give a wide discretion to trustees; here the price of the house was 120*l*., and although its destruction might have produced some slight improvement to the road, that improvement would have been very dearly purchased at that price. The trustees in our opinion were certainly not bound to do otherwise than they did, and our judgment will therefore be entered for the defendants.

Judgment for defendants.

Solicitors for prosecution, *Taylor and Hales* for *Jansons, Banks, and Hicks*, Wakefield.

Solicitors for defendants, *Duncan, Murton, Warren, and Gardner*.

Saturday, May 6.

GRIFFIN (app.) v. DRAYTON-IN-HALES HIGHWAY BOARD (resps.) (a)

Exhausted parcels of land—Adjoining owner—Fair and reasonable value—Appeal—5 & 6 Will. 4, c. 50, s. 48.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

*The respondents sold and conveyed to the appellant, the person whose lands adjoined thereto, an exhausted gravel pit in pursuance of sect. 48 of the Highway Act 1835. The pit was valued by a land surveyor at 15*l*. 6*s*. 6*d*., but a person not an adjoining owner was willing to give 450*l*. for it. The justices at special sessions fixed the latter amount as the fair and reasonable value under the circumstances. Upon appeal, the quarter sessions fixed the lower amount as fair and reasonable between the respondents and the appellant.*

Held, upon a case stated, that the quarter sessions had jurisdiction to hear the appeal, and were right in fixing the value with reference to the interests of both parties.

THIS was an appeal against an order of determination of justices made at a special sessions for highways, authorising the sale of an exhausted gravel pit at a price thereby fixed by the said justices under the 48th section of the Highway Act, 5 & 6 Will. 4, c. 50. The appellant is a gentleman owning the land adjoining the said gravel pit.

The respondents are justices who made the said order, and the Highway Board of Drayton-in-Hales, on whose application the said order was made.

The appellant appealed to the General Quarter Sessions of and for the county of Stafford, held on the 2nd Jan. 1875, when the appeal was respited. And the court of quarter sessions on the 20th Oct. 1875, after hearing evidence and by consent of the above mentioned highway board respondents, the justices not appearing, gave judgment that the said order should be quashed, subject to the following case for the opinion of the Court of Queen's Bench.

By an inclosure award made in the year 1773, under an Act of Parliament passed in the 13th year of King George III., two gravel pits, one of which is the gravel pit referred to in the order of justices above mentioned, were allotted to the highway surveyor for the time being of the Staffordshire part of the parish of Drayton-in-Hales for the repairs of the highways within that part of the parish.

This gravel pit became exhausted many years ago.

The highway board for the district of Drayton-in-Hales have, under the provisions of the 43rd section of the statute 25 & 26 Vict. c. 61, become the successors of the surveyors of the highways for the said parish.

The appellant is the owner of a house and grounds abutting on the site of this exhausted gravel pit, and is the only person whose lands adjoin thereto.

Owing to the fact that this site adjoins his house and garden, and to the annoyance which might be caused to him by any other person into whose hands the land might fall, it has a special accommodation value to him far beyond the intrinsic value of the land.

At a meeting of the highway board held in the month of May 1873, it was resolved that Mr. Bright, a land surveyor, should be instructed to report on the condition and value of certain gravel pits, one of which was that adjoining the appellant's lands, with regard to which the present question arises.

Mr. Bright accordingly valued and reported to

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the board. He reported that the gravel pit adjoining the appellant's land was exhausted, and he valued it at 155*l.* 6*s.* 6*d.*

In due course the waywardens were authorised to apply to the justices in special sessions to fix a reasonable price for the gravel pit in question, and to give their consent to its sale.

On the 26th Oct. 1874, at a special session held at Newcastle-under-Lyme, application was made to the justices there assembled, in accordance with the resolution just mentioned.

The justices thereupon made the order or determination now appealed against, whereby they consented to the sale of the gravel pit to the appellant, and fixed the price at 450*l.*; which sum, under special circumstances which do not affect the points of law to be submitted to the court, a gentleman, who is an owner of property in the parish, but who has no land adjoining or abutting upon the exhausted gravel pit, was willing to give.

The appellant gave notice of appeal to the quarter sessions against this order, and entered into recognisances to prosecute such appeal. And it is admitted that he complied with all necessary formalities, provided any right of appeal existed.

The appeal came on to be heard at the quarter sessions for the county of Stafford, in Oct. 1875, and the court found as a fact that the sum of 450*l.* was not a fair and reasonable price as between the parish or highway board and the appellant, but that such fair and reasonable price was 155*l.* 6*s.* 6*d.*

The court found that, looking at the interest of the parish only, the sum of 450*l.* was a fair and reasonable price for the highway board to obtain for the interest in the site of the gravel pit.

The questions for the opinion of the court are: First, Had the appellant a right of appeal to the quarter sessions against the aforesaid order of justices in special sessions made on the 26th Oct. 1874? Secondly, Was it the duty of the justices in special sessions to regard the interests of the adjoining proprietor, and to fix a fair and reasonable price as between vendor and purchaser, in relation to ordinary market value of the site of the exhausted gravel pit; or was it their duty to regard the interests of the parish or highway board only, and to fix a price higher than the ordinary market value, but which could be obtained under special circumstances from a purchaser other than an ordinary proprietor?

If the court shall be of opinion in favour of the appellant on both points, the order of justices in special sessions is to be quashed.

If the court shall be of opinion in favour of the respondents on either point, the order of the justices in special sessions is to be confirmed.

Holl (with him *Bosanquet*) argued on behalf of the appellant, in support of the judgment of Quarter Sessions.—The 48th section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) upon which this question arises, is as follows: "And whereas under Acts of Parliament heretofore made and which may hereafter be made for the enclosing of waste land, parcels of land have been and may be expressly allotted to parishes, or to the surveyor of the highways for the purpose of obtaining materials for the repairs of the highways in such parish, and the materials in such parcels of land have been and may be exhausted. Be it therefore enacted that in such cases it shall and may be

lawful for the surveyor of such parish for the time being, by and with the consent of the vestry, and he is hereby authorised and required, with the consent in writing of the justices of the peace at a special sessions for the highways, to sell and convey to some persons whose lands adjoin thereto, or if he refuses to purchase, to any other person, the said parcels of land from which the said materials have been so exhausted as aforesaid, at and for such price as the said justices may deem fair and reasonable, and with the money arising therefrom, and with such consent as aforesaid, to purchase other lands in lieu thereof." By 25 & 26 Vict. c. 61, s. 44, sub-sect. 3, "The highway board shall, for all the purposes of the principal Act, except that of levying highway rates, be deemed to be the successor in office of the surveyor of every parish within the district." The special sessions deemed 450*l.* the fair and reasonable price for the disused gravel pit, but the Quarter Sessions have fixed the price at 155*l.* 6*s.* 6*d.*; the latter must be the binding value between the parties provided the Quarter Sessions had jurisdiction to hear the appeal. The right to appeal upon this order of the special sessions depends upon section 105 of the Highway Act 1835, which provides, "That if any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter session of the peace to be held for the county, division, riding, or place, where the cause of such complaint shall arise." . . . "And their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever." The words giving the right of appeal are wide enough to embrace the order of special sessions by which the appellant was here aggrieved.

Lawrance for the respondents.—This is not, within the words of the appeal section, "an order, conviction, judgment, and determination made," or a "matter or thing done by any justice or other person in pursuance of this Act:" the sale and conveyance are directed by the 48th section to be carried out by the surveyor, with the consent of the justices, at a price which the justices may deem fair and reasonable. If the justices come to a determination at all in the matter, they do so as arbitrators between the parish and the purchaser, and their conclusion must be final; this, by analogy with the fuller provision concerning pieces of land not required by Turnpike Trusts, 3 Geo. 4, c. 126, s. 89, seems to be the proper interpretation of this enactment. The other question is, whether even if the quarter sessions had jurisdiction, the higher amount is not the fair and reasonable price under the circumstances. The enactment is for the benefit of the parish, and the parish is not compelled to sell at a price of which it does not approve. The respondents are in the position of trustees, and if they took a less value for the land in their charge than they can obtain, they would be guilty of a breach of trust. If too low an amount were fixed by the surveyor, it might be open to the ratepayers to call upon the justices to fix a fair and reasonable price; but the per-

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son who consents to purchase cannot possibly object to the fairness of the price he undertakes to give.

BLACKBURN, J.—I think we must say that the quarter sessions have in this case decided rightly. Two questions are raised upon the facts stated; first, whether this was such a determination by justices as to give a right of appeal, of which I have no doubt; the second and more important question is which of the two decisions of the justices, that of the special, or that of the quarter sessions, is right in point of law. They both turn upon sect. 48 of the Highway Act 1835 the recital of which admittedly applies to this exhausted gravel pit. The surveyor, with consent of vestry and justices is authorised and required to sell and convey to some person whose lands adjoin thereto such exhausted parcels of land, at and for such price as the justices may deem fair and reasonable. It does not appear that the appellant, who is the only person whose lands adjoin thereto, refused to purchase, as he might have done, and the only difficulty is the price. I think the enactment means that when these exhausted pits become useless to the parish, the parish must not act like the dog in the manger, but must allow the adjoining owners to have them for a fair and reasonable price. I do not think it is a provision solely for the benefit of the parish, but it is intended to give advantage to the adjoining owners. Their interests are considered by the directions for fixing the price. The pits are not to be sold by auction or at the highest price at which personal motives might prompt any purchaser to buy, but at a fair and reasonable price, as it may be so deemed by the justices who are to deal impartially with the interests both of the parish and the adjoining owners. The right of pre-emption given to the adjoining owners would be illusory if the section were interpreted to require the parties to fix the highest price obtainable from somebody else. Here it is stated that a gentleman, not an adjoining owner, was willing to give 450*l.* for this pit. His reasons do not appear, but we must assume he had some personal motive which did not affect the fair value of the piece of land. This of course would be the fair and reasonable value, if those words meant the best value obtainable by the parish, and in that case the Special Sessions were right in so fixing the amount. But if, as I consider, the fairness and reasonableness ought to apply equally to the adjoining owner as to the parish, the lower amount estimated by the land surveyor, 155*l.* 6*s.* 6*d.*, was rightly determined by the Quarter Sessions to be the amount payable by the appellant for his purchase. The Quarter Sessions, in my opinion, had jurisdiction and full power to reconsider the amount fixed at Special Sessions, and by their decision they showed that they rightly understood the objects of the enactment.

QUAIN, J.—I am of the same opinion, and I also think the Quarter Sessions have shown a proper understanding of the objects of this 48th section. As soon as the vestry consented to sell, the surveyor was bound to carry out the conveyance to the adjoining owner, if he was willing to take it. The justices then became a kind of arbitrator between the parish and the purchaser, subject however to appeal to Quarter Sessions; and they ought to fix a fair and reasonable price in the interests of both the parties before them. There

is nothing to justify them in fixing the fancy price of some other person.

Judgment for appellant.

Solicitors for appellant, *Morley and Shirreff* (for *Robinson and Dempster, Eccleshell*).

Solicitor for respondent, *A. R. Oldman*.

Tuesday, May 9.

WAY v. GREAT EASTERN RAILWAY Co. (a)

Carriers—Felony—Servant—11 Geo. 4 & 1 Will. 4, c. 68, s. 8.

Plaintiff entrusted some valuable pictures to the defendants for carriage without declaring them; they had to be conveyed during their transit from the defendants' to another railway, and were stolen from the defendants' yard by a man who falsely represented himself to the clerk, who gave him the necessary pass for the purpose of so conveying them, to be in the defendants' employ. The course of business was, that the men employed in driving the vans were instructed as to the work they were to do at a cartage office; they then applied to the clerk for a pass and the delivery sheet, with which they were allowed by the porter to drive the vans allotted to them out of the yard. The man who stole the pictures received no instructions from the cartage office, but obtained the usual documents from the clerk upon mentioning the number and destination of the van containing the pictures, and drove the van away upon production of the pass.

Held, that the defendants were not liable for the value of the pictures under the 8th section of the Carriers' Act.

This case was stated for the opinion of the court.

The action was brought to recover the value of three pictures delivered by the plaintiff to the defendants, who are carriers for hire from Chelmsford in Essex to Rochester in the county of Kent, and received by the defendants as such carriers for reward, to be carried by the defendants as such carriers from Chelmsford to Rochester, and which were lost in the course of transit in the manner hereinafter set out.

The three pictures, which were original paintings by Vandyke, by Poussin, and by Wilson, were delivered for carriage as aforesaid by the plaintiff to the defendants, having been properly packed in wooden cases. The value of the said pictures was not declared by the plaintiff at the time the same were delivered to the defendants for carriage. Since their loss, their value has been agreed at 1000*l.*, and had this value been declared at the time of their delivery to the defendants the charge for carriage would have been 50*l.* 2*s.* 11*d.*, instead of 2*s.* 11*d.*, the charge actually made. In such a case it is the invariable practice for a policeman to travel with the goods over the defendants' line, and see them delivered to the London, Chatham, and Dover Railway Company.

The defendants carried the said pictures by their railway to their goods station in London, known as the Brick-lane Station, where, besides the servants of the company, persons having or professing to have business with the company have access. There the defendants loaded the pictures on one of their vans No. 418, together with some other goods for the purpose of being

(a) Reported by M. W. M'KILLAN, Esq., Barrister-at-Law.

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conveyed to the London, Chatham and Dover Railway.

At the time when the defendants received the said pictures the course of business adopted by them in transmitting goods from the Brick Lane Station to other railway stations was as follows: "They loaded the goods in their vans or in those of Messrs. Macnamara and Co., who carry for the defendants, or in those of persons employed by Messrs. Macnamara and Co., the said vans standing in the Brick Lane Station for that purpose, and it was the duty of one of the clerks of the department to which the carmen would be referred to deliver to the defendants' carman, or the carman of the said Macnamara, or of their said sub-contractors, the delivery sheets for and weight notes of the goods on the respective vans, and also passes to enable them to pass the porter at the gate of the yard, whose duty was not to permit any van to leave the yard without the production of such a pass. Before, however, a carman could obtain from such clerk the delivering sheets, weight notes, and pass, he had to go to an office called the cartage office, where he received verbal instructions as to what numbered van he could take, what its destination was, and to what department he should apply for delivery sheet, weight note, and pass."

On applying to the clerk of such department and stating the number and destination of the van, and the person by whom he was employed, the clerk would give him the delivery sheets, weight note, and pass, although he did not know him, on the assumption that he was a carman employed by defendants or Macnamara or his sub-contractors. No man had a right to act as carman and receive the above documents unless appointed by the defendants or Macnamara or his sub-contractors.

On the 18th Dec. 1873, while the said van 418 was standing in the defendants' said yard at Brick-lane Station, ready loaded and containing as before-mentioned the said three pictures, a man applied to William King, the defendants' delivery clerk at Brick-lane Station, and stated that his name was Clarke, and that he was one of Messrs. Macnamara's carmen, and asked for a van, giving the No. 418, and stating its destination, and he thereupon received from the said William King the delivery and weight note and a pass, which enabled him to leave the yard, the clerk assuming and believing from the fact of his telling him the number of the van and the destination, that he was, in fact, in Macnamara's employ.

The same man who called himself Clarke having procured the said documents in the manner stated, got on to the said van No. 418, and drove it out of the said yard, after having delivered his pass to the porter at the gate. The clerks in the cartage office gave evidence that to the best of their belief nobody representing himself as Clarke had applied for a van on the day in question, and that certainly no one had been authorised at the cartage office on that day to take away van 418.

The defendants had not a carman of the name of Clarke, but in Dec. 1873 Messrs. Macnamara and Co. had a man of that name. It is admitted that the felony was committed not by him, but by the man who represented himself to be Clarke, and who took away the van as aforesaid.

After the van 418 containing the said goods left the yard nothing more was heard of it till a part of

its contents, viz. a tombstone, was found on Stepney Green. It was then discovered that the same van had been left empty in the Whitechapel coal yard, belonging to the defendants, and that no money had been collected or accounted for, as would have been done in the usual course of business.

Since the loss of these pictures, the practice at the cartage office and the department to which the carmen are referred has been altered, viz., the carman takes a ticket from Macnamara or his sub-contractors to the cartage office, where he receives another ticket to take to the department to which he is referred; upon receiving this latter ticket the clerk of that department would give the documents before-mentioned to the man who presented it, unless he believed he was not a carman of Macnamara's or his sub-contractors. Under the old system this is the only van that has been improperly removed from the company's premises for the last twenty-five years.

The damages to be paid by the defendants to the plaintiff have been agreed at 1000*l.*, if the court shall adjudge that the defendants are liable.

It is agreed that the court shall have power to draw all necessary inferences from the facts stated.

The question for the opinion of the court is whether the defendants are liable on the above facts for the loss of the said pictures.

If the court are of opinion in the affirmative, then judgment is to be entered up for the plaintiff for 1000*l.* with costs of suit.

If the court are of opinion in the negative then judgment is to be entered up for the defendants with costs of suit.

Philbrick, Q.C. (with him *Tindal Atkinson*), argued for plaintiff.—By the voluntary act of the defendants this man who stole the plaintiff's pictures was trusted as a servant; and, therefore, as against the plaintiff he must be taken to be their servant. Indeed, by the peculiar system of working their vans, the defendants, although mistaken as to his identity, actually employed this man as their servant to drive their van. In *Machu v. London and South-Western Railway Company* (2 Ex. 415), it was held that where a common carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the 8th section of the Carriers' Act (11 Geo. 4, and 1 Will. 4, c. 68.) [BLACKBURN, J.—That case makes Macnamara's servants the servants of the defendants, but it does not assist the plaintiff in making out this man who called himself Clarke to be the servant of Macnamara.] Pollock, C.B., said, at p. 426, "I think that all the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of the 8th section of the Act in question." Again, at the end of his judgment: "Upon the general question, I am of opinion that whoever discharges the duty which these companies may have undertaken are to be considered, in point of law, to be their servants within the meaning of this statute." The case finds that this man received the delivery sheet from William King, who was authorised to so employ only the servants engaged, and the porter by letting him pass consented to the employment. [BLACKBURN,

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J.—It might have been a misdelivery, but that would not help the plaintiff in this action. The felony, however, must have taken place when the man first moved the van, not when he passed out of the yard.] It must be remembered that Clarke, whom this man represented himself to be, was not at the time in Macnamara's employ. [BLACKBURN, J.—There may have been negligence, or even gross negligence, on the part of defendants' servants, but that does not come within the 8th section of the Carriers' Act. Nothing is stated in the case which can estop the defendants from denying their employment of this man who committed the felony.] Having *de facto* entrusted him with the care of their van, they thereby employed him *pro hac vice* as their servant; although they made a mistake, they must be responsible as against the consignor. [BLACKBURN, J.—It does not appear that King had authority to appoint servants for this purpose.]

Day, Q.C. and Marriott, appeared for the defendants, but were not heard.

BLACKBURN, J.—I think it is impossible for us by this artificial reasoning to say that this man was a servant in the defendants' employ, when it is distinctly proved as a fact that he was not so.

QUAIN, J.—I am of the same opinion. It cannot be, under the circumstances of this case, that the defendants should be made liable by the 8th section of the Carriers' Act.

Judgment for defendants.

Solicitors for the plaintiff, Paterson, Snow, and Burney.

Solicitor for the defendants, W. H. Shaw.

COMMON PLEAS DIVISION.

Dec. 1 and 2, 1875; and Jan. 20, 1876.

RHODES AND ANOTHER v. THE AIREDALE DRAINAGE COMMISSIONERS. (a)

Arbitration under special Act incorporating the Lands Clauses Act 1845—Compensation—Actionable damage—Award—Evidence of umpire—Removal of shoals from bed of river—Lands Clauses Consolidation Act 1845—Airedale Drainage Act (24 & 25 Vict. c. 160).

By the Airedale Drainage Act (24 & 25 Vict. c. 160) the defendants were empowered to execute certain works, and by that Act it was provided that "full compensation shall from time to time after the passing of this Act . . . be made by the" defendants . . . "to the owners, occupiers, and lessees for the time being sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of this Act of the lands and hereditaments of F." . . . "and in case of dispute as to the amount of such compensation, the same shall be settled by arbitration in manner provided for the settling of questions of compensation in the Lands Clauses Consolidation Act 1845."

The plaintiffs were occupiers of lands of F., and the defendants executed works under the above Act, by reason of which the plaintiffs alleged they had, as such occupiers, sustained injury to the land of F. occupied by them. An umpire was appointed under the provisions of the Lands Clauses Consolidation Act 1845, in accordance with the above Act, who, by his award, awarded to the plaintiffs 110*l.* and costs as the "damages sustained by the

plaintiffs by reason of and consequential upon the exercise by the commissioners of the powers of the Airedale Drainage Act." At the trial the plaintiffs only put in the award, which the judge then ruled was *prima facie* evidence requiring an answer from the defendants. The defendants pleaded, first, a plea denying the validity of the award; secondly, a plea setting out the award and a special case explaining it, drawn by the arbitrator, which plea was held bad upon demurrer; thirdly, that the umpire had awarded damages beyond his jurisdiction; fourthly, that the plaintiffs had sustained no damage. The judge having ruled as above, the defendants put in, as the evidence of the umpire, by consent, the special case drawn by him explaining his award. The judge then directed a verdict for the plaintiffs. In this special case the works done by the defendants were described, *inter alia*, as the removal from the river side "of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river near the confluence therewith of the said tributaries," and the umpire further stated therein "there was no sufficient evidence before me to enable me to determine one way or the other, whether the said works, exclusive of the removal of the said shoals and weir, caused the" damage complained of.

Held, that the defendants were entitled to keep the verdict; that it sufficiently appeared that the damage was actionable damage.

Per Lord Coleridge, C.J., and Archibald, J., on the ground that the award was *prima facie* evidence against the defendants of their liability, and that the award and findings of the umpire given in evidence at the trial, showed that the damage in respect of which compensation was awarded was actionable damage, though they were of opinion that even if the damage were not actionable damage, the award would, by reason of the special clauses of the Airedale Drainage Act, be valid.

Per Amphlett, B., on the ground that the award, taken in connection with the pleadings setting out in the special case, was *prima facie* evidence against the defendants of their liability, and that it sufficiently appeared that the damage was actionable damage, though if it had not so appeared the award would, in his opinion, be invalid.

THE facts and the arguments made use of by counsel in arguing the rule are so fully discussed in the judgments that it is unnecessary to repeat them.

Manisty, Q.C., Bidder, Q.C., and Cave, Q.C. showed cause (1st and 2nd Dec. 1875).

Herschell, Q.C. and K. Digby supported the rule.

Cur adv. vult.

The following judgments were delivered on the 20th Jan. 1876.

LORD COLERIDGE, C.J.—My brother Archibald concurs in this judgment which I am about to read. This was an action on an award made by Mr. Kemplay, who was appointed umpire under the Airedale Drainage Act, a private Act passed in 1861, and with which the Lands Clauses Acts 1845 and 1860 were incorporated, "save so far as any of the sections and provisions of those Acts were expressly excepted or varied" by the Act itself. The 45th section of the private Act enacted that the arbitration should be conducted "in the manner provided for the settling of questions by

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arbitration in the Lands Clauses Act 1845;" and the Court of Common Pleas held on demurrer in this very case that Mr. Kemplay was precluded from stating a special case as he wished to do, and indeed provisionally did, to obtain the opinion of the court on certain questions of law which arose in the course of the proceedings before him. Some of these questions are raised in a less convenient form, and must be determined in our judgment upon this rule. This action is brought upon Mr. Kemplay's award for the sum of 110*l.* and costs, which he found to be the amount of "damages sustained by the plaintiffs by reason of and consequential upon the exercise by the commissioners of the powers of the Airedale Drainage Act." It was tried before me at Guildhall, when the plaintiffs contented themselves with putting in the award of Mr. Kemplay, and then closed their case. The defendants had pleaded first in effect denying the validity of the award under the Airedale Drainage Act. Next they had set out the award and special case, and pleaded a plea which has been held bad upon demurrer. Thirdly, they had pleaded that the umpire had awarded damages in respect of matters beyond his jurisdiction. Fourthly, they had pleaded that the plaintiffs had not sustained any such damage as entitled them to compensation under the provisions of the Airedale Drainage Act. The fifth and sixth pleas are not necessary to be considered for the purposes of this judgment. On this state of pleadings and proof the defendants insisted that there was nothing to go to the jury, and that a nonsuit should have been directed. Mr. Kemplay was called by them, and it was agreed that, without being formally sworn and examined, it should be taken that he had repeated in the witness-box the statements made in the special case appended to his award. No further evidence was given by the defendants, except that a witness was called to establish the fact that the defendants had no funds in hand to meet the demands made on them by the plaintiffs; but the latter evidence became immaterial as the point to which it was directed was abandoned in the argument upon the rule. On this state of the pleadings and the proof, I directed a verdict for the plaintiffs for 244*l.* 1*9s.* 8*d.*, the amount of the damages and the costs incurred in ascertaining them; and the defendants had leave to move to enter the verdict for them. The rule was obtained as a matter of convenience and by agreement to enter either a nonsuit or a verdict in the alternative, and we are now to determine whether that rule should be made absolute or discharged. It is necessary to determine first whether the evidence given by the plaintiffs, which was confined to the award, called upon the defendants for any answer; secondly, whether if it did, the statements in the special case, which are to be taken as the evidence of Mr. Kemplay, afford that answer. The solution of this latter question depends on, thirdly, whether the damage for which the plaintiffs are entitled to be compensated under the Airedale Drainage Act is such damage only as, without the Act, would have been actionable; and fourthly whether all the damage for which it appears the umpire awarded compensation to the plaintiffs was or was not such damage. It will tend to clearness, though it may at first sight appear illogical, if we consider the latter question before the former one. For if the damage giving a right to compensation under the Airedale Drainage Act

be not merely actionable damage, but injury or harm, though not actionable; or if upon the whole case taken together there should be evidence that no damage but damage otherwise actionable was, in fact, taken into account by the umpire in ascertaining the amount of compensation, then there could be no question of nonsuit, and the verdict could not be entered for the defendants; and furthermore, the authority of the cases decided upon the Lands Clauses Acts, and on statutes containing equivalent provisions to the provisions of these Acts, would be materially weakened, because those cases would not then be in point. Now the Airedale Drainage Act was passed, as the preamble recites, for the public object of improving the drainage, and thereby the health of a large district in the West Riding. It authorised the execution by the defendants of considerable works according to deposited plans and sections; and these works, which are enumerated in the 36th section of the Act, include "the removing from the river Aire of shoals and other obstructions;" and after setting out a variety of works to be executed, and conferring on the commissioners a variety of powers for the purpose of executing them, the 43rd section enacts, in the first portion of it, as follows: "In the execution of this Act the commissioners shall do as little damage as may be, and subject to the provisions of this Act shall make, to all parties entitled, compensation for all damage or injury so done." It has already been mentioned that the Lands Clauses Acts are incorporated with the Special Act. Then follow two clauses in favour of two sets of properties, the language of which clauses is the same, except as to the properties affected by them. The 44th is in favour of the owners, lessees, and occupiers of the lands commonly known as the Riddlesden Hall Estate and Lenton Farm. The 45th, under which the present plaintiffs claim, is as follows: "Full compensation shall, from time to time, after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works by this Act authorised, be made by the commissioners out of the rates to be levied under this Act to the owners, lessees, and occupiers for the time being, sustaining any damage by reason or in any way consequential upon the exercise of any of the powers of this Act of the lands and hereditaments of William Ferrand, Esq., situate, &c.; and in case of dispute as to the amount of compensation, the same shall be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845." The plaintiffs are tenants of Mr. Ferrand, and claim under this section; and the question is, in respect of what have they a right to claim? In respect of actionable damage only, say the defendants. The Lands Clauses Acts are incorporated, and a long series of decisions, too numerous and uniform to be now disputed, has settled that the damage for which compensation can be recovered under the procedure enacted by the Act of 1845 is actionable damage only. The words of the 45th section of the Airedale Drainage Act are no wider than the words in the analogous sections in the Public Health Act and the Waterworks Clauses Act. They are substantially the same, and under these last-mentioned Acts the courts have uniformly confined the damage

recoverable to actionable damages. *The New River Company v. Johnson* (2 E. & E. 435; 6 Jur. N. S. 374; 29 L. J. 93, M. C.; 8 W. Rep. 179), decided upon 10 & 11 Vict. c. 17, s. 12 (The Waterworks Clauses Act); *Hall v The Mayor, &c., of Bristol* (15 L. T. Rep. N. S. 573; L. Rep. 2 C. P. 322; 36 L. J. 110, C. P.), decided on 11 & 12 Vict. c. 63, s. 144 (The Public Health Act 1848), are, no doubt, authorities for this proposition. The Legislature, in using the word "damage," use a word to which a legal meaning had already been affixed by judicial decisions, and must be taken to have used it in the sense ascertained by those decisions, i.e., "actionable damage." Nor are the defendants driven to admit that the 44th and 45th sections do not give the persons in whose favour they are enacted any greater or better protection than they already had under the words of the 43rd. For under the 44th and 45th sections, the compensation for damage may be ascertained and awarded "from time to time," during a period of twenty years; whereas, under the 43rd, as to all other persons than those protected by the 44th and 45th sections, it can be ascertained and awarded only once for all. These considerations are, no doubt, of great weight, but there are considerations on the other side of equal weight, or greater. It is difficult, say the plaintiffs, to believe that the 44th and 45th sections would have been inserted in the Act in their present shape, merely to provide that compensation under them might be ascertained and awarded more than once. These sections appear to have intended to give the persons in whose favour they were passed, a remedy wider and larger than the Lands Clauses Act would give. They were the price paid for procuring the acquiescence of certain powerful persons in the passing of the Act, and it is to reduce the price almost to nothing to construe them as suggested by the defendants. For the permanent liability to injury is a permanent injury to the property, which might be taken into account on a single assessment of compensation. In the first words of the 43rd section, "the commissioners shall do as little damage as may be," it is plain that "damage" is used in the broad sense of harm or mischief. The interpretation of the public Acts already referred to is, indeed, now established; but it has been established not without resistance, and the acquiescence of the House of Lords in that interpretation has been by no means hearty or unqualified; and in such an Act as this there is good reason why compensation may have been given for damage not actionable; because the commissioners are clothed with large and varied powers to execute large and varied works, and may, and probably do, exercise these powers to do damage, in the sense of harm or mischief, which, although not actionable, it is plain no individual would be likely to do, and which very few individuals could do. If, therefore, the decision of this case turned upon this point, we should have been prepared to hold that these two sections did go, in their true meaning, beyond the sections of the Acts which have been referred to and decided on; and that compensation was intended to be given by them for damage other than actionable damage. The decision of the case, however, does not turn upon it; because we think that construing the award by the language of the special case, no damage except actionable damage has been included by the umpire in the subject-matter of

his award of compensation. For this purpose we assume (what we have still to discuss) that the award is evidence, and that the statements of the umpire as to his findings are evidence also. The whole controversy as to this point between the plaintiffs and defendants, turned upon the true construction of his language, as to the removal of certain shoals, and upon the question, what kind of removal had taken place in point of fact, and how far that removal, assuming it to have been actionable in point of law, was found by the umpire to have caused any harm in point of fact. It is plain that if the umpire has admitted that he considered and awarded compensation for a matter not within the Act, his award is invalid. He has awarded a lump sum, and if part of the claims for which that lump sum has been given is bad, the whole award is bad also. *The Duke of Buccleugh v. The Metropolitan Board of Works* (L. Rep. 3 Ex. 306; L. Rep. 5 Ex. 221; Ex. Ch.); L. Rep. 5 H. of L. Cas. 418; 18 L. T. Rep. N. S. 906; 23 L. T. Rep. N. S. 255 (Ex. Ch.); 37 L. T. Rep. N. S. 1 (H. of L. Cas.), and the case of *The Dare Valley Railway Company* (L. Rep. 6 Eq. 429; 37 L. J. 719, Ch.) are conclusive as to this. It is important, therefore, to state with accuracy what it is which the umpire has done. He has described the acts of the defendants in respect to shoals; the removal from the river Ayre "of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river, near the confluence therewith of the said tributaries." This is what the defendants did. Then he finds that the plaintiffs "sustained damage . . . by reason of, and consequential upon the execution by the commissioners (i.e., the defendants) of all the said works," including therein the removal of the shoals above-mentioned. He, however, complicates the question, it must be admitted, by immediately appending the following words: "There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, exclusive of the removal of the said shoals and weir aforesaid, caused the farm, on the occurring of the said floodings, to be flooded to greater extents, or for longer periods of time, or to be more damaged than it otherwise would have been." The fair construction, however, of the umpire's language appears to us to be, that the removal of the shoals with other works, and as an appreciable ingredient in the whole result, did damage (we will here say it in the sense of harm or mischief) to the plaintiffs. We further think that the fair meaning of the umpire's description of the work as to the shoals is, that there was a dealing by the defendants with the bed of the stream, beyond that mere scouring which riparian proprietors would have a right to do, supposing, which we doubt, that what a riparian proprietor might do without liability to action could, as a matter of course, be done by the defendants without a liability. We understand the umpire also to describe the removal by the defendants of long standing accumulations, of which, although some portions may have been of recent accretion, the substance must be of great, though unascertained, age. Damage accruing from such acts is clearly, in our judgment, actionable damage. We acknowledge the authority of the cases quoted to us by the defendants' counsel, to the effect that cleansing and scouring of a river

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bed, so as to keep the stream in its accustomed course, and at its accustomed level, is not only permissible in, but obligatory upon, a riparian owner. This is the effect of the *dictum* of Lord Holt in *The King v. Wharton* (12 Mod. 510) of a passage in Rolle's Abridgement, Nusans, A., and of what is attributed to Lee, C.J., in *Brown v. Best* (1 Wil. 174), and we have no intention of questioning the law there laid down. But it is equally clear that a substantial interference with the bed of a stream so as to increase or diminish the flow of water to the detriment of other riparian owners is a thing actionable in itself, and that damage resulting therefrom is actionable damage. It was so held by Lord Thurlow in *Robinson v. Lord Byron* (1 Brown's Ch. Cas. 588), quoted in Goddard on Easements 284, and by the House of Lords in *Bicket v. Morris* (L. Rep. Scotch App. 47; 14 L. T. Rep. N. S. 835), a case to which our attention was drawn with great minuteness by the plaintiffs' counsel. The words of the Airedale Drainage Act itself appear to contemplate such a substantial dealing with the bed of the river by the defendants, and we think that on the findings in the special case, their dealing must be taken to have been such a dealing in point of fact. We are, therefore, of opinion that even on the view of the language of the 45th section of the Airedale Drainage Act most favourable to the defendants, there has been no damage considered by the umpire in ascertaining the amount of compensation, except damage that is actionable. This, however, assumes that the award of the umpire is some evidence of the facts on which it is founded, and that the statements of the umpire, as to what entered into his consideration in ascertaining the amount of damage, are some evidence of the facts which he considered. Whether this is so or not is the only point which remains to be discussed. It is one point, because if the award of the amount of compensation for damage be *prima facie* evidence that the damage in respect of which the compensation was awarded was actionable, the findings of the umpire, which are in truth a mere explanation of his award, are *prima facie* evidence of the facts necessary to, or implied in the findings and of the award, is no evidence, neither are the findings. Now, the award is part of a proceeding under an Act of Parliament, in and by which the jurisdiction of the arbitrator is (for the purpose of this part of the discussion we must assume) confined to awarding compensation for actionable damage. In this respect it is strictly analogous to the proceedings taken before the under-sheriff and a compensation jury, who can give compensation only for damage which is actionable. In such a case, if some claims made are in respect of damage, which is not the subject of compensation, it was said by Lord Cranworth in *The Caledonian Railway Company v. Ogilvy* (2 Macqueen, 229) that it is the duty of the sheriff or under-sheriff to point out to the jury which kind of damage is the subject of compensation and which is not. The award is good upon the face of it; the compensation is to be presumed to be according to the claim. (See Russell on Arbitrators, 433, 4th edit.) As to the umpire it is to be presumed, until the contrary appears, that he kept within his jurisdiction, and did not receive evidence of damage which was not the subject matter of compensation under the Act. As to the compensation the claim is made under the Act and for the

compensation given by the Act, and it is to be presumed till the contrary appears that the compensation following the claim has only been given for damage within the Act under which it is claimed. In most of the decided cases the want of jurisdiction is apparent on the face of the awards set out in them. But in the case before us the claim is made, and the compensation is awarded for damages in general terms; and it must be presumed, until the contrary is shown, that the umpire did not make his award as to matters over which he had no jurisdiction. To hold the contrary, as we have been pressed to do, would lead to consequences of which the barest statement is very startling, and if the argument *ab inconvenienti* can ever have a legitimate place in legal reasoning, it surely should have place here. In this case an eminent lawyer has ascertained the fact of damage necessary in order to arrive at the amount of compensation after the most careful and prolonged inquiry, on the examination of the most skilful men of science on each side, and at an expense of more than 2000*l.* It is not denied that this is not conclusive. However eminent the umpire or expensive the inquiry, it is admitted that the defendants, as they may plead, so may prove that the umpire has been mistaken as to the extent of his jurisdiction, and that his award is invalid. What is contended for on the part of the defendants is that the award and evidence of the umpire is not even *prima facie* evidence against them, and that the plaintiffs must, apart altogether from the award, prove in an action upon it what has been variously called a shilling's worth of actionable damage or a cause of action. But in such a case as this, that means, it is manifest, that they must prove their whole case over again, for almost the whole of the evidence was directed to making out, and almost the whole of the expense was incurred in establishing, the fact of injury, rather than the amount of compensation to be paid for it; and the expense and time consumed in proving a shilling's worth might be as much as that consumed in proving 20,000*l.* worth of actionable damage. Such a view of the law needs authority to support it. If authority could be found we should have deferred to it, whatever our own opinion might be, and have left our judgment to be set right, if wrong, upon appeal. But as far as we are aware there is no such authority; certainly none of the cases cited to us warrant any such conclusion. There is no doubt that it has been determined that the powers of the compensation jury (and therefore of the arbitrator or umpire) are limited to determining the fact of damage and its amount, leaving the question of right to be determined, if it is disputed, in an action on the judgment or award. This was held in the case of the *Queen v. London and North-Western Railway Company* (3 E. & B. 443); in which Sir John Coleridge elaborately reviews the earlier cases, both at law and in equity, and especially the conflicting decisions of Lord Cottenham in the *London and North-Western Railway Company v. Smith* (1 Mac. & G. 216; 19 L. J. 193, Ch.) and of Lord Truro in the *East and West India Docks v. Gatliffe* (3 Mac. & G. 155; 20 L. J. 217, Ch.). But it is nowhere suggested, either in the judgment or in argument, that though the finding of the jury might be impeached in the action, it was no evidence, whether impeached or not. Indeed, the proceeding in that case to bring the inquisition up and quash it, would have been

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useless: if unquashed it was not even a step in proof in an action brought upon it. The case of *Bradby v. Southampton Local Board* (4 E. & B. 1014; 24 L. J. 239, Q. B.) seems, though perhaps not directly in point, yet to lean strongly against the defendants. There had been an *ex parte* award against the Local Board. The Local Board admitted their liability if there had been damage, and the plaintiff's right to the land affected; but they denied that any actionable damage had been done, and unless it had been done, they contended that there was no dispute as to the amount of compensation, and that the award was without jurisdiction. The court held otherwise. They said that the only question at issue was the fact of damage and the amount, and that the arbitrator had jurisdiction. But this must have meant that the award ascertained the fact of actionable damage, till it was impeached, and that it cast upon the Local Board a *prima facie* liability to pay the sum awarded. The cases of *Read v. Victoria Station, &c., Railway Co.* (1 H. & C. 826; 32 L. J. 167, Ex.); and *Barber v. Nottingham, &c., Railway Co.* (15 C. B., N. S., 726; 33 L. J. 193, C. P.; 9 L. T. Rep. N. S. 829), were both decided on demurrer, and established only that you may plead against the finding of a jury, or arbitrator, which is not here disputed. In the case of the *Duke of Buccleugh v. The Metropolitan Board of Works* questions of law arose. But so far as can be gathered from the report, the report and award of the arbitrator, in general terms and good upon the face of it, was taken as *prima facie* evidence that damage within the statute had been sustained. In *Beckett v. The Midland Railway Co.* (L. Rep. 3 C. P. 82; 17 L. T. Rep. N. S. 499; 37 L. J. 11, C. P.) other evidence besides the award seems to have been given. In that case, however, the award merely stated that a narrowing of a road had injuriously affected the plaintiffs' house, without going on to say whether the injury and depreciation was temporary or permanent, a permanent narrowing of a roadway being within the statute, whereas a temporary one is not. The last case which it is necessary to consider is *Chapman v. Monmouth Railway and Canal Company* (2 H. & N. 267; 27 L. J. 97, Ex.). This case is the only one in which, so far as I know, it has ever been suggested that an award of this sort was not evidence for a jury. In this case no doubt the point was taken. But there is no decision upon, or even allusion to, the point in the judgment of the court. At the trial of the case at Nisi Prius Mr. Justice Willes, as he expressly stated, intended deliberately to disregard and indeed overrule the decision of the Queen's Bench in the case of the *Queen v. London and North-Western Railway Company* (3 E. & B. 443), already referred to, and he held the finding of the jury conclusive upon the title as well as upon the fact and amount of damage, and refused to receive evidence to impeach it. The judgment of the Court of Exchequer is confined to this single point, and the rule was made absolute for a new trial on the short and single ground that the court held itself bound by the case which Willes, J., had proposed to overrule. This is the only case, so far as I am aware, in which the point now insisted on appears to have been taken. It cannot be said to have been at all favoured by the judgment. It appears to us, in the absence of authority to be untenable, and we are aware of no authority which gives it countenance.

On the three important points, therefore, insisted on by the defendants we have come to a conclusion adverse to their contention—on the construction of the 45th section of the Aire and Don Drainage Act (a point perhaps not necessary to be decided), on the character of the works executed by the defendants, and on the quality of the damage resulting from them, and lastly on the effect of the award and findings of the umpire. For these reasons it follows that we are of opinion that this rule should be discharged.

AMPHLETT, B.—The first question which I think it will be convenient to consider in this case is whether the damage for which compensation can be claimed under the 45th clause of the Drainage Act is confined to actionable damage. Now it could not be, and was not, in fact, denied on the part of the plaintiffs that by a long series of cases of which I need only mention the *Caledonian Railway Company v. Ogilvy* (2 Mac. 229), it is perfectly settled that the right to compensation under the 68th section of the Lands Clauses Act 1845 is limited to actionable damage. It is true that the language of the 68th section of the Lands Clauses Act, which speaks of lands "being injuriously affected," is slightly more favourable to the limited construction, but the courts have adopted the same construction in analogous cases where the language used was practically identical with that of the clause we are considering.—In *The New River Company v. Johnson* (2 E. & E. 435; 29 L. J. 93, M. C.) under the Waterworks Clauses Act (10 & 11 Vict. c. 17) where the words were "that in the exercise of the powers conferred by the Act the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers;" and in *Hall v. The Mayor, &c. of Bristol* (L. Rep. 2 C. P. 322; 15 L. T. Rep. N. S. 572; 36 L. J. 110, C. P.) under the Public Health Act (11 & 12 Vict. c. 63) where the words were "that full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." I cannot but think, under these circumstances, that it would be very undesirable on light grounds to disturb this unanimity of decision upon a point constantly arising in practice, and which with the single example of Lord Westbury in *Ricket v. Metropolitan Railway Company* (16 L. T. Rep. N. S. 542, 547; L. Rep. 2 H. L. 176, 200), has been approved of on general grounds by almost all who have taken part in such decisions. But it was argued on the part of the plaintiffs that the Legislature must have used the word "damage" in a more extended sense in the 45th section, since otherwise that section would have given the owners and occupiers of the lands mentioned therein no further protection than they would be entitled to under the Lands Clauses Act. I think, however, that there are two answers to that argument. First, having regard to the decision in the *King v. The Directors of the Bristol Dock Company* (12 East, 429); and the language of Lords Cranworth and St. Leonards in the *Caledonian Railway Company v. Ogilvy* (*sup.*), I think it would be an arguable question (and that is sufficient for this purpose) whether persons who have rights in respect of a public road or a public river, the same in principle, but different in degree from other people, could claim compensation under the Lands Clauses Act for damage either to one or the other

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which was authorised by Act of Parliament; secondly, the compensation given by the 45th clause of the Drainage Act is quite different from that given by the Lands Clauses Act. In the latter case compensation is given once for all, whereas in the former case it is to be given from time to time, the reason, no doubt, for which was that as the only damage that could accrue to the lowerlands from the improved drainage of the upper would be at flood times it would be impossible to estimate the damage except when the floods happened. These reasons satisfactorily account for the introduction of the special clauses without supposing the Legislature intended to enlarge the subject matter of compensation. Indeed, looking at the object of the Act, which was for the more effectual drainage of a large tract of country, which is expressly recited to be, as it manifestly was, for the public benefit, it is difficult to suppose that the Legislature intended that the commissioners in the execution of their duties should be hampered by claims for compensation in respect of acts which the riparian proprietors had a common law right to do with impunity, and if the Legislature had any such intention, it is strange that they should have used language which had already at that time acquired by judicial decision a more limited sense. In my judgment, therefore, the first point ought to be decided, if it should be necessary, in favour of defendants. Then arises a question how the amount of such actionable damage (if any) is to be ascertained. By the terms of the Act in case of dispute such amount is to be settled by arbitration as provided in the Lands Clauses Act, and it is now settled, after a great conflict of opinion among the judges, that the jurisdiction of the arbitrator, or in this case the umpire, is confined to settling the amount, and does not enable them to determine what is or is not actionable damage as distinguished from damage in fact. *The Queen v. The London and North Western Railway Company (sup.)*, *Chapman v. The Monmouthshire Railway Company* (2 H. & N. 267; 27 L. J. 97, Ex.), *Bradley v. The Southampton Local Board of Health (sup.)*, and numerous other cases are to be found in the reports, where the same point is either decided or recognised. It follows from these decisions that after the award it is competent to the defendants in an action to recover the amount awarded to deny that there was any actionable damage, and if they succeed in that issue the award will fall to the ground. So far I think there is at the present day no room for controversy, but then in the present case, since the plaintiffs produced no evidence but the award itself, the question arises whether the award, though *ex concessis* not conclusive, is not *prima facie* evidence of actionable damage. On the part of the defendants in this case it may be said that it would be very extraordinary to hold that the finding of the umpire in a matter in respect of which, according to the decision, he had no jurisdiction at all should, nevertheless, have the effect of changing the *onus probandi* from the plaintiffs to the defendants, which might in some cases, and probably in this, be of vital importance, and the remarks of Coleridge, J., at the end of his elaborate judgment in *The Queen v. The London and North Western Railway Company (sup.)*, as to the inconvenience of even a preliminary and inconclusive inquiry when there is to

be a second and conclusive trial, are well worth attending to. Those remarks, however, were made in a case where the damage was capable of being assessed on the assumption that the road alleged to be stopped was a public road. Without going into the question whether that assumption was correct in point of fact or not, it does not apply in a case like this, when it was absolutely necessary for the umpire to ascertain from what acts of the defendants the damage arose, and certainly it would be a most lamentable waste of time and money to prove that matter over again in the action. Upon the whole I am of opinion that these conflicting views may be best reconciled by holding, as I am disposed to do, that the award ought to be taken as *prima facie* evidence of the particular acts which give rise to the damage, but not any evidence at all on the question whether such damage was actionable or not, that being according to the decisions altogether beyond the jurisdiction of the umpire to determine. The only question then which remains is whether the finding of the umpire in respect of those acts enable the court to decide that the damage arising from them is all actionable; for if they do I think there was a case on the mere evidence of the award when put in which called upon the defendants for an answer. Now if the case had depended upon the first part of the award, before we came to the special case, I should have thought the court could not have so decided, because it merely finds that the damages assessed arose from the exercise of the powers of the Act, some of which extend to acts which might have been done by the landowners without making themselves liable to an action, and there would be nothing in the award itself to show that the damages attributable to the last mentioned acts were excluded. I think, however, that the latter part of the award ought not to be excluded altogether from consideration, and that we must read the award by the light of the facts subsequently stated in the special case. Now, it is there stated, sect. 6, that there were four distinct classes of works taken into consideration by the umpire: First, diversions of tributaries; second, new cuts; third, removal of shoals; fourth, removal of weir, and all these, excepting perhaps the removal of the shoals, of which I shall say a word presently, were clearly acts in respect of which damage would be actionable. Probably from not having seen the evidence, or knowing the way in which the case was shaped before the umpire, I find it very difficult to ascertain the exact meaning of the subsequent findings, but I think it must be taken to be this: The damage I have assessed has been occasioned by the four classes of works I have mentioned. I have ascertained that the removal of the weir made no substantial difference, and I am unable to ascertain whether the works, exclusive of the shoals or weir, would or would not have produced damage. This amounts, in my opinion, to a finding that the damage was caused by the conjoint result of three acts, and that the proportion due to each it was impossible to ascertain, and if that is so, the damage would be actionable, although that arising from one of these acts, if it could have been assessed separately, would not have been so. Entertaining this view of the construction of the award it is unnecessary to determine whether damage from the removal of the shoals alone

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would have been actionable. I will only say, therefore, that I think that question one of considerable difficulty, and on which very little authority can be found in the books, and I should be very reluctant to decide it without having before me all material circumstances both as to the formation and as to the removal of the shoals. For the above reasons, I think that it sufficiently appears from the award itself, that the damage assessed was actionable damage, and that consequently the rule ought to be discharged.

Rule discharged.

NOTE.—This decision has since been reversed: (35 L. T. Rep. N. S. 46. Ct. of App.)

Solicitors for the plaintiffs, *Field and Roscoe*, agents for *Taylor, Jeffery, and Co.*, of Bradford.

Solicitors for the defendants, *Phelps and Sidgwick*, agents for *Brown*, of Skipton.

Friday, Jan. 28.

McCORQUODALE AND ANOTHER v. BELL AND ANOTHER. (a)

Inspection of documents—Privilege—Confidential communications.

The statement of claim alleged that the defendants with others unlawfully conspired to prevent a certain tender sent in by the plaintiffs to the Great Western Railway Company for printing and stationery required by that company from being accepted, and that in order to carry out their design they induced a servant of that company to allow the defendants to open the plaintiffs' tender improperly, and inspect the prices at which the plaintiffs tendered, whereby the defendants were enabled to tender at prices slightly lower than the plaintiffs, and so obtain the desired contract with the Great Western Railway, to the exclusion of the plaintiffs.

On a summons for inspection by one of the defendants of documents, it was held by the court that letters written by the plaintiffs to their solicitor relating to the action, and also letters received by the plaintiffs' solicitor from the solicitor of the Great Western Railway Company containing the result of an investigation into the matter of the tenders made at the request of the plaintiffs' solicitor and for the purpose of procuring evidence in the action were privileged from inspection.

The cases of Cossey v. London Brighton and South Coast Railway Company (22 L. T. Rep. N. S. 19; L. Rep. 5 C. P. 146); Skinner v. Great Northern Railway Company (L. Rep. 9 Ex. 298; 43 L. J. 150, Ex.); Fenner v. London and South-Eastern Railway Company (26 L. T. Rep. N. S. 971; L. Rep. 7 Q. B. 767); considered and explained.

Held also, that the fact that the documents were written to the plaintiffs' solicitor "in confidence" would not be a sufficient ground for refusing to grant inspection of them.

In the year 1874 the plaintiffs tendered for the supply of printing and stationery to the Great Western Railway Company. The defendants also tendered for the supply of the same, and their tender being, when the tenders were officially opened, the lowest was accepted. The plaintiffs then commenced an action against the defendants, alleging in their statement of claim that the defendants with others

had unlawfully and maliciously confederated and agreed together to prevent the railway company from contracting with the plaintiffs, and to induce them to contract with the defendants, and that in pursuance of such confederacy and agreement the defendants and the said other persons induced a servant of the company to allow the defendants to open the plaintiffs' tender improperly, and inspect the prices at which the plaintiffs tendered, and that the defendants then altered some of the prices in their own tender to prices slightly lower than the plaintiffs, and so obtained the desired contract with the company to the exclusion of the plaintiffs.

One of the defendants obtained an order for discovery of documents by the plaintiffs. This order was complied with by the plaintiffs, who made an affidavit setting out the various documents, but objecting to the production of the documents set out in the second part of the schedule of their affidavit. Their objection was thus worded: "We object to produce the documents in the second part of the said schedule on the ground that such letters as were written and sent by ourselves or one of us, or by James Wighton, the manager of our business in Southwark, and David Davidson, the accountant in our business at Newton-le-Willows, Lancashire, to Messrs. Baker and Nairne or Mr. Percival A. Nairne, were written to the said Messrs. Baker and Nairne or to the said P. A. Nairne, as solicitor, for us or for one of us in this action, and that such of the letters as are therein mentioned as having been sent by Baker and Nairne to us or either of us were written and sent by Baker and Nairne as our solicitors, and that such of the letters as are mentioned to have been written and sent by Mr. Nelson, the solicitor of the Great Western Railway Company to our solicitors, were written and sent by the said Mr. Nelson for the confidential and private information of our said solicitors, and were accordingly so marked by the said Mr. Nelson (as we are informed and believed) previously to their having been received by our said solicitors; and for the reasons aforesaid we object to produce the above-mentioned documents mentioned and set forth in the second part of the said schedule."

The defendants then applied at chambers for an order to inspect all the documents scheduled by the plaintiffs, and this application was referred by the judge at chambers, Archibald, J. to the court.

Upon the hearing before the court the plaintiffs' attorney filed an additional affidavit, the material parts of which were as follows:

4. In or about the month of February 1875 I was consulted by the plaintiffs upon certain information which had reached them with regard to the manner in which they had been deprived of the contract, and the defendants had obtained it. I was instructed to conduct, on behalf of the plaintiffs, certain inquiries to ascertain the truth or falseness of that information, and to enable the plaintiffs to commence such proceedings as they might be advised, if the information should turn out to be true.

5. The information which the plaintiffs had received with regard to their said tender was to the effect that after their said tender had been delivered to the railway company, and before it and the other tenders sent in by other persons had been considered and accepted or rejected, the defendants, who had also delivered a similar tender to the

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company, and certain other persons acting in concert with them, had in an improper manner obtained access thereto for the purpose of comparing the prices set out in the plaintiffs' tender with those set forth in their own tender, and with the knowledge by that means obtained, and by altering the prices set out in the defendants' tender so as to make their prices lower than the prices set out in the plaintiffs' tender, the defendants obtained the said contract.

6. By the instructions of the plaintiffs I called upon Mr. Nelson, the solicitor of the Great Western Railway Company, and informed him of the statements which had been made to the plaintiffs and to me as their solicitor. The statements implicated certain servants of the Great Western Railway Company as well as the defendants, who were then the company's contractors. I requested Mr. Nelson to make such an investigation of the circumstances as he might be able, and to let me know the result. This he agreed to do, on the stipulation that all communications from him to me would come from him to me as the solicitor of the plaintiffs, and would be for the confidential use of the plaintiffs and of myself on their behalf. . . .

7. My object and the object of the plaintiffs in making these communications to and inquiries from Mr. Nelson was to ascertain the exact circumstances under which the defendants had succeeded in obtaining the contract of the Great Western Railway Company, with a view to the institution of proceedings against the defendants. This action is the result of those inquiries and communications and of the information thus obtained.

Francis, on behalf of the defendants, moved for an order to inspect the documents, the inspection of which was objected to. The fact that the information was intended to be private or confidential, or that the letters are marked "private," is no ground for withholding inspection of them.

Goodall v. Little, 1 Sim., N.S. 155; 20 L. J. 132, Ch.;
Richardson v. Hastings, 7 Beav. 354;
Hopkinson v. Lord Burghley, L. Rep. 2 Ch. 447.

This is an application falling within the principle of *Fenner v. London and South-Eastern Railway Company* (L. Rep. 7 Q. B. 767, 771; 26 L. T. Rep., N. S. 971), which is that every thing which falls short of being rough notes for the brief at the trial must be disclosed. [DENMAN, J.—The 6th and 7th paragraphs of the affidavit of the plaintiffs' solicitor bring this case within the case of *Cossey v. London, Brighton, and South Coast Railway Company* (L. Rep. 5 C. P. 146; 22 L. T. Rep. N. S. 19.) LINDLEY, J., referred to *Ross v. Gibbs* (L. Rep. 8 Eq. 522; 39 L. J. 61, Ch.) The case of *Cossey v. London, Brighton, and South Coast Railway Company* (sup.) is at variance with the more recent cases, and differs from the present case in this, that there the object of the application was to pry into an opponent's case.

English Harrison (contra).—The case of *Cossey v. London, Brighton, and South Coast Railway Company*, was followed by the Court of Exchequer in the case of *Skinner v. Great Northern Railway Company* (L. Rep. 9 Ex. 208; 43 L. J. 150, Ex.), that court expressly adopting the rules laid down in that case in preference to those of the case of *Fenner v. London and South-Eastern Railway Company* (sup.). The case of *Ross v.*

Gibbs (L. Rep. 8 Eq. 522, 524; 39 L. J. 61, Ch.), is a case where the rule to be applied to cases such as the present is laid down by Stuart, V.C.; he says, "communications with a professional or even an unprofessional agent in anticipation of the litigation, and with a view to the prosecution of a claim or a defence against a claim, being confidential, are privileged." He also cited *Simpson v. Brown* (33 Beav. 482).

BRETT, J.—This is an application by a defendant for the inspection of certain documents, which the plaintiffs object to produce for that purpose. The grounds of their objections are that they are either communications between themselves and their solicitors, or between their solicitors and the solicitor or secretary of the Great Western Railway Company, with a view to litigation and for the purpose of procuring information and evidence for use in the present action. I am of opinion that, following the principles which have usually guided judges in chambers and in court in similar cases, we should make no order for inspection of the disputed documents. I do not think inspection can be refused on the ground that the documents in question were written privately and confidentially, even though the writer may have stipulated that they should be treated as private and confidential. That is not a ground of privilege. Neither do I think that the documents can be withheld merely on the ground that they are answers to inquiries made by the plaintiffs or their solicitors of third parties, and that they have reference to the subject matter of the present litigation. But I think that as they were procured with a view to anticipated litigation and for the purposes of such litigation, and for the purpose of enabling the plaintiffs to carry on such litigation successfully, they are privileged from inspection. I know of no case laying down a contrary rule; it was so laid down by this court in *Cossey v. London, Brighton, and South Coast Railway Company*, which was followed by the Court of Exchequer in *Skinner v. Great Northern Railway Company*. The same rule seems to have been previously adopted in the Court of Chancery in *Ross v. Gibbs*. (a) It is said that the case of *Fenner v. London and South Eastern Railway Company* is at variance with these decisions. I think that that is not so. I think that if the precise point there taken is considered, it will be found that the cases of *Cossey v. London, Brighton, and South Coast Railway Company* and *Skinner v. Great Northern Railway Company* are perfectly consistent with it. The precise point decided in *Fenner v. London and South Eastern Railway Company* is that stated in the judgment of Blackburn, J., "Mr. Willis," he says, "contended broadly that as they were answers to questions put by the defendants after litigation was impending, they were necessarily privileged, and if I had thought that there was any such general rule, I should have refused to make the order." Mr. Willis, therefore, did not contend that the documents in that case were obtained with a view to assist in the conduct of the litigation, or to guide its course. Then further on the learned judge is reported as putting a case of anticipated litigation, and of questions asked with a view to guide the party

(a) See upon this case the observations of James, L. J., in *Anderson v. The Bank of British Columbia* (35 L. T. Rep. N. S. 76).

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inquiring as to whether he shall resist the claim or not, and he says, "if such had been the fact, I should, in the exercise of the discretion which I think is vested in a judge, have refrained from ordering the inspection of the answer to that letter, without determining whether I had the power to order it or not." (b) In a case of *Malden v. Great Northern Railway Company* (L. Rep. 9 Ex. 300) I find that the same learned judge says, "If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation has commenced (which is the case with all these letters), is it not *prima facie* a privileged communication, unless you show some reason to the contrary?" With respect to documents which are brought into being with a view to the conduct of litigation either already commenced or anticipated, I conceive the doctrine of all the courts to be of accord. I think, therefore, taking the allegations contained in the affidavits as a whole, that there should be no order for inspection.

DENMAN, J.—I am of the same opinion. This is an application for the production and inspection of documents in the possession of the plaintiffs. There are two objections to the inspection taken by the affidavits used on behalf of the plaintiffs. First, that the documents are confidential communications received from the solicitor for the Great Western Railway Company, and that they were received only on the express agreement or understanding that they should be treated as private and confidential communications. That ground, however, forms no legal excuse for declining production. The second ground, also taken by the affidavits, appears to me to furnish a valid legal reason for refusing to order the desired production and inspection. It is, that these were communications made with reference to and in contemplation of the litigation now in progress, and passing confidentially between the plaintiffs and their own solicitors, or the solicitor, or secretary, of the Great Western Railway Company, and the plaintiffs' solicitors, and procured by the solicitors of the plaintiffs, or sent by the plaintiffs themselves to their solicitors, for the purpose of getting up the plaintiffs' case. There is no contradiction of the affidavits, and we have no reason to do otherwise than rely upon them as accurate. The case then falls within the principle of the cases of *Cossey v. London, Brighton, and South Coast Railway Company* (22 L. T. Rep. N. S. 19; L. Rep. 5 C. P. 146), which was approved and acted upon in *Skinner v. The Great Northern Railway Company* (L. Rep. 9 Ex. 298). Then it is urged upon us that these decisions are opposed to a case of *Fenner v. The London and South-Eastern Railway Company*. I, however, see no difficulty in reconciling these cases, but even if I thought the rule laid down in this court and in the Exchequer strict and too rigid, still I should say that there is no ground here for holding that it would be a proper exercise of discretion to grant the inspection prayed.

LINDLEY, J.—I am of the same opinion. These

(b) It would seem that since the assimilation of the practice of the courts of law and of equity the judge has no longer a discretion: (*English v. Tottie*, 33 L. T. Rep. N. S. 724; L. Rep. 1 Q. B. Div. 141, 143; *Bustros v. White*, L. Rep. 1 Q. B. Div. 423; 34 L. T. Rep. N. S. 835.)

documents are admitted to be documents relating to the subject matter of the action; therefore it follows that *prima facie* the defendants are entitled to inspect them, and that it lies upon the plaintiffs to show some reason for their conduct in resisting inspection. The first reason assigned, namely, that they were written and sent by the solicitor or secretary of the Great Western Railway Company for the confidential and private information of the plaintiffs' solicitors, is clearly insufficient to protect the documents from inspection. But when we look at the facts as disclosed in the second affidavit filed on behalf of the plaintiffs, we find the state of matters to be as follows: The plaintiffs' solicitors set about getting information for the purpose of the action, which they have instructions to bring, if they can do so, against the defendants on behalf of the plaintiffs; in the course of so doing, they apply to the solicitor to the Great Western Railway Company, and to others, to see what evidence they could obtain. It is as though the plaintiffs' solicitors had employed their own clerks to obtain the information, and had received from them letters containing the results. In the case of *Fenner v. The London and South-Eastern Railway Company* there was nothing to show that the documents in question were documents which had been obtained for the purposes of litigation, either pending or anticipated. That case, as has been shown by my brother Brett, can be regarded as in unison with the other cases cited. *Rule refused.*

Solicitors for plaintiffs, *Baker and Nairne*.

Solicitors for defendants, *Courtenay and Croome*.

Friday, Feb. 18.

PLEVINS v. DOWNING. (a)

Sale of goods—Statute of Frauds—Parol variation of written contract—29 Car. 2, c. 3, sect. 17.

The defendant signed a bought note as follows:

"Bought of Messrs. Plevins and Co. 100 tons of grey forge pig iron at 75s. per ton, delivered to my works. Payment in cash less 2½ per cent. discount, on the 10th of each month following delivery. Delivery 25 tons at once, and 75 tons in July next." The first 25 tons were delivered at once, and 50 tons more were delivered in July. On the 15th Oct. the manager of the plaintiffs met the defendant, who said to him, "You have not sent any pigs lately," to which the plaintiffs' manager replied, "I will send a boat this week," and accordingly the plaintiffs sent 25 tons directed to the defendant; but the iron was not sent to the defendant's works, and the defendant, on being informed by letter of the dispatch of iron, wrote to refuse it.

Held, that as the non-delivery in July, according to the contract, was not at the request of the defendant, the plaintiffs could not recover on the original contract, and that there was no evidence of any new contract valid in law.

The facts are sufficiently stated in judgment of the court, and also in the head note above.

The case was tried before Quain, J., at Stafford, and resulted in a verdict being, by direction of the learned judge, entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them.

(a) Reported by CYRIL DODD, Esq., Barrister-at-Law.

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H. Matthews, Q.C. obtained a rule *nisi* pursuant to the leave reserved.

Powell, Q.C. and *Bosanquet*, showed cause against the rule so obtained. They cited

Marshall v. Lynn, 6 M. & W. 109;

Goss v. Lord Nugent, 5 B. & Ad. 58;

Noble v. Ward, L. Rep. 2 Ex. 135; 15 L. T. Rep. N. S. 672;

Stowell v. Robinson, 3 Bing. N. C. 928;

Stead v. Dawber, 10 A. & E. 57;

Hickman v. Haynes (*infra*).

H. Matthews, Q.C. and *Jelf*, in support of the rule, contended that a contract about the time of delivery of goods was not within the Statute of Frauds, and also that there was sufficient evidence of acceptance and delivery to take the new parol contract, if the old contract was no longer enforceable as varied, out of the Statute of Frauds. They cited the following cases:

Leather Cloth Company v. Hieronimus, 32 L. T. Rep. N. S. 307; L. Rep. 10 Q. B. 140; 44 L. J. 54, Q. B.;

Ogle v. Lord Vane, L. Rep. 2 Q. B. 275; L. Rep. 3 Q. B. 272;

Tyers v. Rosedale, &c., Company, 33 L. T. Rep. N. S. 56; 29 L. T. Rep. 951; L. Rep. 10 Ex. 195; L. Rep. 8 Ex. 905;

Hickman v. Haynes, L. Rep. 10 C. P. 598, 604; 32 L. T. Rep. 873.

Our. adv. vult.

The judgment of the court (Brett, Grove, and Denman, JJ.) was delivered by

BRETT, J.—In this case, which was tried before Quain J., at the last spring assizes at Stafford, the action was for non-acceptance of iron. There was a plea that the plaintiffs were not ready and willing to deliver according to the terms of the contract. Upon the issue on this plea the learned judge directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them, if there was any evidence to go to the jury in support of their claim. A rule *nisi* having been obtained, the case was argued before us. The action was founded on the following bought note: "Bought of Messrs. Plevins and Co. 100 tons of grey forge pig iron at 75s. per ton delivered to my works. Payment in cash less 2½ per cent. discount, on the 10th of each month following delivery. Delivery 25 tons at once, and 75 tons in July next." Signed by the defendant. By the end of July the plaintiffs had delivered and the defendant had accepted 75 tons. There was no evidence of any request by the defendant to the plaintiffs, made before the end of July, to withhold delivery of the remaining 25 tons till after the end of July. But there was evidence that in October the defendant verbally requested the plaintiffs to send him the remaining 25 tons, and that the plaintiffs did in October forward 25 tons addressed to the defendant; but the iron did not arrive at the defendant's works, and the defendant, on being informed by letter of the dispatch of the iron, wrote refusing to accept it. It was argued for the plaintiffs that they could maintain the action upon the original contract; that they were not driven to rely upon an alteration of it as to the period of delivery, or upon a new contract; that the request of the defendant, acceded to by the plaintiffs, was only an arrangement as to a mode of performance of the original contract. It was further argued that if there was a new contract, there was evidence of a delivery under it which entitled the plaintiffs to sue

for the price of goods sold and delivered. It seems to us, however, that the verdict was rightly directed to be entered for the defendant. It is true that a distinction has been pointed out and recognised between an alteration of the original contract in such cases and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect in favour of either to such attempt; if the parties make an arrangement as to the second, though such an arrangement be only made by words, it can be enforced. The question is, what is the test in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so, made by the vendee before the expiration of the agreed time, and when after the expiration of the agreed time, and within a reasonable time the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it, but if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer, to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract, or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes*. In the present case the plaintiffs cannot prove that they were ready and willing to deliver the disputed iron in July. They cannot say that, being so ready, they withheld an offer to deliver in July at the request of the defendant made in July. The day after the end of July they could not have insisted on an acceptance of iron then offered to the defendant. They attempt to enforce an offer of delivery made in October by means of an alleged request then made by the defendant to forward iron, assented to by them. Inasmuch as they cannot rely upon their readiness and willingness to deliver according to the terms of the original contract, because they were not so ready and willing, they are logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced. As to the suggestion that there was such a delivery and acceptance according to the terms of a new contract as can support an action for goods sold and delivered, we think there was

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no sufficient evidence of such a delivery and acceptance. We are therefore of opinion that the rule must be discharged.

Rule discharged.

Solicitor for plaintiffs, *F. T. Dubois.*

Solicitor for defendant, *T. W. Goldring.*

Tuesday, May 2.

CAMPBELL AND OTHERS v. IM THURN, AND OTHERS. (a)

Bankruptcy—Composition—Default in payment of composition by trustee—Insertion of name and address in statement of debts and assets—Sect. 126 of Bankruptcy Act 1869 (32 & 33 Vict. c. 71)—32 & 33 Vict. c. 71, sect. 126.

The plaintiffs sued the defendants for a balance due on an overdue bill of exchange. The defendants pleaded that they had made a composition arrangement under sect. 126 of the Bankruptcy Act 1869, and that a trustee had been duly appointed for the creditors, for the purpose of receiving on their behalf and paying to them the agreed composition, and that the said trustee was duly furnished with or had funds sufficient for the payment of the composition and applicable thereto, and that all conditions happened necessary to make the arrangement a bar to the action.

To this the plaintiffs replied that the amount of composition due to the plaintiffs was not paid or tendered to them within the proper time; but the said trustee, by direction, request, and procurement of the defendants refused to pay it to the plaintiffs.

Held (upon demurrer) that this was a bad replication, as the non-payment by the trustee, having funds in his hands sufficient to pay the composition, did not cause the original debt to revive, and as the direction of the debtor to the trustee could not alter the duty of such trustee, or prevent the plaintiffs from being entitled to the benefits of the trust, but must, in law, be a nullity.

Held, also (upon motion for judgment on the facts found at the trial), that where creditors come in and claim, and vote for the resolutions for a composition and for the appointment of a trustee, they are assenting creditors, and their names and addresses need not be inserted in the statement of debts and assets which has to be produced at the meetings by sect. 126 of the Bankruptcy Act 1869, that provision relating only to non-assenting creditors.

Semble (per Brett, J.), a trustee may, before paying over the composition to a creditor, investigate the validity of his claim, and is not bound to pay upon the amount which the creditor claimed at the time of agreeing to the composition, if that amount was not in fact due.

THE declaration was upon an overdue bill of exchange for 1373l. 3s. 11d. drawn by Stewart and Co. upon, and accepted by, the defendants, and indorsed by the drawers to the plaintiffs.

The defendants pleaded that after the accruing of the plaintiffs' claim and before action, the defendants, being unable to pay their debts, petitioned the London Court of Bankruptcy, which

then had jurisdiction in that behalf under sects. 125 and 126 of the Bankruptcy Act 1869 in the form prescribed, and such proceedings were thereupon had that the creditors of the defendants, by an extraordinary resolution duly passed under sect. 126, resolved that a composition of five shillings in the pound, to be payable at the expiration of twenty-eight days after the registration of that and the confirming resolution, should be accepted in satisfaction of the debts due to the creditors of the defendants, and that John Young should be appointed trustee for and on behalf of the creditors for the purpose of receiving on their behalf and paying to them such composition, which resolution was afterwards duly confirmed and registered. The above-mentioned extraordinary resolution, and the resolution confirming the same were respectively duly assented to and signed by the plaintiffs. And the defendants say that a sum sufficient to pay the said composition was before this action and within the said twenty-eight days duly paid and received by the said John Young for the purpose of his paying the same pursuant to the said resolution, and all necessary conditions were fulfilled to make the said resolution binding on the plaintiffs, and a bar to this action.

This plea was demurred to, on the ground that the composition was not shown to have been paid to the plaintiffs, nor was anything equivalent to payment shown.

There was a replication to the plea, as follows: The amount of the said composition due to the plaintiffs under the said extraordinary resolution was not paid or tendered to the plaintiffs within the time mentioned in that behalf, nor has the same or any part thereof been paid to the plaintiffs; but the said John Young, by direction, request, and procurement of the defendants, refused to pay the said amount to the plaintiffs.

This replication was also demurred to, the ground of the demurrer being (1) That it was not necessary that the said composition should have been paid or tendered to the plaintiffs.

(2) That the trustee was the agent of the creditors to receive and distribute the composition, and not of the debtor, and that a wrongful omission or neglect of such agent, even at the request of the debtor, would not effect the debtor's liability.

Issue having been joined on these demurrers, they were set down for argument.

Before they came on for argument the issues in fact were tried; and upon the trial of such issues in fact, it appeared that the debtor did not insert the names and addresses of the plaintiffs in the statement of his debts produced, as required by the Bankruptcy Act 1869. It was admitted that the debtor was aware that the plaintiffs were the holders of the bill in question. It also appeared that the plaintiffs attended at the first meeting of the defendants' creditors, and claimed to be paid the sum now sued for, and put in a proof claiming that sum. The plaintiffs also voted at the meeting in favour of the composition, and again, at the confirming meeting, repeated their vote in favour of the composition. The gentleman (Mr. Young) who had previously been appointed receiver under the bankruptcy proceedings, was appointed by the resolutions for composition a trustee for the receipt and distribution of the composition. Before the time for the payment of the composition enough

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money had come into the hands of Mr. Young (the trustee) to pay the agreed composition to all the creditors, including the plaintiffs.

On the evening of the day on which the first meeting was held the debtors' solicitors, without the knowledge of the plaintiffs, indorsed the plaintiffs' claim as follows: "This proof is objected to on behalf of the debtors on the ground that the two last-mentioned bills in the schedule to the proof were accepted by the claimants in payment of the first-mentioned, which should be given up to be cancelled."

This indorsement was signed by Mr. Young, the trustee.

The trustee did not pay to the plaintiffs the composition on the sum due on the bill sued on. He was called as a witness at the trial, and swore that it was not by the direction, request, or procurement of the defendants that he did not pay the said composition.

The learned judge (Bramwell, B.) at the trial did not enter judgment, but the verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter the judgment for them for the amount claimed as remaining due on the bill.

The motion to enter judgment for the plaintiffs, and the argument of the demurrers were, by arrangement, taken together.

Herschell, Q.C. and W. G. Harrison were for the plaintiffs, in support of the motion and the replication. It is contended by the other side that when a trustee is appointed he alone is responsible. That, however, is not enough, he must be furnished by the debtor with money for the purpose of paying the composition. *Edwards v. Coombe* (L. Rep. 7 C. P. 519; 27 L. T. Rep. N. S. 315; 41 L. J. 202, C. P.) shows that where the amount of a composition under the Bankruptcy Act 1869 is neither paid nor tendered the original debt revives, and the debtor cannot rely on the agreement for a composition as a defence to an action on the original debt. The money here was in the hands of the trustee, so that he might have paid it, had it not been for the conduct of the debtors through their solicitors in ordering him not to pay it to the plaintiffs. A debtor cannot be instrumental in preventing the composition reaching certain of his creditors, and yet be entitled to say "it is the trustee's fault, I am in no way responsible for the fact that you have not got the agreed composition." If a debtor disputes a debt he does so at his peril: (*Ex parte Peacock*, 28 L. T. Rep. N. S. 830; L. Rep. 8 Ch. 682.) A composition under the Act is an agreement by which the creditors agree to accept a composition, and the debtor to pay it. Now here there was no true agreement, for the plaintiffs' offer, if the debtor is willing to pay it, to take a composition, but the debtor, though he does not let them know it, repudiates their claim altogether. The defendants never assented to the plaintiffs coming in and proving their debt, but utterly repudiated the claim, and therefore ought not now to be allowed to treat the plaintiffs as people who have in any way bound themselves by coming in or proving. The composition never bound the plaintiffs, on another ground, it is submitted; namely, because their names and addresses, though they were known to be the holders, and their names and addresses were known to the defendants, were not inserted in the statement produced to the

meeting of creditors. They also cited *Edwards v. Haucher*, 33 L. T. Rep. N. S. 575.

Benjamin, Q.C. and Holl were for the defendants, against the motion, in support of the plea, and against the replication. The provision of the Bankruptcy Act 1869, s. 126, which requires the production of a statement showing names and addresses has no application to a case, such as the present, of an assenting creditor. It applies only to dissentient creditors, and they are not to be bound unless their names and addresses so appear. If a creditor's name does not appear he need not come in or claim under a composition, but if he voluntarily comes in and agrees to the composition he is then bound by it. If the trustee acted wrongly, that does not give a cause of action against the debtor: (*Ex parte Warterer*, 43 L. J. 25, Bank.; 29 L. T. Rep. N. S. 907.) It cannot, however, be that a trustee is bound to pay without exercising any caution, or that if he does exercise caution and investigate, and so let the time for payment of a composition go by, the debtor loses the advantage of the composition and has to pay in full. In *Ex parte Botting* (31 L. T. Rep. N. S. 736; L. Rep. 19 Eq. 261) it is said by the Chief Judge in Bankruptcy (Bacon) that the trustee under an agreement for a composition has a right to examine into proofs. The agreement between the debtors and their creditors is that a composition shall be paid on all debts really due, not that any disputed or dubious items shall be treated from thenceforth as indisputable. If the debtors were wrong in giving advice to the trustee, the trustee ought to have disregarded it, and if he regarded it, the wrong is his; but as matter of fact he did not, as indeed the jury found, act upon the advice given by the debtors, but upon his own view of his duties.

Herschell, Q.C. replied.

BRETT, J.—This is an action to recover the full amount of a balance unpaid upon an overdue bill of exchange. In answer to this claim there is a plea that the defendants became parties to an agreement to accept a composition, and agreed to a resolution appointing some one to act as trustee on their behalf and that of the other creditors, to receive payment of such composition. Enough money was paid over to the trustee so appointed to satisfy all demands possible for the payment of the composition, and amongst them the present demand of the plaintiffs. The plaintiffs reply that the composition has never been paid or tendered to them, but that the trustee, by direction, request, and procurement of the defendants, refused to pay the composition to them. Now there arise in this case two distinct questions—one upon the facts and the other upon the demurrer. The real facts, as proved at the trial, were, I take it, these: The plaintiffs claimed for the full balance, and then a composition, under sect. 126, was proposed. A statement of the debts and assets was prepared for the purposes of the composition, and in this statement, though the amount of the bill now sued on was shown, the names and addresses of the plaintiffs, the holders of the bill, did not appear. The plaintiffs, therefore, were not put down as creditors for the full balance now said to be due to them. I will take it, then, as though the plaintiffs were not mentioned in the statement so prepared at all. Before the resolutions for a composition were passed the plaintiffs came forward and made their claim upon the bill now sued on. They were

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admitted as creditors and treated as creditors at the meetings, and voted for the composition resolutions, and voted for the appointment of a trustee. Then, although their claim had been thus far admitted, the defendants induce the trustee to put on the back of their proof the indorsement to which our attention has been directed. "This proof is objected to, on the ground that the two last-mentioned bills," one of which was the bill now sued on, "in the schedule to the proof were accepted by the claimants in payment of the first-mentioned, which should be given up to be cancelled." Now, although this indorsement was made upon the claim, the plaintiffs had no knowledge of the fact that it was so made. The trustee's appointment was agreed to by the plaintiffs, and he had in his hands, having got it as receiver before his appointment as trustee apparently, enough money from the defendants' estate to pay the composition according to the resolutions to all creditors, and amongst them to the plaintiffs. This money was in the trustee's hands, and unless the indorsement prevented him from paying it, or unless he of his own accord abstained from paying it to the plaintiffs, they, as creditors, would in the ordinary course of proceedings have got the composition paid to them. The trustee, however, does not pay the composition to the plaintiffs, and then they claim to have, instead of the composition, the whole amount paid to them which they originally claimed on the bill. Now, it is said, on behalf of the plaintiffs, that inasmuch as their claim was not inserted in the statement produced at the meeting, they are not bound by the resolutions for a composition. It is said that this is so by reason of the provisions of the 126th section of the Bankruptcy Act 1869, and if they are not bound under that section they can only be bound, if they are in point of fact bound at all, by virtue of a common law agreement for a composition, and that in order to make such a common law agreement it must be shown that the plaintiffs agreed to take, and that the defendants agreed to pay, a composition, which it is said the defendants did not agree to do and did not in fact do. It is said that the defendants did not agree to pay on any specified amount, but by this indorsement, on the contrary, they expressly repudiated the plaintiffs' claim. For the defendants, on the other hand, it is contended that although the plaintiffs were not inserted in the statement they are bound by the resolutions for a composition, because they came in and claimed and agreed to take the composition and appointed a trustee for themselves and the other creditors, and that this trustee was duly furnished with, or had funds applicable to, the payment of the composition to the plaintiffs. It is said then, in short, on behalf of the defendants, that the plaintiffs were parties to a composition under sect. 126, and that they are bound by it and cannot now sue for their original claim. Then, as to the indorsement, it is said that it was not a direction not to pay to the plaintiffs the composition, and that even if it amounted to such a direction, the trustee was bound to disregard it, and that it was his duty to pay and that it could have no legal effect. It is necessary to ascertain what is the true construction of sect. 126. The scheme of it provides for a composition without a deed containing a release, and that includes two kinds of composition, one without and the other with a trustee. In the section itself there is no mention

of a trustee; it is by rule 279 that provision is made for the appointment of a trustee, if it is desired to have one appointed. The Act gives power to make rules, such as the one in question, to carry out the provisions of the Act. The result then, as I say, is that there may be a composition with a trustee, or a composition without one. Now, there are also two kinds of creditors who may be bound under the 126th section; those who are bound because they agree to be bound, and those who, without agreement on their part, are bound by virtue of the action of other creditors and by force of the section. If certain conditions are fulfilled, those who have not agreed are by compulsion bound. The section begins: "The creditors of a debtor unable to pay his debts, may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor;" it then goes on to show what is an extraordinary resolution, and then it proceeds as follows: "The debtor . . . shall produce to the meetings a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due;" and then lower down it proceeds: "The provisions of a composition accepted by an extraordinary resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors." By virtue, then, of these provisions, recalcitrant creditors can be bound; but only if the conditions required by the section are fulfilled. One of the conditions is the insertion of the creditor's name in the statement. The provision, "but shall not affect or prejudice the rights of any other creditors," does not apply to creditors who come in and agree to a composition, but only to dissentient or nonassenting creditors. The next paragraph to those which I have read provides for unknown holders of bills, and gives an exception under certain circumstances to the preceding clause. Neither of these paragraphs applies to the case of a creditor who agrees to be bound. It therefore appears to me that the plaintiffs in this case cannot be said not to be parties to a composition under the 126th section. They have agreed to a composition under that section, and that a composition with a trustee. They agreed to make Mr. Young the trustee, and if he has received enough money to cover the whole composition and to pay what under the resolutions for composition they are entitled to, they must look to him for payment, and not to the defendants. The defendants are discharged as soon as the trustee has enough in his hands to pay the composition, when due, upon the original debt; and the plaintiffs cannot make them liable for the original debt because the trustee has not done his duty and paid them the composition. But then it is said the defendants directed the trustee not to pay the composition to the plaintiffs and that the facts at the trial prove this; the jury, however, found that it was not so, and we agree with them. The trustee himself swore upon the trial that it was not by the direction, request, or procurement of the defendants that the composition was not paid to the plaintiffs. The finding of the jury may mean that the trustee

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acted on his own independent judgment, or it may mean that the indorsement does not amount to a direction not to pay over. There is, however, no motion on the ground that the verdict is against the weight of evidence, but the motion is, that sufficient of the replication was proved to afford an answer to the plea. It is said that the judge ought to have told the jury that enough of the replication was proved to answer the plea. If the refusal of the trustee to pay or his neglect to pay would cause the original debt to revive, or be again payable, then enough was proved, and so too if, as a matter of law, this indorsement amounted to a direction to the trustee not to pay, enough would have been proved; but in this latter case, though the replication would have been proved in fact, we should have had to consider now upon the demurrer whether the replication thus proved in fact was good in law. I think that the jury were entitled to find that the trustee did not act on the direction given to him by this indorsement, and that they were also entitled to find that this indorsement did not amount to a direction not to pay, but was merely an intimation to the trustee to look into the claim. It does not as a matter of law amount to a direction not to pay the composition. To me it seems rather that it is a notice to the trustee that in the debtor's opinion the amount of the claim might be objected to. I will, however, go further and say, that even if it be a direction not to pay, it would be the duty of the trustee to disregard it. The trustee having funds had a clear duty to perform, and that was to pay the composition as it became due to the creditors. He was bound to pay, and such a direction to the contrary would be futile. As I have said before, it was no direction; but, as I now say, if it had been a direction it would not affect the rights of the parties. In the result, then, and upon the true construction of the Bankruptcy Act, I arrive at the conclusion that the facts proved the plea, and that they failed to prove the replication. Now, with regard to the demurrer. It follows, from what I have said, that I think the replication bad. It has to be assumed on the demurrer that the refusal of the trustee to pay the composition to the plaintiff was "by direction, request, and procurement of the defendants," but, as I have said above, I think the trustee was in law bound to disregard any direction given to him by the defendants, and then, as fraud is not charged, the replication must be held bad in law. With regard to the cases cited, the case of *Ex parte Peacock* does not appear to be in point. There was no evidence in that case to show that the creditors there claiming were parties to the resolutions for composition, or had agreed to a composition. It was an attempt to bind non-assenting creditors, and fell within the principle of *Edwards v. Coombe*. That case, therefore, is no authority for the decision of the present case, where we have to deal with a trustee and assenting creditors. That was a case of recalcitrant creditors; this is a case of assenting creditors. As to the case before the learned Chief Judge in Bankruptcy (*Ex parte Botting*), that is not an authority binding upon us. There was a compromise, and the decision was left unappealed from. Still it stands as the expression of the opinion of an experienced judge, and as such is entitled to our respect. I am inclined to agree in the view of that learned judge expressed in that case, that as

the trustee is the trustee for all, and also trustee of the surplus for the debtor of any funds in his hands, he should inquire into the correctness of claims made, and endeavour to ascertain what amount is really due to the various creditors. Where there is a trustee it is a fundamental object that all creditors should be treated alike, and should get only the composition on the amount due. It is, however, not necessary to determine this question in the present case. As to the case of *Ex parte Waterer*, we need not, for the purposes of the present case, enter into any discussion of the principles there enunciated. It may be true that where the creditor has claimed for a particular sum, and has been admitted so to claim, no objection can afterwards be made to the amount, but though it may be that he can claim that amount from the trustee, yet it by no means follows that if the trustee does not pay it him, he can sue the debtor for the whole amount of the original debt. We think, then, in this case the plaintiffs agreed to be bound by the composition, and that as the defendants did all that they had to do, and as enough was in the trustee's hands to pay the composition, there is no ground for holding that the present action can lie; our judgment, therefore, will be for the defendants. My brother Archibald has, after having heard the whole case, been compelled by business to leave the court before delivering judgment, but I am authorised by him to state that he agrees in the result at which I have arrived, and substantially in the reasons which I have given for arriving at that result.

LINDLEY, J.—I am of the same opinion. The case for the plaintiffs has been rested on these two grounds; first, it is said that if the plaintiffs did agree to the composition they are not bound because their names and addresses, though known to the defendants, were not inserted in the statement produced at the meeting. This raises a difficult question upon the construction of sect. 126 of the Bankruptcy Act 1869. The section says that the provisions of a composition accepted, &c. shall be binding on all creditors whose names and addresses, and the amount of the debts due to whom are shown in the statement, but shall not affect or prejudice the rights of any other creditors. It is contended that even if a creditor does agree to a composition, and if everything, except the insertion of the name and address on the statement, is perfectly regular; yet if the name and address is not inserted that that creditor is not in law bound. Now I think this contention goes too far. The section provides for both assenting and non-assenting creditors; the negative words apply only, I think, to non-assenting creditors. The assenting creditors are bound by their assent, the non-assenting are bound by the statutory majority of their fellows, except in the cases in which the statute for their protection enacts that they shall not be bound. The second point is, that the plaintiffs did not agree, that the plaintiffs and the defendants were never *ad idem*, that the debtors and the creditors were assenting to different propositions. If it is part of the law that claims for composition can be investigated, then I apprehend the plaintiffs assented subject to their claim being so investigated, and if by law such claims cannot be investigated, then the assent was not subject to the claim being investigated. If the trustee cannot legally investigate the plaintiffs' claim, then they are entitled to the agreed compo-

tion on their claim. The question of what is really the law upon this matter is not in this case material. If then the trustee was wrong in refusing to pay on the whole claim without investigating, what effect has such refusal? It is said that if the claim was not open to investigation or discussion, the trustee, by not paying the composition, has prevented the composition resolutions from having any effect as against the plaintiffs, and that they are remitted to their original rights. That, however, I think does not follow. Then reliance is placed upon the indorsement made upon the claim without the plaintiffs' knowledge: "This proof is objected to," &c. It is evident that the debtor thought that there was a right to investigate claims, and that there was some ground of objection to the particular claim, thus thinking he calls the trustee's attention to the objection. He says in effect "I think there is an objection which ought to be taken to this claim." If the result of the objection had been to exclude the plaintiffs from the benefit of the trust created in their favour, then the argument for the plaintiffs would have been a most forcible one, but it has not that effect. A direction cannot exclude the plaintiffs from the benefit of the trust. Whether their right as *cestui que trusts* extends to the composition on their whole claim, or whether it is limited to what may be really due, is not a question which we now have to determine, but what it is material for us to be assured of is that the plaintiffs are not excluded from the trust, but are still in a position to claim the benefits of the trust. If *Ex parte Waterer* be law, the plaintiffs would seem entitled to the composition on their whole claim, whilst if the case before the Chief Judge in Bankruptcy is law they would apparently only be entitled to the composition on the amount really due. No case shows that the original debt, under circumstances such as we have in this case, revives. I agree, therefore, with the conclusion arrived at upon the facts by the rest of the court.

Judgment for the defendants.

Solicitors for the plaintiffs, *Clarke, Rawlins, and Larke.*

Solicitors for the defendants, *Nicol, Son, and Jones.*

Tuesday, May 9.

BLAKE v. THE ALBION LIFE ASSURANCE SOCIETY. (a)
Pleading—Practice—Order XIX., r. 4—Striking out scandalous and irrelevant paragraphs—Evidence—Fraudulent course of dealing.

A statement of claim charged in effect, that the plaintiff being desirous of borrowing money, agreed with H. to borrow it from him on personal security only, and to insure his life in the defendants' office as collateral security for the loan, and to pay a premium on such insurance to the defendants, that the plaintiff for the purpose of so borrowing, as the defendants knew, did so insure and pay a premium. That H. throughout was an agent of the defendants, and that the transaction was a contrivance of the defendants to obtain the said premium. That neither H. nor the defendants ever lent or intended to lend any money to the plaintiff, and, further, that this was the usual course of conduct of the defendants.

(a) Reported by CTRIL DODD, Esq., Barrister-at-Law.

Held, that the paragraphs stating that it was the usual course of conduct of the defendants, were scandalous and irrelevant, and should be struck out, as amounting at the most to mere evidence, which by Order XIX., rule 4, is not to be pleaded; and further, that the matter therein contained was not even evidence, and that evidence could not be given upon a trial, in chief, of such conduct being the usual course of conduct of the defendants.
Reg. v. Francis (30 L. T. Rep. N.S. 503; L. Rep. 2 O. C. R. 128) distinguished.

THE statement of claim, so far as it is necessary to set it out for the purpose of this report, was as follows:

3. The defendants employed certain persons as agents, and partners with the defendants in the proceeds arising out of such employment, to advertise in the principal newspapers in London and the country that the aforesaid agents were willing to lend money upon personal security, at the same time giving the address to which the application was to be made.

4. The mode of conducting the business with reference to such loans was as follows: Upon an application being made to one of the said agents by a proposed borrower the agent agreed to lend the sum required upon the condition that the proposed borrower would insure his life in the defendants' office, and would deposit the policy of insurance granted by the defendants' office with the agent as security for the repayment of the money to be advanced, which said deposit of the said policy of insurance was the only security which the said agent required, and thereupon the proposed borrower insured his life in the defendants' office, and paid the premium to the defendant company. The agent then, acting under the instructions of the defendant company, with the intention of avoiding their obligation to lend the money which had been agreed to be lent as aforesaid, forwarded to the proposed borrower securities to be executed by him of the description following, that is to say:

- (1) A bill of sale over the furniture of the proposed borrower.
- (2) A guarantee of two sureties.
- (3) An assignment of the aforesaid policy.
- (4) A bond for the amount of the loan to be executed by the proposed borrower.
- (5) A declaration as to debts to be made by the proposed borrower before a bench of magistrates.

And upon the refusal or inability of the proposed borrower to execute and procure the said securities, the loan was not carried through.

5. The business of the defendants consisted in obtaining premiums in this manner and they were not, nor were the said company ever intended to be, a legitimate insurance company carrying on a legitimate business.

6. The arrangement between the defendant company and the said agents was that the said agents should be pretended lenders of money, and that it should be made to appear as if the defendant company had no connection with the said agents, except that the agents required the proposed borrowers to insure their lives in the defendants' office, whereas, in fact, all the matters alleged in paragraph 4 in this statement of claim was done by the contrivance and at the instigation and for the benefit of the defendant company.

7. In or about Nov. 1874, the plaintiff saw an

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advertisement in the *Standard* inserted by one Howard, one of the aforesaid agents of the defendants, offering to lend money upon personal security. The plaintiff being at this time desirous of borrowing 1500*l.*, applied to the said Howard by letter requesting a loan of 1500*l.*, and received the following reply:

11, Euston-square, 21st Nov. 1874.

Dear Sir,—I can entertain your application for an advance of 1500*l.* for seven or fourteen years at 4 per cent. interest per annum, interest payable half-yearly. The 1500*l.* to be repaid in one sum at the end of the term. You will have to insure your life in an insurance office to be selected by me for 1500*l.*, and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep it for the benefit of your relatives. Let me know per return of post if this meets your views.—Yours truly,

H. HOWARD.

Mr. Blake.

8. The plaintiff called at the office of the said Howard on two occasions in answer to the above letter, but on neither occasion did he see the said Howard, but only saw the manager of the said Howard. On the last time he called, the said manager, on behalf and by the authority of the said Howard and the defendants, agreed to lend the plaintiff, and the plaintiff agreed to borrow from the said Howard, the sum of 1500*l.*, upon the condition that the plaintiff would insure his life in the defendants' office and pay them a premium for the said insurance, and would deposit the said policy of insurance with the defendants as security for the repayment of such loan with interest, and the said manager, on behalf and for the said Howard and the defendants, agreed that no other security than the said policy should be required from the plaintiff.

9. The plaintiff accordingly applied to the defendant company to effect a policy of insurance on his life, which they accordingly did effect upon the payment by the plaintiff to the defendants of the sum of 59*l.* 6*s.* 3*d.* The plaintiff informed the said Howard that he had insured his life as aforesaid, and forwarded to the said Howard the company's receipt for 59*l.* 6*s.* 3*d.* which the defendant company had given to him to show that he, the plaintiff, had effected a policy of insurance with the defendants' company as agreed.

10. The said Howard instead of advancing the said 1500*l.* as agreed sent to the plaintiff the following letter:

11, Euston-square, London, 25th Jan., 1875.

Dear Sir,—By book post you will receive draft securities as prepared by my solicitor for your perusal and approval, which please return to me at your earliest convenience, with any comments you may have to make endorsed thereon.—Yours truly,

Rev. J. Blake.

H. HOWARD.

The draft securities mentioned in the said letter were:—

- (1) A bill of sale of furniture.
- (2) A guarantee of two sureties for repayment of the loan.
- (3) An assignment of the policy.
- (4) A bond for the amount advanced to be signed by the plaintiff.
- (5) A declaration as to debts to be made before a bench of magistrates sitting for the division of Norfolk.

Upon receipt of this letter, the plaintiff made several efforts to see Howard, but failed.

11 The plaintiff has been unable to obtain the said loan, or any part of the same, although he

has performed, or been ready and willing to perform, all conditions by him to be performed, and all times have elapsed, and all things have happened, necessary to entitle the plaintiff to have the said loan advanced upon the terms agreed upon, and the defendants and the said Howard have not and never intended to advance the said loan to the plaintiff.

12. The defendants and the said Howard, by the contrivance as in this statement appearing, induced the plaintiff to pay the said sum of 59*l.* 6*s.* 3*d.*, upon the pretence that the sum of 1500*l.* should be advanced to him upon the terms set forth in paragraph 8 of the claim, whereas in fact they never intended that the sum should be advanced, &c.

13. After the receipt of the said sum of 59*l.* 6*s.* 3*d.* by the defendants, the same was divided between the defendants and the said Howard.

14. The said Howard, as the defendants well knew, was wholly unable to pay any sum of money recovered from him, and with the knowledge and contrivance of the defendants changed his name and address from time to time.

15. The said policy of insurance was effected by the plaintiff, and the said premium was paid only for the purpose of procuring the said loan of which the defendants always had knowledge, and there never has been any consideration whatever for the defendants retaining the said sum of 59*l.* 6*s.* 3*d.*

16. Every matter and act done by the said Howard or his manager, was done for and on behalf and with the sanction of, and was ratified by the defendants, and the said Howard and his manager were in all things agents to carry out the contrivance to procure them the premium of 59*l.* 6*s.* 3*d.*, there being no intention at any time either by the said Howard or the defendants, that the said sum of 1500*l.* should be advanced.

17. The plaintiff claims the said sum of 59*l.* 6*s.* 3*d.* and also the expenses he has been put to in endeavouring to procure the advance to him of the said 1500*l.*

Butt, Q.C. (*English Harrison* with him) moved to strike out articles 3, 4, 5, and 6 as irrelevant and scandalous (the matter having been before *Amphlett*, B., at Chambers, who referred it to the court). He read the claim, leaving out the paragraphs complained of, and contended that it showed the whole cause of action. These articles charged a general conspiracy to defraud the public only and were immaterial, as the action was one for defrauding a particular person, the plaintiff. That the defendants had previously defrauded other people would not even be evidence in the cause, but if evidence, then by Order XIX., r. 4. it was inadmissible. That the charges were clearly scandalous, and though the fact that they were scandalous would not, by itself, be a reason for striking them out, yet that fact, coupled with the fact that they were irrelevant to the issue, was. He also referred to Order XXVII., r. 1 of the rules under the Judicature Acts.

H. Tindal Atkinson, in support of the claim, contended that if such a system of fraud could be proved in evidence at the trial, it was well pleaded. The rules of pleading (Order XIX., r. 4) required all material facts to be pleaded, and this being a charge of conspiracy the facts stated in the articles were material. [COLERIDGE, C.J.—On

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cross-examination you might elicit these facts; but could you prove them in chief? Yes, because if a man cheats A., you can show that he has cheated other people in a similar way, so as to show that it was not a mere mistake, but a fraudulent piece of conduct. The case of *Reg. v. Francis* (L. Rep. 2 C. C. R. 128; 30 L. T. Rep. N. S. 503) shows that, upon principle, such evidence is admissible. Once may be an accident, or may happen from various causes, but a continuous course of suspicious conduct strongly supports the view that the conduct is fraudulent. In that case Lord Coleridge, C.J., in delivering judgment, says "that such evidence tends to show" that a person "was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

LORD COLERIDGE, C.J.—The charge is, in point of fact, one of conspiracy and fraud, and the question is, whether it is relevant to charge a course of business not really that of a legitimate insurance office. I am of opinion that it is not relevant, for if the plaintiff can prove his alleged cause of action, he will not require to prove the paragraphs complained of. In my opinion he could not prove by evidence in chief, upon the trial, the paragraphs in question. It is in effect saying that is fraudulent conduct, because the conduct of the defendants was fraudulent in other cases. The case of *Reg. v. Francis* is very distinguishable; the facts there were not in dispute, and the question was merely as to guilty knowledge. The question was, did the prisoner know that the articles were spurious?

BRETT, J.—The paragraphs must be struck out; they are not well pleaded: mere evidence is not to be pleaded, and at the very highest the facts stated therein are mere evidence. Some facts must be proved and are pleadable, others are merely evidence of what is to be proved, and these are not pleadable. Some facts are both facts which must be proved and evidence of what is to be proved. I do not, however, think that these facts are even evidence. They are scandalous and irrelevant, and cannot be pleaded.

LINDLEY, J.—I am of the same opinion. No obstacle must be put in the way of proving fraud, but I must say I think where fraud is intended to be charged, it should be distinctly charged as fraud. The passages objected to amount to a conspiracy to deceive every one and can only be evidence, if receivable at all, and evidence cannot be pleaded.

Paragraphs to be struck out.

Solicitor for the plaintiff, Robinson, Philpot-lane.

Solicitors for the defendants, Phelps, Bennett, and Woodforde.

EXCHEQUER DIVISION.

Jan. 28 and 29.

(Before KELLY, C.B. and AMPHLETT and HUDDLESTON, BB.)

THE IMPERIAL FIRE INSURANCE COMPANY (apps.) v. WILSON (resp.)(a).

Income tax—Fire insurance company—Assessment of the tax—Return of profits—Unearned premiums—Claim for deduction in respect of—Mode of return and assessment.

In making a return of their profits for assessment

(a) Reported by H. LEMAR, Esq., Barrister-at-Law.

to income tax under Schedule D of the Income Tax Act (5 & 6 Vict. c. 35), a fire insurance company is not permitted by the Act to credit themselves with, or to claim a deduction for, a portion, calculated by them at 33 per cent., or one-third of the amount of premiums received during the given year, as the unearned or unexhausted portion of such premiums, although in respect of such portion the company remain liable to losses which may occur in the ensuing year. The fair and proper mode of ascertaining the amount of net profits for the purposes of the Act (it being impossible to ascertain it with such strictly mathematical accuracy as to do perfect and absolute justice) is to take on the one side the whole receipts and on the other the whole expenditure and disbursements for the given year, the balance remaining being, for the time at least, net profits on which the tax should be assessed. This being done year by year, there is an absolute balancing of accounts; and if any wrong be done by losses afterwards occurring in respect of premiums on which, as profits, income tax has been assessed and paid, that will be taken into consideration in the ensuing year.

THIS is a case stated for the opinion of the court, under Part 3 of the Act 37 & 38 Vict. c. 16, as to income tax, schedule D, as follows:

The directors of the Imperial Fire Insurance Company, of No. 1, Old Broad-street, in the City of London, gave notice of appeal to the special commissioners, through their solicitors, by letter dated the 3rd Dec. 1874, against an assessment of 67,927*l.*, made on them by the Commissioners for General Purposes, for the year ending 5th April 1875. The special commissioners issued their precept requiring statements of accounts for the three years preceding the yearly assessment, and in reply thereto a statement was sent in of which a copy (marked A) is annexed.

The appeal was heard at the office of the Special Commissioners of Income Tax, Somerset House, on the 12th Feb. 1875, when Mr. Cozens Smith (general manager), Mr. Johnson (clerk in the accountants' office), and Mr. Oliver, solicitor, attended on behalf of the Imperial Fire Insurance Company. Mr. W. Wilson, the surveyor of taxes for the district (the respondent), also attended on behalf of the Crown. Mr. Oliver, the company's solicitor, was informed that he could take no part in the proceedings, but that there was no objection to his remaining in the room.

The company originally returned a loss, or rather put in a statement instead of a return, dated the 19th Dec. 1874, showing a deficit of 45,559*l.*; but afterwards they consented to pay on 42,340*l.* The books of the company were produced by Mr. Johnson, and showed that the accounts are made up to the 3rd Dec. in each year, and that no notice is taken therein of unearned premiums. In other respects the figures in the statement corresponded with the books, and showed an average of profit of about 67,000*l.* The commissioners would not allow the introduction of the unearned premiums, as they did not appear in the books, and as this was the first year in which they were taken into account by the company in making their return for income tax, the commissioners confirmed the assessment on 67,927*l.*

Mr. Smith, the company's manager, being dissatisfied with the determination of the special commissioners, declared his dissatisfaction, and

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duly required the commissioners to state and sign a case for the opinion of the Court of Exchequer, under the provisions of the Act of 37 Vict. c. 16, which the commissioners accordingly did.

The following is a copy of the account "A" referred to in the case:

STATEMENT OF PROFIT AND LOSS FOR THE YEARS 1871, 1872, AND 1873.

Income, 1871.	£	s.	d.	£	s.	d.
Premiums	609,184	4	10			
Ditto unearned in 1870	150,808	0	0			
				760,992	4	10
Interest on investments, &c.				39,884	15	9
Balance				656	14	2
				£801,533	14	9

Expenditure, 1871.	£	s.	d.	£	s.	d.
Losses... ..				345,768	0	10
Expenses				194,735	13	11
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				210,030	0	0
				£801,533	14	9

Income, 1872.	£	s.	d.	£	s.	d.
Premiums	718,864	14	2			
Ditto unearned in 1871	201,030	0	0			
				919,876	14	2
Interest on investments, &c.				44,597	3	2
Balance				41,783	15	1
				1,006,257	12	5

Expenditure, 1872.	£	s.	d.	£	s.	d.
Losses... ..				472,342	4	9
Expenses				236,696	7	8
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				237,219	0	0
				£1,006,257	12	5

Income, 1873.	£	s.	d.	£	s.	d.
Premiums	682,526	10	5			
Ditto unearned in 1872	237,219	0	0			
				919,745	10	5
Interest on investments, &c.				45,793	17	8
				£965,539	8	1

Expenditure, 1873.	£	s.	d.	£	s.	d.
Losses... ..				375,335	2	6
Expenses				24,097	7	1
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				225,233	0	0
Balance				83,873	18	6
				£965,539	8	1

The company is assessed for the year 1874 on the average profits of the above three years at	55,973	1	4
Interest on investments 1873 on which tax has not been paid	11,954	18	4
	£67,927	19	8

The company contended it should be—
Average profits £20,385 17 6
Interest on investments 11,954 18 4

42,340 15 10

Imperial Fire Insurance Company,
1, Old Broad-street, London.

(Signed) E. COZENS SMITH,
General Manager.

A. L. Smith (with whom was John, Q.C.), for the appellant company.—The company are entitled to credit themselves in their return to the income tax, or to claim a deduction for a certain portion, calculated by them at 33 per cent. of the total amount of premiums received by them in any given year, as the unearned por-

tion of such premiums. Suppose, for instance, a fire company insure 100 people in a given year, there would be 100 premiums received; but inasmuch as the policies are dated and issued, and the premiums on them paid at different times and in different months during the year, the whole of those premiums would not be earned in that year. If all the premiums were paid on the 1st Jan. in any one year, then all the policies would have expired, and all the premiums have been earned on the 31st Dec. of that year; but assuming one premium to be paid in March, another in June, and another in September, and so on, then the whole of these premiums would not be earned till the subsequent months of March, June, and September respectively; and inasmuch as the company's books are made up in December every year, there would then remain a considerable portion of unearned premiums in respect of which the company would be liable to risks and losses during the subsequent year. This proportion is calculated on a fair average at 33 per cent. of the whole year's premiums. [KELLY, C.B.—How do you arrive at the proportion of 33 per cent. ? The case does not state anything about that.] The case does not, but we have an affidavit of the manager, showing beyond doubt that that is the true average of the unearned premiums in any one year in insurance offices, and though I cannot refer to it, I may state the result as a matter of fact. True, the office has received all these premiums in the year, but they have not, in the words of the section, earned them, because throughout the whole of the next year they are liable to be called on to pay them back in case of losses occurring on the policies in respect of which they were issued; one-third, therefore, of the premiums received in the year is still unexhausted, and liable to losses which may occur in the succeeding year. A fair result cannot be arrived at by the mode adopted by the commissioners of taking the whole receipts of the year, and setting off the losses and expenses of that year, and assessing the company on the balance. The fair and just mode would be to take, as the appellants proposed to do, the whole receipts of one year, and then to deduct 33 per cent. therefrom, and carry it to credit next year, and so go on for three years. The unearned premiums should be brought into the account on both sides, and as the company debit themselves with the unearned premiums of, say, 1872, they ought not to be debited with the unearned premiums of 1873. Taking a fair average of a third in this last year, 1873, the assessable amount, instead of 67,000*l.*, is only 42,000*l.* (He referred to, and relied upon, the rules appended to sect. 100 of the Act 5 & 6 Vict. c. 35, schedule D, case 1, rules 1, 3, 4.) The company have not made a gain of 600,000*l.* on the 31st Dec. 1874, inasmuch as throughout 1875 they are under liabilities with respect to one-third of the amount. [HADDLESTON, B.—Suppose an agister of cattle takes them at 5*l.* a head per month, payable for the year in advance, if one is brought at the end of Dec., and he is paid 60*l.* in respect of it, he carries that into his account, because it is what he receives; but inasmuch as he has to give the animal twelve months' food next year, he debits himself with 55*l.* and credits himself with 5*l.* only; that is this case.] Gorst, Q.C. (with whom were the Attorney-General (Sir J. Holker, Q.C.), the Solicitor-General

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(Sir H. Giffard, Q.C.), and *Pinder*), for the Crown, *contra*.—No doubt my friend's suggestion is an ingenious one for improving the method of keeping insurance companies' accounts, but it has been made merely for the purpose of reducing the amount of duty payable in this particular case; and the answer to it is that the company do not keep their books in that way themselves. For the purpose of ascertaining the dividend divisible amongst their shareholders, they take no account of these so-called "unearned premiums or profits," and therefore, if they leave them out of consideration in calculating the amount of profits divisible amongst their shareholders, it is not unreasonable to require them to be left out of consideration in ascertaining the amount of income tax payable by the company. As to the phrase "unearned premiums," the premium is earned the moment it is paid. It becomes an asset of the company, and cannot be received back from them. [AMPHLETT, B.—Has a servant who is paid a year's wages in advance earned his wages before he has served a year?] It is submitted that that is not a parallel case. This is not a case of service, nor is it like the agistment of cattle put by Huddleston, B.; but a case in which, in consideration of the company contracting to pay a very large sum upon a contingent event, a very small sum is paid in advance; and the loss, if it occur, is not paid out of the premiums, but out of the capital of the company. The Crown contend that there should be no deduction, except that which they have already allowed for actual losses and expenses of management. All left after these deductions is the net gain of the year. The tax is not and cannot be calculated upon an exact and scientific ascertainment of the profit of each year, but, according to the statute, upon a rough average of three years, the Crown having a right to a return of the gross actual receipts in those three years, and the company being entitled to treat as losses every expense actually incurred upon an average of three years. The mode now suggested is not a more strict and scientific mode of ascertaining the profit than that prescribed by the Act and pursued by the commissioners. The strictly scientific and accurate method would be to take the amount of every single contract during the year, putting on one side the premiums received in respect of those contracts, and on the other side the payments made in respect of losses which are the subject matter of them. So also the expenses of the management should be strictly confined to the given year. As a matter of fact, until every single contract entered into in any one year has come to an end, it is impossible to say whether the year's transactions result in a profit or a loss. The company now seek to apply that strict method to one item of the account only, viz., the premiums, but they have no right to include losses incurred in respect of contracts made in some other year. If premiums are to be dealt with in a particular way on one side of the account, losses should be dealt with in the same way on the other side. [HUDDLESTON, B.—If they debited themselves with the gross receipts and credited themselves with the expenses, and then with a fair proportion of the premiums applicable to the risks in the ensuing year, would not that be a fair way of getting at it?] I admit that that is a fairer principle and way of doing it, but here they have fixed on a lump sum which they

choose to take at one-third. Their books, by which they are bound, show 67,927*l.* to be the right sum. He referred to 5 & 6 Vict. c. 35, sect. 100, schd. D, rule 1, par. 3; case 1, rule 1, sect. 133.

A. L. Smith in reply.

Our. adv. vult.

Jan. 29.—KELLY, C.B.—It is with some reluctance that I feel that we ought to give judgment in this case in favour of the Crown. I say with reluctance, because it is impossible not to see that perfect justice cannot be done by giving our judgment for the Crown; and, on the other hand, it is not to be forgotten that the scheme or mode of making out and settling the accounts suggested by the insurance company seems substantially, though it is not really, unobjectionable. Perhaps it is the most reasonable mode that could be determined on in most cases; but it really is not according to law. There is nothing in the Income Tax Acts which enables the parties in such a case, the Crown on the one side and the insurance company on the other, to determine with certainty what is the amount or value of the risk which continues after the end of the year, while a number of policies upon which a year's premiums have been paid are unexhausted, and where there may or may not be, upon one, or two, or more, or all of them, losses to a large amount, or to a small amount, or no losses at all. Therefore, the company, in the mode suggested by them, are obliged to resort to a speculative mode of ascertaining the probable amount of the risk which continues; but I see no warrant in the Income Tax Acts, nor, indeed, in the principle of the law, which will enable this to be done. Under these circumstances, therefore, it seems to me that, unless we revert to the 133rd and 134th sections of the Act which have been referred to, but which do not apply in the present instance, the case stands thus: The only mode in which one can really say what is net profit is by taking on the one side the whole receipts, and on the other side the actual expenditure or disbursements for the given year, and all that remains is, at least for the time, profit; and, therefore, taking the sum of 682,000*l.* and odd as having been paid to and received by the company in the year 1873, and, taking, on the other hand, losses during that year to the amount of 275,000*l.* and odd, expenses to the amount of 221,000*l.* and odd, and some further disbursements which it is admitted should be allowed, and which reduces the sum on the profit side to 50,000*l.*, their profit for the year 1873 is 50,000*l.*; and if everything were to stop at once, and if nothing further were done by the company, 50,000*l.* would be the amount of their profits. It is open to this observation, however, and that is why this mode does not do, and I do not know any mode which can do, perfect justice; and it is this, that the company remain under the liability of paying the amount of any losses in respect of these policies upon which they have received the 600,000*l.* premiums, which may occur in the course of the ensuing year; and if they do occur, it is quite clear that the amount of the profits upon which the income tax has been assessed and paid will be thereby diminished. But there is a provision for that in the Act. If they leave off business the 134th section applies, and then a calculation is made in which perfect justice upon the figures is done. If, upon the other hand, they continue their business, then at the end of the year 1874 they again take the

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amount of premiums which they have received on the one side and they take the receipts and any other sums of money which may be properly set off against the amounts received, and they take the amount of the losses against which the 600,000*l.* and odd has been received in the year before, so that year by year, as they go on, there is an absolute balancing of accounts, and it is only when the last year comes—if a last year does come—when the company are about to cease carrying on their business, that, although they will have paid the income tax upon the same sum of 600,000*l.* and odd of premiums, they may leave off business within a month, but are liable to make good any loss which may happen upon the policies in respect of which this 600,000*l.* and odd has been paid. But that, as I have before said, can only happen in the last year of the business being carried on; and if that should happen, then, by the 134th section, there is a provision for the fact being ascertained and the matter being made clear in some way or the other, and a deduction if necessary being made. Looking, therefore, at the very nature of the case, and to the absolute impossibility of doing perfect justice, because, even if we were to take it upon an estimate of an actuary, which might be fair enough, if we take into account the number of policies and the amount of premiums paid upon them in numerous small sums, amounting in the aggregate to some hundreds of thousands of pounds, it would cost more money to get the calculations made by an actuary or anybody else than perhaps double the amount of the income tax which has to be paid. Under the circumstances, then, and seeing that at the moment it is profit, and that, if any wrong be done by losses afterwards occurring, that will all be taken into consideration in the next year's account, it seems to me that the only way in which something as near to exact justice as possible can be arrived at in a case of this nature is by taking the accounts as they have been made out and adjusted and the income tax upon them assessed. Our judgment, therefore, will be for the Crown.

AMPHLETT, B.—I am of the same opinion. I was certainly struck in the first instance with what seemed to me to be an apparent injustice in this mode of assessing the duty, but on further consideration I saw that the injustice, if any, was really confined to the first year when the company commenced business. In the first year there would, no doubt, be this injustice, which has been pointed out by my Lord—they would be charged upon all the premiums received, though as to some or most of them there would be a liability of loss, and in strictness that loss ought to have been taken into account in the first year when the business commenced. Not very much injury, however, arises, because in the very next year—one year too late, no doubt, so far as strict justice is concerned—these losses are all brought into the account and are allowed as a deduction to the company. It is not a recurring loss. After that system has been once begun, there is really no injustice at all for the subsequent years, unless it should happen that the business was an increasing business; and then, with regard to the increase of business done in any subsequent year, there would be a slight modicum of loss, the same as there was in the first year; but on the other hand, if in any subsequent year the business diminished, then this way of keeping the accounts would be in

favour of the company; and I observe that in these three years there was in the last year a not inconsiderable reduction in the premiums received. In that case it is actually rather an advantage to the company than otherwise. Taking, therefore, three years together, and taking the average, supposing the business to remain stationary, there is no recurring loss at all. The only thing is this, which my Lord has pointed out, if the business be stationary the account would be perfectly accurate for this year upon the average of the three years in this way of taking it; and assuming for the moment that the business did remain stationary, the only possible further injury which could be done would be after the last year, when the company would have paid income tax upon the whole amount of the premiums, and then there would be some loss which would remain unaccounted for in consequence of their having ceased to carry on business. I have no doubt that, under the section of the Act of Parliament which has been referred to, if this company should happen to come to an end of their undertaking, an allowance would be obtained from the commissioners in respect of that loss, which had not been taken into account during the year in which the premiums upon the policies were paid, and which would be a loss which had never been brought into the accounts in favour of the company. I cannot, therefore, help thinking that really the inconvenience is, at any rate now, after the insurance office has been started for some years, extremely small; and when we consider the inconvenience of having recourse to estimates and averages for the purpose of ascertaining how much contingent loss ought to be taken into account during the year in which the premiums are paid, I think that the insurance company themselves would find that they would gain nothing by now making any change of plan. If they find it to be for their interest to adopt a new system, I by no means intend to say that if they choose at a future time to alter their mode of taking the account, and to set aside, for instance, some fund to answer contingent losses in the next year; if they choose to do that, and make it intelligible, I by no means say that they may not oblige the commissioners to accept the accounts in that amended form. But they have not done so. They have kept the accounts, I have no doubt, in the most convenient way, taking the premiums as receipts in the year, and taking the actual losses incurred in that year as a payment, and striking the balance, and calling the balance profit. It is not exactly mathematically accurate, but that is the way in which, as between themselves and their own shareholders, they have found it most convenient to keep their books; and, therefore, I think that as long as they keep their books in this way, the commissioners have a right to apply the same rule in estimating the amount upon which they ought to be assessed. Under these circumstances, I think that we ought to give our judgment for the Crown.

HUDDLESTON, B.—I should have thought that the most convenient way for the insurance company to have kept their accounts would have been to have debited themselves first of all with the amount of premiums applicable to the risks of the year; that is to say, they might very readily have ascertained when the premiums were paid, in whatever month it was, how much of them was appli-

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cable to the current year, and how much would be applicable to the risks to be incurred in the succeeding year, assuming them to be annual payments; and they might very readily have carried out a figure which would really represent the amount applicable to the rates of that year—that is to say, they might either, in the first instance, have taken the gross sum of the premiums received, deducting therefrom such proportion as would be applicable to the succeeding year, and have debited themselves with the balance; or they might have done it in the way in which it is suggested by the company that they should now do it here, they might have debited themselves with the gross sum, and then have credited themselves with the actual sum which would be applicable to the next year; and in that case I think that they probably would have got at the right amount of the gross profits. I do not see that in the case of fire insurances such a course would be very difficult, or, perhaps, as difficult as in the case of life insurances. This, however, the company has not done. What they have done is this: under these three years they have debited themselves first with the gross sum of the year, they have then added to that sum the sum with which they say they have credited themselves in the previous year, and then, adding to that the sum receivable from interest, they carry to the other side of the account first their losses, next their expenses, and then their dividends, which are all proper items of deduction, and then they take an arbitrary sum, which they say (but we have no evidence whatever of the fact) would represent the unearned premiums, and they take that at something like 33 per cent. We have to decide whether the difference between the two sides of the account, as stated by the company, is “the full amount of the balance of the profits or gains of such trade upon a fair and just average of three years.” They do it with reference to the three years. It is quite clear to me, looking at this arbitrary sum which they put in the credit side of the account, that they have not arrived at “the full amount of the balance of the profits or gains of such trade upon a fair and just average of three years.” They have not (as is found by the case) kept their accounts in that way as between themselves and their shareholders, and I find it also stated that “this was the first year in which they” (that is the “unearned premiums”) “were taken into account by the company in making their return.” Now, an obvious inconvenience arises. Supposing that at the expiration of the next three years the company should feel themselves justified in establishing a different mode of accounts; it might be that they would not carry to the debit of the first year of the next three years that sum which they had carried to their credit in the year previous to the first of the three years, and then justice would not be done. I cannot help thinking that, as the company have not in their accounts adopted this method of computation, as this is the first year in which they have made this attempt at changing the mode of keeping or stating the accounts, they must be bound by their accounts; and really, as pointed out by my Lord and my brother Amphlett, in the result, *communibus annis*, no injustice will be done. If they find that in one year there are great losses they may, under the 133rd section, get the matter put right by the commissioners.

If they stop business they may, under the 134th section, obtain the proper return of what they have overpaid. On the whole, I think, looking at the case as stated before us, that our judgment must be for the Crown.

KELLY, C.B.—I may add that it is not unworthy of consideration that the company have in their hands during the whole of the year, say 1873, from the time of the receipt of each premium, the premiums upon the whole of these policies, and so they have in the year 1874, until the losses with respect to the policies begin to be sustained. They possess this advantage, which is a great one to them. We do not think that this is a case for costs. Each party must pay its own costs.

Judgment for the Crown.

Solicitors for the Company (appellants), *Oliver and Sons.*

Solicitor for the Crown (respondents), *The Solicitor of Inland Revenue.*

Jan. 31 and Feb. 1 and 2.

THE CESENA SULPHUR COMPANY (LIMITED) v. NICHOLSON; AND THE CALCUTTA JUTE MILLS COMPANY (LIMITED) v. NICHOLSON. (a)

Revenue—Income tax—Company incorporated and registered in England—Business and profits carried on and earned abroad—5 & 6 Vict. c. 35, s. 40, and 16 & 17 Vict. c. 34, s. 2, sch. D.—“Person residing within the United Kingdom”—“Trade carried on in the United Kingdom or elsewhere”—Residence of a joint-stock company.

The Cesena Sulphur Company, incorporated in 1871 under the Companies Acts of 1862 and 1867, with a capital of 35,000l., in 10l. shares, and registered in Italy for all purposes in 1872, was formed for the purpose of developing and working the mines of sulphur at Cesena, in Italy, and the manufacture and sale of sulphur there, with power to take occupation of lands wherever sulphur was likely to be found. As regards its affairs in the United Kingdom, the company is managed by a board of directors, who hold their meetings at the registered office of the company in London. An Italian delegation, consisting of two or three members of the board, reside in Italy, and carry on all the practical management of the company's properties and affairs, one of them being the managing director of the company, and residing at Cesena, where all the operations connected with the manufacture and sale of sulphur are exclusively carried on and the profits are earned. The Italian members of the board are in constant correspondence with their co-directors resident in France and England, who meet at the registered London office; and the working of the mines, the mode of the disposal thereof, and the general business of the company, are wholly under the order, direction, and management of the directors, subject to the control of general meetings, as provided by the articles. The original account books and all the moneys are kept at Cesena, but copies of such books are sent to London, where the register of shareholders prescribed by English law is kept. The company's principal banking accounts are kept at Turin and Paris, the London banking account being kept for payment of office and ad-

(a) Reported by H. LUSH, Esq., Barrister-at-Law.

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ministrative expenses and the dividends required for the English shareholders, which are the only part of the company's profits which are sent to England. The shares of the company are divided between English and foreign holders in the proportion of 8924 held in England to 26,076 held abroad.

The Calcutta Jute Mills Company, incorporated in 1872, under the Companies Acts 1862 and 1867, with a capital of 120,000l., in 20l. shares, was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills near Calcutta, then belonging to and carried on by a firm of merchants resident there. The affairs of the company in the United Kingdom are managed by a board of not less than five directors, by whom one of the shareholders residing in Calcutta was appointed to be the managing agent and resident director of the company in India, and by whom and under whose entire control the buying of the raw material and its manufacture and sale, as well as all the operations connected with the company's business in all its branches, are wholly and exclusively carried on in India, where alone the profits of the company are earned; the company neither buying, manufacturing, nor selling in the United Kingdom. There is both an Indian and an English share register, and rather more than half the capital and shares are owned by residents in India. The company has no office or place of business in England, but, for purposes of registration, its address is at a merchant's office in London, where, by leave of the occupier, the meetings of the company are held. The books of accounts, documents, and moneys are kept, received, and dealt with by the manager in India, and the company has no property in the United Kingdom. Nothing whatever comes into the hands of the English directors, except periodical remittances from Calcutta to defray necessary expenses, and such portion of the profits realised in India as are divisible as dividends amongst the shareholders in the United Kingdom; and all that takes place in England after receiving such proportion of the profits is the calling by the directors of a meeting of shareholders, and a declaration by the directors of the amount to be distributed by way of dividend amongst the English shareholders for the current year.

The companies having been assessed to income tax in respect of the entire gains or profits of their business carried on by them in Italy and India respectively, appealed therefrom, and contended that they were only liable to be assessed on the portion of their profits remitted to England for distribution in the way of dividends amongst the shareholders resident in the United Kingdom.

Held by the Court (Kelly, C.B., and Huddleston, B.), giving judgment in favour of the Crown in each case, that it was clear from the constitution of both companies, as shown by their articles of association, that the entire and absolute control of their affairs and business was vested in and exercised by a board of directors in London, which place was therefore, in each case, the seat of business of the company, at which it must be deemed to "reside," and that in effect the companies therefore were to be, and were rightly, assessed as a "person residing within the United Kingdom," upon the whole of the annual profits or gains of their businesses carried on in Italy and India respectively.

Per Curiam.—A corporation is not a partnership, nor are the shareholders in a joint-stock company partners; and a company cannot be divided into two portions, the English and the foreign, and income tax be assessed only upon the profits accruing or belonging to the shareholders residing in England.

THE Commissioners of Income Tax for the city of London assessed the above first-named company, the Cesena Sulphur Company, in the sum of 5834l., under schedule D, in respect of their entire profits in their business of sulphur miners, &c., at Cesena, in Italy. They also assessed the other company, the Calcutta Jute Mills Company, under the same schedule, in respect of their profits in the sum of 25,000l., being their entire or aggregate gains for the year 1874, as spinners and manufacturers of jute in India. The company in each case appealed, and contended that the assessment should be restricted to the portion of the profits distributed amongst the shareholders resident in the United Kingdom, and thereupon the Commissioners of Inland Revenue, in conformity with the provisions of the 37 Vict. c. 16, s. 7, stated two cases for the opinion of the court.

The question raised and the point involved in these two cases being very similar, the court decided to hear the arguments in each of them in succession before delivering their judgment in either.

The following are the material portions of the cases that were so stated:

THE CESENA SULPHUR COMPANY (LIMITED).

1, 2. The Cesena Sulphur Company (Limited), hereinafter called the company, was formed to carry on the trade or business of sulphur miners, manufacturers, or merchants, at Cesena, in the province of Firli, in Italy. It was incorporated under the Companies Acts 1862 and 1867 on the 27th Oct. 1871, with a capital of 350,000l., divided into 35,000 shares of 10l. each, and was subsequently registered in Italy, for all purposes, in the following year, viz., on the 1st Nov. 1872.

3. By the articles of association (forming part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board of eight directors, holding their meetings at the registered office of the company in England. There is an Italian delegation, consisting of two or three members of the board, resident in Italy, by whom all the practical management of the company's properties and affairs is carried on. One of the Italian directors is managing director of the company, and resides at Cesena.

4. All the operations connected with the manufacture and sale of sulphur are wholly and exclusively carried on at Cesena, where the profits of the company (if any) are earned, but the Italian members of the board are in constant correspondence with their co-directors resident in France and England, who meet at the English registered office, No. 84, King William-street, in the City of London.

5. Transcripts and copies of the company's books of accounts are sent to London, where the register of the shareholders, prescribed by the English law, is kept, but all the original books of accounts of the company, and all its moneys, are kept in Italy, the dividends required for the English shareholders being the only part of its profits which are sent to this country. The principal banking accounts of the company are kept

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at Turin and at Paris; the London banking accounts being kept for the payment of offices and administrative expenses and of dividends here.

6. The shares of the company are divided between the English and foreign shareholders in the proportion of 8924 held in England to 26,076 held abroad.

7. The assessment or tax is leviable under Schedule D of the Acts of 5 & 6 Vict. c. 35, and 16 & 17 Vict. 34; under the former of those Acts (see sect. 1, Schedule D) certain duties are granted to Her Majesty upon the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere . . . and upon the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, employment, or occupation, whether the same shall be respectively carried on in Great Britain or elsewhere.

8. By sect. 40 of the first mentioned Act it is enacted that all bodies politic, corporate, or collegiate, companies, fraternities, &c., whether corporate or not corporate, shall be chargeable with such and the like duties, as any person would, under and by virtue of the said Act, be chargeable with.

9. By 16 & 17 Vict. c. 34, the like duties as are referred to in paragraph 7, are granted to Her Majesty upon profits arising from property, profession, trade, and offices (*inter alia*) sect. 2.

SCHEDULE D.

For and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere.

10. By 5 & 6 Vict. c. 80, s. 2, persons entrusted with the payment of foreign dividends or annuities are required to deliver, for the use of the Commissioners of Taxes, true and perfect accounts of the amount of the annuities and shares payable by them respectively, and the said commissioners are empowered to make an assessment thereon under Schedule C.

And by sect. 10 of the 16 & 17 Vict. c. 34, the provision so made by the last recited Act is extended to the assessing and charging of the duties granted by the Act, "as well on such dividends and shares of annuities aforesaid, as on all interest, dividends, and other annual payments payable out of or in respect of the funds or shares of any foreign company, society, adventure, or concern, and which said interest, dividends, or other annual payments, have been or shall be entrusted to any person in the United Kingdom for payment to any persons, corporations, companies, or societies in the United Kingdom;" and all persons entrusted with the payment of any such interest, dividends, or other annual payments as aforesaid in the United Kingdom, or acting therein as agents, or in any other character, are required to perform all such acts and things in order to the assessing of the duties on such interest, dividends, and other annual payments as are required to be done by persons entrusted with the payment of annuities or any dividends under the 5 & 6 Vict. c. 80, above referred to. And the assessment of the duties on all such interest, dividends, and other annual payments as

aforesaid, shall be made by the Commissioners for Special Purposes under Schedule D.

11. By sect. 5 of the 16 & 17 Vict. c. 34, the duties thereby imposed are directed to be assessed under the regulations of the statute 5 & 6 Vict. c. 35.

12. The duties granted by 16 & 17 Vict. c. 34, have been continued at various rates by a series of subsequent Acts, and the Act imposing the duty for the year 1874 is the 37 Vict. c. 16.

13. The commissioners, having regard to the articles of association accompanying the case, and to the certificate of incorporation signed by the Registrar of Joint-stock Companies, and also to the fact that the registered office of the company is in England, where the directors meet, and direct, and control the main operations of the company, were of opinion that the company is an English company, formed under the Joint-stock Companies Acts, for carrying on an undertaking abroad, and is, by virtue of sects. 40 & 192 of the 5 & 6 Vict. c. 35, in the same position as a "person" residing within the United Kingdom, and liable under the provisions of the 5 & 6 Vict. c. 35, sect. 1, and 16 & 17 Vict. c. 34, s. 2, to make a return of the whole of the profits of any trade, whether the same shall be carried on in the United Kingdom or elsewhere.

The commissioners were further of opinion that the decision of the Court of Exchequer in the case of *The Imperial Ottoman Bank v. The Attorney-General, Alexander, and others* (31 L. T. Rep. N. S. 694; L. Rep. 10, Ex. 20; 44 L. J. 3 Ex.) was not adverse to but confirmatory of the contention of the Crown in the present case; the Court of Exchequer having there decided that the residence of a corporation must be regarded as the place of its incorporation, which, in the case of the Cesena Sulphur Company, is within the United Kingdom. That the 5 & 6 Vict. c. 80, s. 2, and sect. 10 of the 16 & 17 Vict. c. 40, referred to by the company in the present case, do not bear upon the question at issue, and apply only to agents or other persons entrusted with the payment of dividends or other annual payments payable out of or in respect of stocks, funds, or shares of any foreign company, society, or concern.

14. The assessment was accordingly confirmed upon the whole of the profits of the company.

15. The question for the opinion of the court is whether the company is bound to make a return in respect of all annual profits wholly made by its business in Italy, including the portion paid to the Italian shareholders, and is chargeable to income tax thereon; or whether, as is contended on the part of the company, the London directors are bound only to make a return and to pay income tax in respect of so much of the profits made abroad as actually pass through their hands for distribution among the shareholders residing in the United Kingdom.

Points for argument on behalf of the appellants.—First, that the company is not a person residing within the United Kingdom, within the meaning of schedule D to the Acts 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, respectively. Secondly, that residence in the United Kingdom cannot be predicated of a company within the meaning of the said Acts. Thirdly, that there is no one within the United Kingdom who receives any profits in respect of the said company's business, other than the amount of dividends required for the share-

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holders in this country. Fourthly, that the profits, other than the aforesaid amount of dividends, accrue outside the United Kingdom, and are received by persons not resident within the United Kingdom. Fifthly, that no part of the profits of the said company is liable to income tax except the amount of dividends distributed among shareholders in the United Kingdom.

Points for the Crown.—That the Cesena Sulphur Company, being an English company, registered in England under the Companies Acts 1862 and 1867, and having also the registered office of the company in England, is in the same position as a person residing in the United Kingdom, and is liable to income tax under schedule D of the Acts 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, in respect of the annual profits and gains of the company, whether made in England or elsewhere. Secondly, that on the facts of this case the company resides in the United Kingdom, and not in India. Thirdly, that the provisions of sect. 10 of the 16 & 17 Vict. c. 34, relied on by the appellants, apply to the case of dividends payable by or for a company or concern to shareholders residing in the United Kingdom, and have no application to the present case. Fourthly, that the return made by the secretary of the company is bad in law.

THE CALCUTTA JUTE MILLS COMPANY (LIMITED). CASE.

1. The Calcutta Jute Mills Company (Limited) (hereinafter called "the company") was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills at Ishera, near Calcutta, in India, belonging to and then carried on by a firm of merchants, Messrs. Borradaile, Schiller, and Co., resident there.

2. The company was incorporated under the Companies Acts 1862 and 1867, on the 16th April 1872, with a capital consisting of 120,000*l.*, in 6000 shares of 20*l.* each.

3. By the articles of association (a copy of which forms part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board consisting of not less than five directors. The directors have (*inter alia*) power to appoint one or more persons resident in Calcutta as "the Calcutta directors." As a matter of fact, there is at the present time one Calcutta director, Mr. George Muirhead Sturthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller, and Co., of Calcutta, the former proprietors of the mills.

4. On or about the 1st May 1872, the company commenced business as spinners and manufacturers of jute at Ishera, in Calcutta, aforesaid, and not elsewhere.

5. The buying of the raw material and the manufacture and sale of the same, as well as all the operations connected with the business of the company in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned.

6. At the time of the purchase of the said mills the company adopted an agreement whereby Messrs. Borradaile, Schiller, and Co., of Calcutta aforesaid, were constituted the managing agents in India, and they have had the entire control of its business and works at Ishera. At the same

time they guarantee the solvency of those with whom they deal, and receive a *del credere* commission from the company in return.

7. There is an Indian as well as an English share register, and the larger amount of capital, as well as the greatest number of shares, are owned by persons residing in India.

8. On the 31st Dec. last the share register stood as follows: 3843 shares, representing a capital of 76,860*l.*, were held in India, and entered on the Indian share register; while only 2157 shares, representing a capital of 43,140*l.*, were held by persons residing in this country, and entered in the English share register.

9. The company has no office or other place of business in the United Kingdom, although, for the purpose of registration, its address here is No. 4, St. Helen's-place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there, it is entirely by his leave and favour.

10. All the company's books of accounts, papers, and other documents, as well as its moneys, are kept, received, and dealt with by the management in India.

11. As a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time, to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend, passes through their hands.

12. After receiving such proportion of the profits as is mentioned in par. 11, all that takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the current year.

13. For the year 1874 the sums received by the directors in this country as the proportion of the profits wholly made and acquired by the business of the company in India, and payable to the shareholders in the United Kingdom, amounted to 8497*l.*

14. In the said year the secretary of the company duly made a return of that amount to the commissioners for putting into execution the Income Tax Acts for the City of London, as the true and proper amount upon which the company was ready and willing to be assessed to income tax. To the said return there is appended a statement of the manner in which the same was made or estimated, as follows: "This return is made by me as secretary of the Calcutta Jute Mills Company (Limited). It includes the whole amount of the dividends or profits paid or payable to the shareholders residing in the United Kingdom for one whole year, on a fair computation or average, from the commencement of the business of the company on the 1st May 1872, but not the dividends or profits paid or payable to shareholders resident in the East Indies, and whose names are entered on the company's Indian share register. The trade of the company is that of jute spinners and manufacturers. The only place of manufacture as well as the place of sale is at Ishera, Calcutta. The company neither buys, manufactures, nor sells in the United Kingdom. The raw

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material is all purchased in India, manufactured there, and sold there, where also the entire profits are made."

Paragraphs 15 to 20 inclusive (setting forth the several sections of the Income Tax Acts applicable to the present question) are similar to paragraphs 7 to 12 inclusive in the previous case; and paragraphs 21, 22, 23, stating the opinion and decision of the commissioners, and the appeal of the company therefrom, and the question for the opinion of the court, are similar to paragraphs 13, 14, 15, in the previous case.

Points for argument on behalf of the appellants:—First, that under the circumstances stated, the Calcutta Jute Mills Company is not a company resident within the United Kingdom, within the meaning and for the purposes of the Income Tax Acts; secondly, that the trade of the said company is not exercised or carried on within the United Kingdom within the meaning and for the purposes aforesaid; thirdly, that under the said Acts the appellants are liable to pay income tax only upon so much of the profits as are received by them for distribution amongst the shareholders in this country.

The points for the Crown are similar to those in the previous case of the Sulphur Company.

The articles of association in each case, so far as they are material on the present occasion, are so fully stated and gone into in the judgments of the court, that it is unnecessary to set them forth here.

THE CESENA SULPHUR COMPANY (LIMITED).

Jan. 31 and Feb. 1.—Sir H. James, Q.C., and E. S. Wright (with them was B. T. Reid), argued on behalf of the appellants, and cited and referred to the following authorities:

- The Carron Iron Company v. Maclaren*, 5 H. of L. Cas. 141 (per Lord Cranworth, L.C.);
- The Keynsham Blue Lias, &c., Company (Limited) v. Baker*, 9 L. T. Rep. N. S. 418; 33 L. J. 41, Ex.; 9 Jur. N.S. 1346;
- Taylor v. The Crowland Gas and Coke Company*, 24 L. J. 283, Ex.;
- The Kilkenny and Great Southern and Western Railway Company v. Fielden*, 6 Ex. 81; 29 L. J. 141, Ex.;
- The Attorney-General v. Alexander and others*, 31 L. T. Rep. N. S. 694; L. Rep. 10 Ex. 20; 44 L. J. 3, Ex.;
- 5 & 6 Vict. c. 35, s. 40; 16 & 17 Vict. c. 34, s. 2 (sebed. D), s. 10.

The Attorney-General (Sir J. Holker, Q.C.), with whom were the Solicitor-General (Sir H. S. Giffard, Q.C.) and Pinder, on the part of the Crown, *contra*, commented on the cases cited on the part of the appellants, and cited and referred to the following additional authorities:

- Adams v. The Great Western Railway Company*, 3 L. T. Rep. N. S. 631; 6 H. & N. 404; 30 L. J. 124, Ex.;
- Shiels v. The Great Northern Railway Company*, 4 L. T. Rep. N. S. 479; 30 L. J. 331, Q.B.; 7 Jur. N. S. 731;
- Brown v. The London and North-Western Railway Company*, 8 L. T. Rep. N. S. 695; 4 B. & S. 326; 32 L. J. 318, Q.B.;
- Sully v. The Attorney-General*, in error, 2 L. T. Rep. N. S. 439; 5 H. & N. 711; 29 L. J. 464, Ex.;
- The Aberystwith Promenade Pier Company v. Cooper*, 13 L. T. Rep. N. S. 276; 35 L. J. 44, Q.B.;

and the following American cases:

- The Bank of Augusta v. Earle*, Curtis' Rep. 282; 13 Peters' Rep. 589;
- The Blackstone Manufacturing Company v. The In-*

- habitants of Blackstone*, 13 Gray's Rep. (Massachusetts) 488;
- The United States v. Arnesley*, 11 Wheat. 412; 13 Peters' Rep. 135;
- Beason v. The Farmers' Bank of Delaware*, 12 Peters, 135;
- The Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black's Rep. 286;
- The Baltimore and Ohio Railroad Company v. Glenn*, 28 Maryland Reps. 287;
- Lindley on Partnership*;
- Lorton's Conflict of Laws*, sect. 38;
- Savigny (Guthrie's Translation, 1869)*, p. 63;
- 5 & 6 Vict. c. 35, s. 192;
- The Companies Act 1862*, ss. 10, 18, 38;
- The Companies Act 1867*.

E. S. Wright (for the appellants) replied.

The court then proceeded to hear the arguments in the case of

THE CALCUTTA JUTE MILLS COMPANY (LIMITED).

Feb. 1 and 2.—H. Matthews, Q.C. (with him were Sir H. Jackson, Q.C. and Bolland), argued on behalf of the appellant company, and, in addition to citing and commenting on all the cases and authorities that were cited and relied on upon both sides in the *Cesena Sulphur Company's case*, cited also the following:

- Newby v. Van Oppen and others (Colt's Patent Fire Arms Manufacturing Company)*, 26 L. T. Rep. N.S. 164; L. Rep. 7 Q. B. 253; 41 L. J. 148, Q. B.
- The Oldham Building Company (Limited) v. Heald*, 10 L. T. Rep. N. S. 534; S. C., in error, 33 L. J. 236, Ex.; 3 H. & C. 132;
- The United States v. Mackenzie (American)*, 3 Brockembrough, 393;
- Lindley on Partnership*, p. 6;
- 5 & 6 Vict. c. 35, ss. 39, 40, 46, 59, 100, Rule 3.

Pinder (with whom were The Attorney-General (Sir J. Holker, Q.C.) and The Solicitor-General Sir H. S. Giffard, Q.C.) for the Crown (*contra*), was not called upon to argue.

In each case the contention on the part of the Crown was that the company was an English company under the Joint-stock Companies Acts for carrying on an undertaking in England, and was by virtue of the Income Tax Acts in the same position as a "person" residing in the United Kingdom, and was liable under the provisions of the Acts to make a return of and be assessed upon the whole of their profits, whether arising from business carried on in the United Kingdom or elsewhere; the companies, on the other hand, insisting that they were not "persons" residing within the United Kingdom under the Income Tax Acts, and were only liable to be assessed upon the amount of the dividends sent to England and there received by and distributed amongst the shareholders resident in the United Kingdom.

It is unnecessary to state the arguments on either side more at length here, as they are fully noticed and commented on by the learned Barons in their judgments.

KELLY, C.B.—In both these cases I think that the Crown is entitled to the judgment of the court. I will first deal with the case of the Calcutta Jute Mills Company, which has been most admirably argued on both sides, and especially—if I may say so without being invidious—by Mr. Matthews, who in his zeal has certainly said and done all that was possible to overcome the difficulties by which he was environed. We have carefully considered both the cases, and the great principles of the law upon which they ought to be decided. Both are cases raising, I believe for the first time, a question of great importance both in its nature and

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the extent of its operations, and involving important principles of great weight as affecting the law of this country, and, I may almost say, the international law of the world. I should be glad if we felt it possible, consistently with our duty and the view which we take of the law, to decide the question otherwise than we are about to do; for it is in vain to deny that the result of our decision is to declare that the Legislature taxes foreigners who are neither natives nor inhabitants of this country, and, with the exception of India, are not within the jurisdiction of its laws. Now, the question in the case of the Calcutta Jute Mills Company is whether they can be held liable to income tax upon the entirety of their profits. It is a company incorporated in England under the Joint-stock Companies Acts, having a local position in this country, and occupying, or rather being permitted to occupy, an office within the City of London, where it transacts its business and exercises the very large and extensive powers with which it is invested by the Act of Parliament. On the other hand, it is equally true that the whole property in which the entire capital of the company is invested is not in this country, but in India, and that the mills are worked and the whole profits of the company earned in that country alone. It likewise appears (and it is here that the question arises) that out of the whole of its profits, amounting for the year in question to 25,000*l.*, about two-thirds of the dividends are payable, not to inhabitants of England, nor to persons having any connection with England, except that they happen to dwell under the same Crown and the same rule, but to persons residing out of England, and chiefly, if not entirely, in India. Again, the actual trading business of the company is transacted in India and not in England. But then, on the other hand, upon looking to the constitution of the company and its articles of association, under and by virtue of which it exists, we find that it is entirely under the control and in the actual possession of the governing body in England. It is stated in the case that "the company, so far as its affairs in the United Kingdom are concerned, is managed by a board, consisting of not less than five directors. The directors have power (*inter alia*) to appoint one or more persons resident in Calcutta as the Calcutta directors. As a matter of fact, there is at the present time one "Calcutta director," Mr. George Muirhead Struthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller, and Co., of Calcutta, the former proprietors of the mills. We begin, then, with this, that the company is incorporated in and under the law of England, and, therefore, its origin and first existence is in England, and England alone; that the governing body, the directors, are in England, and that they have power to appoint—not that there exists by virtue of the company's constitution a director having power himself to act and conduct the company's affairs in India—but that the governing body in England have power to appoint one or more persons resident in Calcutta as the Calcutta directors, and that they accordingly appointed a resident director at Calcutta, who controls the whole conduct of the business there. But he is merely the appointee or agent of the governing body of directors in England. Then we see that "the

buying of the raw material, and the manufacture and sale of the same, as well as all the operations connected with the business of the company, in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned;" and further on in the case, without going at more length into what relates to the property itself, we find (and these are the passages chiefly relied on by the appellants) that the company has no office or other place of business in the United Kingdom, although for the purpose of registration its address here is No. 4, St. Helen's-place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there it is entirely by his leave and favour. Now it really signifies little, and makes no difference whether the office, in which the very important business of holding meetings at which everything, that is, may, or can be done by the company, is determined, is an office hired at a rent, or is a place lent for that purpose by one of the directors of the company for the use of the company and at their disposition, and for that purpose alone. There is their location, their "residence," to apply the term of the Act of Parliament; and there it is that the directors accordingly meet, and there the company, the great body of shareholders, hold their general and extraordinary meetings. It is, therefore, for all the purposes of this case, the office of the corporation. The case then states that, "as a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom, by way of dividend, passes through their hands." Now, it may be convenient here to refer to what must be the basis of our decision, namely, the words of the Act of Parliament. By the 5th section of the 15 & 16 Vict. cap. 34, it is enacted that "The said duties hereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the Act of 5 & 6 Vict. c. 35, and of the several Acts therein mentioned or referred to, and also of any Act or Acts subsequently passed explaining, altering, amending, or continuing the said first mentioned Act;" and by schedule D there is the provision that the companies or persons are to be assessed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere," and to be charged for every 20*s.* of the annual amount of such profits and gains. Now, the first thing important to be noticed here is that the tax is imposed upon "any person residing in the United Kingdom." By other Acts of Parliament for the word "person" may be substituted a "corporation" or "joint-stock company;" so that we may read this word "person" here as if the words were for and in respect of the annual profits or

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gains arising or accruing to any "joint-stock company." Then follows the words "residing in the United Kingdom," and so forth. A great deal has been said as to how an individual entitled in his own right to property of this description would be assessed; but I think it leads only to complication and confusion to enter into all the cases which might well be applied to the tax as imposed upon a single individual, and to attempt to apply them to the tax as imposed upon a joint-stock company. I therefore pass away from that, and will consider the matter as if the words "joint-stock company" had been here used in place of the word "person." In order to come within the Act, it must be a joint-stock company "residing in the United Kingdom," and upon that a question of law arises, independently of the particular terms and provisions of this company's articles of association. Where does a joint-stock company "reside," and what is the meaning of the term "residing" as applicable to such a company? The answer to that question, without expressing any opinion at the present moment as to whether there may or not be two places at which a joint-stock company or corporation can reside, is that it resides where its place of incorporation is, and where its general body exercises the powers conferred upon it by the Act of Parliament and its articles of association, and where it meets, and is in bodily and personal presence for the purposes of the concern. Where, then, is that place in the present case? I deny that the whole case presents a single act which is done in Calcutta otherwise than in England or elsewhere than in this very office, which can truly be called the act of the company. That acts of the highest importance as affecting the well-being of the company, the operation of its business, and the realising and disposing of its funds, are done in India, is perfectly true, but they are all done by mere agents, whether they be directors or not, appointed under the sole authority of the general body of, and represented by, the corporation in this country, and so making their acts the acts of the corporation; therefore, within these words, if a company can be said to "reside" anywhere, as we must suppose that it can, in order to give effect to the Act of Parliament touching joint-stock companies, this company undoubtedly resides at the office or place where the directors meet—meetings of the whole company are held—and where they transact their business and exercise the powers conferred upon them by the law and their articles of association. I need not go into the cases about "residing." The question has arisen, as it did in the case of *The Attorney-General v. Wheeler*, whether the acts of a single member of a firm consisting of several partners, carrying on business in New York, and which single member happened to reside in Nottingham and represented the firm there, and purchased goods which were afterwards sent to America and purchased and paid for by the firm, their commencing the operations and performing a part of them in the name of the firm in this country, made the firm liable; and it was held that this one individual did not represent the firm, and that the firm were not liable to be assessed to the income tax in his person by reason of his carrying on a portion of the business, namely, that of buying goods and consigning or transmitting them to America; because, in the first place, no one com-

plete transaction of business was ever effected by him; and also because the principal seat of business and the place at which alone the great bulk of the business of the firm was carried on was in New York. There are a variety of other cases arising under the County Court Acts, where the question has arisen as to where the corporations constituting the great railway companies of this kingdom reside. Where, for instance, do the Great Western and the London and North-Western Railway companies reside? Everybody who knows anything of these affairs would say, directly the question was asked, why, at Paddington and at Euston. And it has been held that the railway companies do reside there, because there is the principal seat of their business, and there their directors meet and exercise their powers; there their books are kept, and there or thence all their lines of railway emanate, and either begin or end. I need refer to no other authority. There is none, nor the shadow of any quoted, which goes to show that the place in which the directors or governing body meet and the shareholders hold their general and special or extraordinary meetings and the power of transacting the business is exercised, is not the principal seat of business, and the place in which, in the language of the Act of Parliament, the company may be said to "reside." I am, therefore, clearly of opinion in this case, upon these principles, and for these reasons, that this joint-stock company resides at No. 4, St. Helen's-place, in the City of London. Now, it is said that the whole business is transacted in India, and that "nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses; in addition to which, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend, passes through their hands." All that is true; but every act which is done, the working of the mills, the realising of the profits, the transmission of the proportion of them to England, and the distribution of them in the form of dividends to the different shareholders, all that, if not done by the company directly in India is done by them indirectly, because it is done by the person whom they appoint and may recall at their pleasure, and who has no power to do a single act or any authority to interfere in any degree in the affairs of the company except the authority conferred upon him by the governing body at home. Then comes the other statement, "after receiving such proportion of the profits as is mentioned in paragraph 11, all that then takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the then current year." And then the case gives a statement of the amount of the profits payable to the shareholders in the United Kingdom. Now it is quite true that all that they actually do in England with respect to the dividend is that, having received a certain proportion, about one-third, of the profits, they apportion it among the shareholders who are in England, and distribute and pay over to each of those shareholders the dividend to which he is entitled. But the payment of the dividends to the shareholders who are in India or elsewhere, though not actually done by the hands of the governing body, is done

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under their authority; and, undoubtedly, at any time upon learning that 25,000*l.* was in the hands of their representative in India, and therefore to be distributed in dividends, they might direct that sum to be at once remitted to England; and if it was withheld by any person or banker into whose hands it had been paid, they might maintain an action against that banker for money had and received, and recover it against him. It is their money, and they are the persons who, in contemplation of law, are the possessors of it as of right; and it is only because it would be a very expensive and useless, and it might be, through the failure of agents and banks, sometimes a very hazardous proceeding to desire the acting director in India to remit the whole amount to the governing body in London for them to remit two-thirds of it back again to India for payment to the shareholders there, that that course is not adopted; they clearly have and might exercise that power if they chose so to do. I do not propose to refer particularly to any other of the statements in the case, because they will all be found to fall within the same principle and to be open to the same observation. Though the property is in India, and the whole capital invested there, and though the produce of the property is in India, and the whole of the money which the company are ever entitled to receive, whether as profits or in any other shape or way, or for any other purpose, is earned in India, yet it all belongs to the company, who might at any moment virtually take possession of it, and might bring ejectment against anybody in India who against their will and without their consent had taken possession of one of these mills, and to such an action there would be no defence. Everything, therefore, is the property of the company, and it is the company thus located in England that alone can deal or authorise the dealing with the property in any way whatever. That this is so appears clear also from the terms of the articles of association. The memorandum of association, after stating the name of the company, and that its registered office will be situate in England, goes on to state: "The objects for which the company is established are, first, the purchasing of the jute mills, land, business works, machinery, plant, and stock-in-trade of the present proprietors of the Ishera Jute Mills, Bengal, with all the rights, privileges, and appurtenances thereto belonging, the carrying on there of the trade or business of buying, selling, and manufacturing jute in all its branches, and the extending of the said business and works or either of them." Now, who is that purchaser? Not the director who has been over there, nor the shareholders who are resident in India, but the company themselves in this country. Then what is to be done? Why, the carrying on in all branches of the trades or businesses of dealers in jute and other similar materials including their purchase, preparation, pressing, and so forth, and all this to be done, not by people in India, though it must be done of course by the hands chiefly of labourers in that country, but by the company or by persons authorised by them to do the acts in question in India. So with regard to "the purchasing or otherwise acquiring of any total or partial or contingent interest in, or the taking out in Great Britain, British India, or elsewhere, and the working of letters patent or inventions which may be conducive to the advancement

of the businesses aforesaid." No one but the company can do that. Indeed it, will be found that every single act which is to be done, from the beginning to the end, from the coming into existence down to the ultimate dissolution of the company, is to be done by the company, and by them alone, namely, by the governing body or by meetings of the shareholders, all in England and nowhere else. Then we come to this object, "the establishing of agencies for the purposes of the company either in the United Kingdom, British India, or elsewhere." Now there is the key to the whole of the proceedings on behalf of the company upon which the appellants rely. The learned counsel contended that all that is done in India is done by a director there, who may do as he pleases, and by certain persons under him who alone carry on the business of the company. How is that? It is under the last-mentioned article that the company authorised Mr. Struthers to go to India and to do this very act of establishing an agency in his person for carrying on the entire business of the company. But, as I have before said, his act is theirs, and it is they alone who do the acts which constitute the entire carrying on of the company's business. There is, then, a power to amalgamate the company, and so forth; and, finally, "the doing all such other things as are incidental or conducive to the attainment of the above objects." All this, as before said, is done by the company alone. The next article I will refer to is the third: "The directors may, with the sanction of a resolution of the company previously given in general meeting, increase its capital by the issue of new shares," and then there is provision made for that. Now, that is one of the most important powers which can be conferred upon a company. If their capital be a million, they may increase it to two millions. Could they do that, or take any step towards such an act, in India? Clearly not, even by their authorised agent there. It could only be done by the directors here with the authority of a general meeting. Then comes the last of the series of provisions to which it is necessary to call attention, viz., as to the creation of shares; the company being constituted and having come into existence under the Joint Stock Companies' Acts, and the articles of association being the constitution of the company, the questions come, How is it to be set going, what is to be done, and who is to do it? Here, again, we find that the company and they alone, are to do it. By article 5 "The directors may allot and issue shares in the capital of the company to such persons, upon such terms, and at such times, as they may think fit; and any shares which may be allotted in payment or part payment for property transferred, goods or machinery supplied, or for services rendered to the company, may be issued and, if so issued, shall be deemed to be fully paid-up shares." Here, again, is what we may call really the creation of the entire company. The creation of shares which may pass into the hands of Indians, Frenchmen, Italians, and Englishmen also, is entirely and exclusively the act and under the sole authority of the company. Before a single share is issued or allotted to anyone they belong to the company, who may by such machinery or system as they think convenient allot them to as many people, whether Englishmen or the natives of any other country, as they

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think fit. I need go no further into the articles of association. Suffice it to say that there are provisions for general meetings and powers given as to the forfeiture of shares and for a great variety of other purposes, all of which powers are vested solely in the company. The only remaining question, therefore, is this. It is the case that every power which has to be exercised touching the property of the company or the carrying on of their business must be exercised by the directors, the general body of the company, with or without the authority of a general meeting; the governing body, and these shareholders' meetings all being in England, where the "residing" is locally situated. Reliance was, no doubt, justly placed upon the fact that the whole carrying on of the business took place in India, but the carrying on of the business, the manufacture of the jute and the realisation of the funds, and the immediate and ultimate disposition of the funds, is wholly and exclusively under the authority of the general body in this country. And the language of the Act of Parliament is conclusive that the assessment shall be upon the company, "for and in respect of the annual profits or gains arising or accruing," and so forth, "from any kind of property whatever, whether it be in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing from any profession, trade, employment, or occupation, whether the same shall respectively be carried on in the United Kingdom or elsewhere." Is not this an assessment upon the company in relation to their property, although the property happens to be situated, in the language of the Act of Parliament, not in this country but in India, and in respect of profits which are earned and acquired, not in this country but in India? It appears to me, therefore, that the case is clearly and directly within the terms and meaning of the Act of Parliament, and that on this ground the Crown is, without any doubt, entitled to judgment. Before I conclude my observations on this case, I might say that in the first place the great principle of the law of England in relation to taxation is, that the tax shall only be imposed upon persons or things actually within this country. Here, undoubtedly, the question must be determined. Is this company, who are the persons, and is this property, which, under the Act of Parliament, is included in the same category as property actually in this country, are they or not, under the express terms of the statute, to be treated in the same way, with respect to the application of the principle of law, as if the property had been situated in an English county? It appears to me that the true principle of the law is that they are. Now, although it may seem to be an infringement of one of the principles upon which taxation is levied in any country that two-thirds of the earnings of this company made or arising from a business carried on out of England, and belonging to persons not resident in the United Kingdom, should be subject to taxation, yet the answer to that (and it is not for me to say whether or not it is a sufficient one) is that if a foreigner residing abroad, and having no property or interest in and no connection with this country, thinks fit to invest his money here, and so to obtain the broad shield and protection of English law for his property, he must take the benefit with the burdens belonging to it.

It may seem to be hard upon a foreigner, who may be never in his life set his foot upon English ground, and never intends to do so, to tax him upon his whole income, but nevertheless the law is so, and he must submit to it. On these grounds, therefore, I think that this assessment was well made. I might deal with the latter argument so ably urged by Mr. Matthews, which held that there may be cases in which persons in this country may be taxed in relation to property abroad, and that therefore there is something like a reciprocity of injustice, if injustice it be. I will not, however, dwell upon those cases, or upon that argument, because it is founded upon clauses in the Act which have no relation to the matter now before the court, which is as to the property and the gains or income of a joint-stock company. If the words "joint-stock company" had been introduced into those clauses which Mr. Matthews lastly referred to, his argument would have been entitled to much consideration; but I find nothing in the Act of Parliament, or in any one of the numerous authorities which have been cited, which interferes with the plain and direct operation of the clause to which I have called attention, and under which I hold that this company is liable to be assessed in respect of the whole amount of its annual profits. I will now proceed to deal with the other case of the Cesena Sulphur Company. It is not necessary to repeat the observations which I have already made as to the general principles of the law and their operation upon the cases now before the court. Like the Calcutta Jute Company, this company also was brought into existence under the Joint-stock Companies Acts. It appears that certain persons being possessed of some sulphur mines and plant and other property of considerable value at Cesena, in Italy, which they were desirous of parting with, sold the whole of it to a body of persons, seven in number, who were the first subscribers, and through whom the company was constituted and came into existence under the Joint Stock Companies Acts. They became the purchasers of the whole of this property and, like the company in the previous case, they were stationed (I will not use the word "resided") in England, where they had an office, their whole property being within the kingdom of Italy. Again, upon looking at their articles of association, we find that the company was "formed for the purpose of developing and working the mines of sulphur at Cesena, and carrying on the business mentioned or included in the memorandum of association." Then comes a description of the business, as follows: "The business of the company shall include all the business mentioned in the memorandum of association, and all incidental matters; and the working of the mines will be commenced as soon as the board shall think fit, after the 1st Jan. 1872, and whether a part only or the whole of the capital of the company is subscribed." The very origin and commencement, and the first step taken in the creation of this business, which is clearly the act of the company, is "the working of the mines as soon as the board shall think fit." Then, "the working of the company's mines, the mode of the disposal thereof, and the general business of the company shall be wholly under the order, direction, and management of the directors." Everything that is done, whether in England, in France, or in Italy, at Cesena itself, is to be done wholly

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under the order and management of the directors, subject only to the control of general meetings, as thereafter provided for. The general meetings are in England; the location or residence, as I may now call it, is in England, and the directors exercise their powers and authorities at their office in this country; and, except under their order, control, and management, not a single act of any kind whatever, in relation to the business or proceedings of the company, is or can be done. Again, "the company may undertake any operation or business mentioned or included in the memorandum of association, either singly or in connection with any other firm, corporation, or company in England or Italy, upon such terms as the directors may think fit. The directors shall have full power to register the company in Italy as a 'Société Anonyme,' and to do all necessary acts for that purpose." Now, although it is a registered company in Italy, that does not in the least degree injure its power, character, or nature in this country. And, as in the present case, "the directors may from time to time appoint and send any number, not exceeding three, of their board, to superintend or examine into the working and state of the company's mines and business at Cesena, and to remain there or in that locality for any period of time not exceeding one calendar month, and shall defray, out of the funds of the company, the travelling and hotel expenses of the director or directors who shall undertake such superintendence or examination;" and such director or directors shall make a written report of their proceedings and the state of the mines, their produce and prospects, with remarks and suggestions relative to the company's business as they shall consider proper. Then comes a provision that "no person except the directors shall have any authority to make, accept, or indorse any promissory note or bill of exchange on behalf of the company or otherwise to pledge the credit of the company. No person, except the directors and persons thereunto expressly mentioned by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to enter into any contract or engagement so as to impose thereby any liability on the company." And then comes a very important article (the 12th), which seems to me alone sufficient to dispose of this case in substance. It is as follows:—"All moneys payable to the company shall be received by the directors, or the bankers, or by some person authorised by the board, and shall be paid to the account of the company with the bankers." When, therefore, the money constituting the annual profits or gains of the company, and in respect of which the present assessment was made, comes to be received, whose was that money, and to whom did it come? It came to the company, it was received by the directors, or the general body of the company, and came into their hands as constituting the profits of the company, and they, and they alone, have the power to dispose of it; and they alone are liable to the assessment. I have disposed of the question of residence, and therefore only refer to the 14th article because it is very short. It may not be immaterial, and it is as follows:—"The office shall be at such place in London as the Board shall from time to time appoint." Then the first officers are mentioned, and there

are also many clauses relating to the capital and its disposition; but in every case it is to be the capital of the company, and not a fraction of it can be touched or dealt with except under the company's authority. It is identical in that respect with the previous case. It is, indeed, open to the same complaint, and perhaps in a stronger form, because in the Calcutta case the shareholders in India are subjects of the Queen, and India itself is subject to the exercise of the legislative powers of this country. But that cannot be said of these Italian shareholders, whose case, therefore, if it be a hard one at all, is harder than that of the Indian shareholders. But it is open, as that case was, to the same observation, that if Italian investors think fit for any reason to come to this country, or by their agents who represent them, to become shareholders in a joint-stock company here, and receive a considerable income under the protection of English laws, I do not know why they should not be subject to the obligation of paying a tax upon the incomes so received by them. However that may be, as a matter of opinion, it is clear that these gains are the gains of the company. A company cannot, as Mr. Matthews suggested might be done, be divided into two or three portions as a partnership consisting of two or three individuals can; and it cannot be said that "so much of this money belongs to the Italian, so much to the French, and so much to the English shareholders; let them therefore only be assessed in respect of the portion belonging to the English shareholders." That cannot be done, and there is no instance of such a thing being attempted. The result consequently is that the whole of these gains, being the property of the company, and coming into the hands of the company, have to be divided in certain proportions amongst all the shareholders, both English and foreign; but until they are so divided they are the property of the company, and only pass into the hands of the shareholders when the dividends have been declared by and under the company's authority and according to the articles of their constitution. Under these circumstances I think that, in both these cases, our judgment must be for the Crown.

HUDDLESTON, B.—I am of the same opinion. The whole question turns, as has been agreed on all sides, upon the interpretation of the word "residence," as applicable to a company. The income tax is only imposed upon a "person who is resident in the United Kingdom," in respect of property which he has there, or which he receives from foreign sources. A corporation, for the purpose of paying income tax, is a "person," and then we have to see what interpretation we should give to the word "residence," as applied to a corporation. Now the definition of the word "residence" is founded upon the habits and relations of a natural man, and is, therefore, inapplicable to the artificial and legal "person" which we call a "corporation." But for the purpose of giving effect to the words of the Legislature, an artificial "residence" must be assigned to this artificial "person," and one formed on the analogy of natural "persons." No great difficulty is found in defining what is the "residence" of an individual. It is where he sleeps and lives. What is the residence of a natural person we understand perfectly well. Then what is the "residence" of this artificial

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"person?" All the learned counsel I think agreed here, the residence of an artificial person, such as a trading corporation, must be taken to be where his real trade and business is carried on. I adopt the powerful suggestion of Mr. Matthews, that the Income Tax Act of 15 & 16 Vict., when it speaks of a "residence" does not mean an artificial residence; and Mr. Matthews argued, therefore, that when dealing with a corporation the Act did not mean the place where they carry on the form or shadow of business, but the place where they really carry it on; and that seems to be a definition almost conceded by all the learned counsel. It is one perfectly understood by foreign jurists. There is a German word which is applicable to it, which means "the middle point" of the business carried on. The French term, adopted from Savigny, is "le centre de l'entreprise," the central point of the business, that is to say, the real place where it is carried on. Now all the cases which have been cited support that view. In *The Keynsham Blue Lias Company v. Baker* although the court held that Keynsham was the place of business, they did so because the real substantial business was carried on there, although the company had no office in London. In the case of *Taylor v. The Crowland Gas Company* the judgment of the court was put upon the question of the place where the corporation carried on its business. In *Adams v. The Great Western Railway Company*, for a similar reason it was held that the place where the company carried on its business was Paddington, and in *Brown v. London and North-Western Railway Company* that it was in London, and not in Chester. The same rule is applied in *Shiels v. The Great Northern Railway Company*. Then there is a very strong authority, namely, the case of *The Aberystwith Promenade Pier Company v. Cooper*, in which the place of the company's business was held to be in London, although the pier was built in Wales, and the tolls were there taken. Mr. Matthews, I think, satisfactorily distinguished the case of *The Kilkenny and Great Southern and Western Railway Company v. Fielden* (*ubi sup.*), which was cited by Sir H. James. The decision in the case of *Sully v. The Attorney-General* was to the same effect. And in the last case in this court, *The Attorney-General v. Alexander and others* the judgment of two at least of the learned judges (the Lord Chief Baron and Baron Amplett) pointed out that Constantinople, where the company was incorporated (there being no charter of incorporation in England in that case) was the seat of business, that is to say, the place where it was carried on. The learned Attorney-General put a proposition which, with deference, I for one cannot assent to. He suggested that the registration of a company was conclusive of its "residence," and if a company were registered in England that it must be held to reside there. I think Sir Henry James gave a good answer to that when he said that "registration," like the birth of an individual, is a fact to be taken into consideration upon the question of "residence," because, if we find that a man was born in a place, and eats and drinks and lives in that place, it is a strong circumstance to show that it is his place of "residence;" but it is only a circumstance. The birth is not conclusive of "residence." Taking the analogy between a natural and an artificial person, in the case of a

corporation we would say that its place of registration is its place of birth, but it is not because it is the place of its birth that its "residence" must be there. It is a fact to be taken into consideration with all the other facts, and if it be found to be registered in a particular country, and acting and having its office and receiving dividends in that country, those are all acts, coupled with the registration, leading to the conclusion that that country is the seat of its business. Mr. Matthews, on a former occasion, I believe, in this court, quoted many American authorities as applicable to the individual States; and yesterday he mentioned a case in Brockenbrough's Reports, *The Bank of the United States v. MacKenzie*, as to the difference between a corporation created merely by the act of a State and one created by an act of Congress. He pointed out also that it is not at all consistent with the English view of the subject, that a corporation cannot be a corporation except in a particular State, and he founded that on the authority of the case of *Newby v. Van Oppen and Others* (*The Colt's Patent Firearms Company*). The principle of law, therefore, is not, I think, in dispute, and we may take it for granted that the place of business is the sort of artificial residence which one would give to this artificial person to make him a "person resident" in this country, within the meaning of the Income Tax Act. And now comes the great difficulty which I have felt all along, and that is, in applying the facts of each individual case to the principle. I quite agree that the onus of proving the "residence" lies upon the Crown, as put by Cleasby B., in his judgment in *The Attorney-General v. Alexander*, and that if the Crown fails to satisfy the court that the place of residence is within the jurisdiction, or within the area of taxation, it cannot be said that the company should be taxed. Admitting that, I have to ask myself where, in both these cases, was really the centre of the operations, the substantial and real place of business, "le centre de l'entreprise," or the middle point? I am afraid that I must answer that question, looking at the facts in both these cases, by saying that it was in England. It is not necessary to go at any length into the facts, because they have in both cases been so minutely and elaborately examined and commented on by my Lord, but Sir H. James's argument with reference to the Cesena Company, was put in so captivating a form that until my attention had been carefully called by the Attorney-General to the articles of association, I confess I was, if I may use the expression, caught by it. I am not going through the various clauses of the case, but in substance, as was said by Sir H. James, they amount to this: the trading of the company is in Italy, their unrealized and their fixed property is in that country, and everything that is sold is sold there; no goods are ever sent to England, the majority of the shareholders are in either Italy or France and the small minority of them only in England, the original books are kept in Italy, the managing director is in Italy, where he resides; and therefore, said the learned counsel, we have almost everything—books, profits, manufactures, &c., in Italy. At first I thought it appeared that the centre of business was in Italy, but when I looked at the articles of association, and found that the object of the memorandum was no doubt to pur-

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chase sulphur from a company or firm established at Cesena, but that they contemplated "taking concessions of any lands wherever sulphur is likely to be obtained," and that it is not confined to Italy, and that the general powers of the company are for "the selling, leasing, letting and disposing of any of the lands, mines, and property acquired by the company," it seemed clear, by the memorandum, at all events, that the operations of the company were not to be confined to Italy. Now, the very first article of association is that "the company is formed for the purpose of developing and working the mines of sulphur at Cesena aforesaid, and carrying on the business mentioned or included in the memorandum of association;" that is, carrying on the business of a sulphur company wherever sulphur may be found. Then, on looking to see where the power is which is exercised by the directors, by the office in London, we find that the "board" is "a meeting of the directors duly called and constituted," and that "the working of the company's mines, the mode of disposal, working, and the general business of the company shall be wholly under the order, direction and management of the directors, subject only to such control of general meetings as is hereafter provided for." Then the directors have power (which they have exercised) to register the company in Italy, and to make promissory notes, and so on. "The office shall be at such place in London as the board shall from time to time appoint." A London bank is to be their "first and present bankers." True it is that they had a banker at Turin and one at Paris. They may invest their money in a reserve fund. General meetings are to be held, and those meetings which are described as ordinary or extraordinary, are to be held in London. There is the power given of adjourning from place to place no doubt. It is true that it is not said anywhere that the board meetings must be held in London; but it is obvious from the facts in the case, and from all the requirements of the articles of association, that the books must be kept at the office, and the office, according to the articles of association, must be in London, and thus, inferentially, we arrive at the conclusion, from the facts, and from the case, that the directors are to meet in London. Without going through the other different clauses of the articles, it appears that almost every act of the Cesena company connected with the administrative part of its business is to be done in London. No doubt the manufacturing part may be and was done in Italy; and so, supposing they found sulphur in some other part of the world, and carried on their business there, the manufacturing part of it would be carried on in that other place; but the administrative part of the business would be carried on at the place from which all the orders came, all the directions flowed, and where the appointments of the various officers were made and revoked, where agents were nominated and recalled, where the money was received and dividends were declared and were payable. We find all these acts performed in London, and I cannot help thinking that the main place of the company's business is in England, and that at Cesena is merely an agency as it were of the principal house, that agency being confined to the manufacture and sale of sulphur, but under the direction of the principal house. With regard to the other

case of the Calcutta jute mills, which also has been so fully and elaborately gone into by my Lord, I am bound to say that at one time I thought this case also a strong one in favour of the appellants. The learned counsel put it very strongly, and summed up his arguments as to the result of the case in very clear and terse language. He said in fact this: The only transactions in England are the receipts of the amount transmitted for the payment of the English expenses and dividends, and the declaration of their amount and its division amongst the English shareholders. Again, I look at the articles of association and the case. The office was no doubt lent to the company, or allowed to be used by them for the purpose; from that office would issue all the orders to the managing director in Calcutta, and no doubt until he received orders to the contrary he would have full power and discretion to do what he liked there; but at any moment they might from their head office have revoked his authority or altered any arrangement which he had made connected with the working of the company. The meetings were held in London. The operation of the company in London was, not to divide the money sent among the shareholders, but it was to "declare the dividend." And I apprehend that within the meaning of that clause the directors in London, who had full power, might disapprove of the system upon which the dividend had been made, and require a different dividend for the future, thus showing that they exercise the authority and are the principal body, while the Calcutta director is only their agent for the purpose of the manufacture and sale of the jute, as the Cesena Company is the agent of the London company for the purpose of the manufacture of the sulphur. Mr. Matthews argued with great ingenuity that, assuming the place of business to be in England, still the only division of the profits here is to be a division of the profits earned by the English shareholders; and he argued that if this were a partnership, then, on the authority of *Sully's case*, the English portion of the partnership only would be liable to pay on the profits received by them, whereas the Indian portion would not have to pay on their profits. If this artificial being, a corporation, could be made a partnership, and every shareholder a partner, that argument would be in accordance with, as he said, natural justice, and would be very striking. But I fear the simple answer is this, that a corporation is not a partnership, and the shareholders are not partners. For these reasons I cannot avoid coming to the conclusion that the place of business of both these companies is in London, and that, therefore, they are within the provisions of the Income Tax Act.

KELLY, C.B.—This is, I think, the first time this question has been raised, and, looking to the peculiar circumstances of the case, I do not think that we ought to give costs to the Crown. Each party, therefore, will pay its own costs.

Judgment for the Crown in each case, without costs.

Solicitors for the Calcutta Jute Mills Company, Solicitors for the Cesena Sulphur Company, *Nash, Field, and Matthews.*

Solicitors for the Crown, *The Solicitor of Inland Revenue.*

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JONES v. ADAMSON AND ANOTHER.

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Friday, Nov. 5.

(Before CLEASBY and AMPHLETT, BB.)

JONES v. ADAMSON AND ANOTHER.(a).

Ship and shipping—Charter-party—Breach of contract to load—Detention of ship—Demurrage—Damages—Proximate cause—Remoteness.

The plaintiff's ship was chartered by the defendants under a charter-party, whereby it was agreed that the ship should go to a foreign port for a cargo, "and there in the usual and customary manner load in her regular turn," a cargo, &c. The ship went to the port but was not, owing to the defendants' default, ready to load when her turn came, and consequently had to wait for eleven days before her turn came again. When it did come round again the ship was ready, but the wind having meantime come on to blow hard, and the harbour being crowded with shipping, the harbour master would not allow the ship to move up to the loading berth, whereby she was detained for a period of three days further.

In an action on the charter-party for damages as demurrage for detention of the ship, it was

Held by the Court (Cleasby and Amphlett, BB.), that, inasmuch as the default of the defendants in not being ready for the "first turn" was the proximate cause of the further detention of the ship during the three days, the plaintiff was entitled to recover damages as demurrage for the detention of his ship during the three days as well as during the eleven days.

This was an action by the plaintiff upon a charter-party to recover damages from the defendants as demurrage for the detention of the plaintiff's vessel at the port of loading.

The action came on for trial before Huddleston, B. at the summer assizes 1875, at Liverpool, upon which occasion it appeared that by a clause in the charter-party in question it was provided that the ship should go to a foreign port for a cargo of coals, and there "in the usual and customary manner load in her regular turn a cargo," &c. The ship went to the port named, but when her "turn" came she was not, through the default of the defendants, ready to load, and, consequently, she lost one turn, and had to wait eleven days before her "turn" came again. When that came round again she was ready. The wind, however, had in the meantime come on to blow hard, and the harbour being crowded with shipping, the harbour master would not permit the plaintiff's ship to be taken alongside the loading place in the harbour, for fear of an accident from collision, &c., and in consequence she was detained for a further period of three days. The plaintiff then claimed damages, as demurrage, in the present action for the detention of the ship and loss of time for the whole period of fourteen days. The jury found that the loss of the "first turn" to load was occasioned by the default of the defendants, and gave a verdict for the plaintiff, with damages for the detention of his vessel, such damages including the sum of 93*l.* 15*s.* as demurrage for the three days during which the vessel was prevented by the harbour master from moving up to the loading berth as before mentioned, and leave was reserved to the defendants, by the learned judge, to move to reduce the damages by such last-mentioned sum.

Benjamin, Q.C. (with whom was Foard), on the part of the defendants, now moved for a rule to that effect accordingly, and argued that the defendants were in no manner responsible for the delay and detention during the three days, such detention being the result entirely of "perils of the sea." It is not contended for a moment that the defendants are not liable for the delay in not being ready to load when the vessel's first turn came, whereby she had to wait till her regular turn came again; but when that second turn came she was ready, and it was by no act or omission of the defendants that she did not then proceed to load; but it was the act of the port authority, over which the defendants had no control, and they are not liable or responsible for the consequences resulting from it. The damages claimed for these three days are too remote, and arise from a cause and a state of things which the parties never contemplated. They are not the natural result of the first default of the defendants, and the damages, therefore, ought to be reduced by the amount mentioned, namely, 93*l.* 15*s.*

CLEASBY, B.(a)—I am of opinion that in this case we ought not to grant a rule for the reduction of the damages on the ground on which it has been asked for by the learned counsel for the defendants. The detention of the plaintiff's vessel for the three days must properly be taken into consideration as part of the damages sustained by him. There were not two separate detentions, but only one. The defendants' contract was to "load in regular turn," and it was not a question of the first turn or the second turn. The defendants did not load the ship "in regular turn," and it was the breach of their contract in that respect that caused the delay and detention of the ship for fourteen days altogether. Mr. Benjamin has argued that the defendants are not to be held responsible for the three last days of the fourteen, because the detention of the vessel during that latter period was caused, not by any default on the part of the defendants, but by events and circumstances over which they had no control. I cannot agree with that argument. It seems to me that the proximate cause of the detention of the vessel during those three days was the default of the defendants in not being ready to load when the vessel's first or "regular" turn arrived, and so not performing their contract, and that it was not the result of any *vis major*, or any accident over which the defendants can be said to have had no control.

AMPHLETT, B.—I am entirely of the same opinion.

Rule refused.

Solicitors for the defendants, *R. Miller and Wiggins.*

(a) KELLY, C.B., had left the court.

[CT. OF APP.]

Re THE REGENT'S CANAL IRONWORKS COMPANY (LIMITED).

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Tuesday, April 12.

(Before JAMES and MELLISH, L.JJ., and
BAGGALLAY, J.A.)Re THE REGENT'S CANAL IRONWORKS COMPANY
(LIMITED). (a)*Company—Debentures—Issue of debentures at a discount—Mortgage of debentures by company—Right of holders under second issue to rank pari passu with holders under first issue.**The directors of a company, who were empowered by the articles of association to borrow money on mortgage, or on bonds, debentures, or any other security whatsoever at such rate of interest and upon such terms as they should think fit, resolved to issue 100 mortgage debentures of 250l. each, at the price of 95l. per cent. Each debenture recited that debentures to the amount of 25,000l. had been or would be issued, and provided that there should be no priority between the holders of the debentures as between themselves. Sixty of these debentures were taken up by the public, and the remaining forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The company having been ordered to be wound-up:**Held (affirming the decision of Malins, V.C.), that the mortgagees were entitled to prove in the winding-up for the full nominal value of the debentures pari passu with the other debenture holders, but so as not to receive more than was due to them in respect of money advanced, interest, and costs.*

THIS was an appeal from a decision of Malins, V.C.

The facts of the case, which are briefly stated in the report of the hearing before the Vice-Chancellor (34 L. T. Rep. N. S. 130), were more fully as follows:

By the articles of association of the Regent's Canal Ironworks Company (Limited), which was formed in 1864 with a capital of 250,000l., the directors were empowered to borrow from time to time any sum or sums of money on mortgage, or on bonds, debentures, or any other security whatsoever, at such rate of interest and upon such terms and with such provisions in favour of the lenders as the directors should think proper.

At a meeting of the directors, held on the 21st March 1865, it was duly resolved that mortgage debentures of the company for 25,000l., in 100 debentures of 250l. each, with interest at the rate of 6 per cent. per annum, should be issued at the price of 95l. per cent.

Sixty of these debentures were taken up by various persons on the terms specified in the resolutions, and the remaining forty debentures were issued to J. D. Carnegie and W. H. Covington, as trustees for the company.

Each debenture was in the form of a deed poll, whereby the company declared itself liable to pay to the person named therein the sum of 250l., and interest at 6 per cent., and also charged all the lands, property, and effects of the company

with the due payment of the sum of 250l., with interest at 6 per cent.; and each debenture contained a statement that it was granted upon the express condition that other debts to the extent of the principal sum of 25,000l. in the whole, including the sum thereby secured, had been, or would or might be granted by the company, and provided that there should be no priority in point of security as between the persons entitled to such debentures for the time being.

On the 5th Aug. 1865, the International Financial Society agreed to advance to the Ironworks Company the sum of 8000l., by discounting promissory notes of the company to that amount; and it was agreed that the Ironworks Company should give to the Financial Society the above mentioned forty mortgage debentures for the aggregate principal sum of 10,000l., as security for the due payment of the promissory notes at maturity, and in default of such payment, as security for the amount remaining unpaid, with interest at 10 per cent. per annum.

The Financial Society accordingly discounted the promissory notes, and Carnegie and Covington transferred the forty debentures to two trustees for the Financial Society.

By an indenture, dated the 6th Dec. 1865, and made between the Ironworks Company of the one part, and the Financial Society of the other part, after reciting the advance of the 8000l., and that the Ironworks Company had issued to the Financial Society, by way of collateral security for the money so advanced, debentures to the amount of 10,000l., the Financial Society covenanted to re-transfer the debentures on the payment of the promissory notes at maturity; and the Ironworks Company covenanted that if the promissory notes were not paid at maturity, the Financial Society should be at liberty to sell the debentures, and apply the proceeds of the sale in discharge of the said sum of 8000l., or so much thereof as should remain due, with interest at 10 per cent. per annum. This indenture also, by way of further security for payment of the 8000l. and interest, charged the seventh call then about to be made on the shares of the Ironworks Company.

The promissory notes were not paid at maturity, but were renewed, and the amount thereof, together with some further advances, was made a charge upon a part of the uncalled capital of the company.

On the 17th Dec. 1861, the company resolved to wind-up voluntarily, and on the 21st Dec. 1866, an order was made for continuing the winding-up under the supervision of the court.

The company then owed the Financial Society the sum of 10,354l.

In the winding-up the Financial Society claimed to be entitled, as holders of the forty debentures, *pari passu*, with the holders of the other sixty debentures, to a first charge on all the property of the company charged by the debentures for the sum of 10,000l., with interest thereon at 6 per cent. per annum; and to hold the proceeds of such charge as security for the amount remaining due to them in respect of the advance of 8000l., with interest thereon at 10 per cent. per annum, and their costs as mortgagees.The Vice-Chancellor allowed this claim, and ordered that the Financial Society should be admitted to prove on their debentures *pari passu* with the other debenture holders, but only to the

extent of what remained due in respect of the 8000*l.*, interest, and costs: (see 34 L. T. Rep. N. S. 130.)

From this decision the holders of the other sixty debentures appealed.

Glasse, Q. C., and C. T. Simpson, for the appellants.—The forty debentures cannot rank with ours, for they were not issued in accordance with the terms of the resolution. The trustees to whom they were issued by the company paid nothing and could have no right to prove, and the Financial Society cannot be in a better position than the trustees who transferred the debentures to them. We paid 95 per cent. for our debentures, and the Financial Society only paid 80 per cent., therefore it would be most unjust to put them on equality with us. The forty debentures were issued at a large discount, and at 10 per cent. interest, instead of 6 per cent. as provided by the resolution, the issue was therefore *ultra vires* and invalid. The company had no power at all events to issue them as collateral security. They cited:

Re Blakely Ordnance Company, 21 L. T. Rep. N. S. 12; L. Rep. 8 Eq. 244;

Re The Richmond Hotel Company, 16 L. T. Rep. N. S. 442; L. Rep. 2 Ch. 527.

J. Pearson, Q. C., and Davey, Q. C., for the International Financial Society, were not called upon.

JAMES, L. J.—I think that the order of the Vice-Chancellor cannot be disturbed. The position of the appellants is this: They are the owners of six-tenths of an aggregate mortgage debenture of 25,000*l.*, having no interest in the other four-tenths. They became the owners of those six-tenths of the debenture debt with full notice that the company intended to deal with the other four-tenths as they might be advised. The company has dealt with the other four-tenths in this way: It has in terms made those four-tenths a collateral security for the sum of 8000*l.* and interest at 10 per cent. That was the bargain between the respondents, the holders of the four-tenths of the debentures and the company. The company cannot recede from that bargain, and I cannot see that there is any equity on the part of the owners of the other six-tenths of the mortgage debt to alter the bargain or transaction which took place between the debtors and the creditors. That being so, it seems to me that the Vice-Chancellor's order must remain. The respondents have got as good a title to their four-tenths of the mortgage debt as the appellants have got to their six-tenths; and the mode in which those four-tenths are to be applied is governed by the instrument which was executed between the company and the respondents. I think the Vice-Chancellor was quite correct in saying that it is their right to have these debentures treated as a collateral security, and to have what is due in respect of the four-tenths ascertained in exactly the same way as what is due in respect of the six-tenths is to be ascertained, and of course to have the amount so found due applied so far as may be necessary in payment of what is due in respect of the 8000*l.* and interest. I do not see my way to altering the order of the Vice-Chancellor in any respect.

MELLISH, L. J.—I am of the same opinion. It appears to me that the proper way of looking at this case is, first, to inquire what was the bargain

with respect to these debentures as between the Regent's Canal Ironworks Company, and the International Financial Society, and then to inquire whether the other debenture-holders have any equity to prevent that bargain from being carried into effect. Now, as between the company and the society there is, upon the statement of facts, no doubt at all, in my opinion, that the agreement was that the debentures should be a collateral security for the money which was lent upon the promissory notes and for the interest thereon. The money was lent on the promissory notes at 10 per cent. interest under a bargain that those debentures which had been issued to two trustees for the company should be assigned over to trustees for the society as a collateral security for the payment of the 8000*l.* and 10 per cent. interest, and it is proved clearly enough by one of the terms of the bargain that the Financial Society was to be entitled to sell the debentures. Mr. Glasse argued, in the first instance, that because the resolution of the directors was that the debentures should be issued at 95 per cent. and at 6 per cent. interest, they could not be issued on any other terms than those. That, however, was nothing more than a resolution of the directors, and they were perfectly competent to vary that resolution and issue them in any other way. Then the real question is, have the other debenture holders any equity to prevent that bargain from being carried into effect? The rights of the other debenture holders depend solely on their debentures, and they have nothing to do with the resolution of the directors as to the terms on which the debentures were to be issued. They can claim no greater rights than their debentures give them. Each debenture says that the whole number of the debentures is to be a hundred. The appellants have got sixty of the debentures, and they are all to have equal security. They took theirs by giving, no doubt, 95*l.* for each 100*l.*, and getting 100*l.* security for each 95*l.* that they advanced. They left it open to the directors to issue the other forty on any other terms they might please. I do not see any reason why they should complain of the terms upon which the directors did issue them, namely, that they should be a collateral security for the payment of the promissory notes and interest. They are not injured, as the debentures cannot be paid twice over—they can only be paid once. The society was entitled to hold them, and use or treat them as a collateral security; the order so treats them, and says that they are to be available until the holders are paid the whole amount for which they were intended to be a collateral security, that is to say, the 8000*l.* and interest. That appears to me to be the correct order.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me, upon the admitted statement of facts, that the directors had power to do that which they did, namely, to issue the debentures for 10,000*l.* as a collateral security for the loan of 8000*l.*, which was primarily secured by the promissory notes. If the matter had rested there it appears to me that there could have been no question as regards the propriety of the order made by the Vice-Chancellor; but in the course of the argument it has been suggested that at a subsequent period the International Financial Society, not being satisfied with the security which it held, applied for a further security, and

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that it had got, by way of further security, a charge upon the future calls to be made by the company, that is to say, a charge upon property which was not included in the property upon which the debentures were charged. Any moneys received by virtue of that charge upon future calls would no doubt be properly applied in reduction of the debt itself, but cannot, as it appears to me, in any way be regarded as a reduction of the security itself.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitor for the appellants, *Charles Morgan*.

Solicitor for the respondents, *G. M. Clements*.

Monday, May 1.

(Before CAIRNS, L.C., JAMES, L.J., and BAGGALLAY, J.A.)

Re THE EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS; *re* THE INDUSTRIAL AND GENERAL LIFE ASSURANCE AND DEPOSIT COMPANY (COCKER'S CASE). (a)

Assurance company—Novation—Amalgamation of companies—Transfer of assets to meet claims—Appropriation of transferred assets—Acquiescence of policyholder.

The deed of settlement of the Industrial Assurance Company gave power to dissolve the company by means of a resolution passed at a general meeting and confirmed at a second general meeting, and provided that thereupon the directors, after satisfying all immediate claims on the company, should obtain from some other company an undertaking to satisfy the remainder of the claims when the time for payment should arrive, and should transfer to such other company so much of the assets as should be agreed upon as sufficient to meet such claims. In accordance with these provisions, the Industrial Company was in 1855 dissolved, and a portion of its funds transferred to the People's Provident Society, which covenanted to satisfy the liabilities of the Industrial Company.

In 1851 C. effected a policy of life assurance with the Industrial Company on the non-participating scale. This provided that the subscribed capital, funds, and property of the company should alone be liable to answer all claims under the policy, which was made subject to the conditions of the deed of settlement. C., though, a non-participating policyholder not entitled to vote at the meetings of members, received notice of the intended amalgamation, but he received no formal notice of the completion of the amalgamation, nor was his policy indorsed by the People's Provident Society. To that society, however, he paid his premiums for fifteen years, and the receipts were made out in its name:

Held (affirming the decision of Lord Romilly), that the amalgamation was valid and binding upon C., and that he was also bound by acquiescence.

Held, also, that the deed of settlement did not mean that the assets transferred to the transferee company should be ear-marked and kept separate for the purpose of being applied only to the payment of the liabilities of the transferring company.

This was an appeal by Matthew Cocker from a decision of Lord Romilly, sitting as arbitrator

under the European Society Arbitration Act 1873, whereby he decided that Cocker was not entitled to rank as a creditor of the Industrial and General Life Assurance and Deposit Company, under a policy of assurance which he had effected with that company.

The facts of the case were as follows:

*In 1851 Cocker effected a policy of insurance for 100*l.*, on the non-participating scale, with the above-named company, on the joint lives of himself and Sarah Ann Cocker, his wife, at the yearly premium of 2*l.* 0*s.* 6*d.**

*The policy, which was dated the 22nd July 1851, provided that if the premiums were punctually paid at the office of the company, the funds and other property of the said company should be liable, according to the provisions of the deed or deeds of settlement of the said company, to pay to the said assured, his executors, administrators, or assigns, within three months after satisfactory proof had been given of the death of either of the said Matthew Cocker and Sarah Ann Cocker, the sum of 100*l.*: Provided always, that the capital stock of the said company, or so much thereof as for the time being should have been subscribed, and the other stocks, funds, securities, and property of the said company remaining at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, should alone be liable to answer and make good all claims and demands upon the said company, under or by virtue of the said policy and all other policies; and that no director, proprietor, or member of the said company, his heirs, executors, or administrators, should by reason of any policy of assurance or instrument securing annuities, or of the whole of the policies of assurance and instruments securing annuities taken together, which any director had signed or might sign, be in anywise individually or personally liable or subject to any claims or demands against the said company beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such part of the said capital stock as for the time being should have been subscribed.*

This policy was executed by three directors of the company, and sealed with the company's seal.

The Industrial and General Life Assurance and Deposit Company was formed under a deed of settlement, dated the 10th Dec. 1849, and was completely registered under the Joint Stock Companies' Act 1844 (7 & 8 Vict. c. 110).

The deed of settlement provided by its 190th clause that "it shall be lawful for an extraordinary board of directors, specially called for the purpose, to enter into a resolution recommending the dissolution of the company, and upon such dissolution being so recommended, the same extraordinary board shall cause an extraordinary general meeting to be convened for the purpose of taking into consideration the propriety of dissolving the company; and if at such extraordinary general meeting a resolution should be entered into for dissolving the company, then the board of directors shall call a second extraordinary general meeting for the purpose of confirming or rejecting such dissolution; and such extraordinary general meeting shall be held within the space of forty days after the resolution for dissolving shall have been entered into at the first extraordinary general

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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meeting; and if such resolution for dissolving shall have been confirmed at such second extraordinary general meeting, then from the time of such confirmation the company shall be dissolved, and the business thereof shall be concluded.

And by its 191st clause it provided "that immediately upon the dissolution of the company the board of directors shall, out of the funds or property of the company, pay and satisfy all the immediate claims and demands on the company arising from insurances or other contracts or engagements, and shall obtain from some other assurance company, or from the directors or managers of some other assurance society or company, an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts or engagements, when and as the time for the payment and satisfaction of the same shall respectively arrive; and shall cause to be transferred to some other assurance company, or to some of the trustees or directors of such other assurance society or company, so much of the funds or property of the company as shall be agreed upon between the contracting parties as will be sufficient with the premiums that may become payable in respect of all their existing policies, to enable the society or company from whom or from whose directors or managers the undertakings shall have been obtained to comply therewith, and shall make such arrangements with the said assurance company, or the said directors or managers in regard to the said undertakings as the board of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds, and things, as in the opinion of the board of directors shall be necessary or advisable for carrying the same engagements into effect; and if any funds or property of the company shall remain after answering the purposes aforesaid, shall cause the same or so much as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed at such time or times as they shall think fit, to and amongst the proprietors and other holders of shares in the temporary capital of the company and the members, according to their respective rights and interests therein; and notwithstanding the dissolution of the company, these presents, and the provisions herein contained, and all powers, privileges, rights and duties of the proprietors and other holders of shares and members, including the powers to call and hold extraordinary general meetings of proprietors and members, and the power to call for and enforce the payment of further instalments or shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final decision shall have been made of the residue (if any) of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding-up the concerns of the company, and for enabling the board of directors to dispose of the funds or property of the company, and to satisfy and to provide for such claims and demands, and to make such payments and distribution as aforesaid."

In Sept. 1855, negotiations were set on foot for the amalgamation of the Industrial and General

Life Assurance Deposit Company, with another company called the People's Provident Assurance Society, which was established under a deed of settlement, dated the 2nd Sept. 1854, and was completely registered under the Joint Stock Companies Act 1844.

In Oct. 1855, a circular was issued by the directors to the shareholders and policyholders of the Industrial Company, stating the terms of proposed amalgamation, and setting forth the advantages which would result to all parties therefrom. It was admitted that Matthew Cocker received a copy of this circular, although being a non-participating policyholder, he was not entitled to vote at the meetings of the members.

The proposed amalgamation was agreed to and confirmed by extraordinary general meetings of the members and shareholders of the Industrial Company, and it was carried into effect by a deed dated the 6th Nov. 1855, by which the two companies mutually covenanted that immediately on the dissolution of the Industrial Company, the whole business, assets, and property of the company should be consolidated and amalgamated with the business, assets, and property of the People's Provident Society, and that the said society should continue as theretofore to be regulated in all respects by the said deed of settlement of the 2nd Sept. 1854; that upon the said amalgamation, the then present manager of the Industrial Company should become the manager and Secretary of the People's Provident Society; that as soon after the completion of the amalgamation as circumstances would permit, the business of the People's Provident Society should be principally carried on at No. 2, Waterloo-place, the then principal office of the Industrial Company; and by the last clause, that the People's Provident Society should pay and satisfy all the claims and demands on the Industrial Company arising from assurances, annuities, or other contracts or engagements whatever, when and as the times for payment or satisfaction of the same should respectively arrive, and should indemnify the Industrial Company and each of the members and shareholders thereof against all such claims and demands. After the amalgamation, the business of the united companies was carried on under the name of the People's Provident Industrial and General Life Assurance Society.

Cocker received no notice of the completion of the amalgamation, nor was his policy indorsed by the People's Provident Society, nor was any new policy issued to him in place of his old policy.

By the European Society's Act 1859, the People's Provident Society was incorporated with the European Assurance Society, and the business was thenceforth carried on under the latter name at the same offices.

By an order dated the 12th Jan. 1872, the European Assurance Company was ordered to be wound-up, and by an order dated the 7th June, 1872, the Industrial Company was ordered to be wound-up.

Cocker paid the premiums on his policy on the footing of the amalgamation down to the date of the winding-up. After the amalgamation the receipts were headed "The People's Provident Assurance Society, with which is incorporated the Industrial and General Life Assurance Company" down to 1859, from which date they were headed "The European Assurance Society."

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Cocker claimed to prove against the Industrial Company for the amount of his policy.

His claim was rejected by Lord Romilly, who, on the 13th Nov. 1874, delivered the following judgment: "I am of opinion that Mr. Cocker assented to the arrangement indicated by the circular, and that he assented to the terms of the deed of the 6th Nov. 1855, by which it was carried into effect. I am also of opinion that the fact of Mr. Cocker having paid his premiums after the year 1855, and taken receipts for the same in the form referred to in the case, is evidence that he looked to the European Society for payment of the moneys assured by his policy, and intended to release the Industrial Company. I am still more strongly confirmed in this view by finding that a case similar to this has been before me at the Rolls. In *Carr's Case* (33 Beav. 542) a policyholder was held to be bound by years of acquiescence in a similar arrangement, whereby he paid his premiums to another company, and acted in every way upon the arrangement. The object in that case was that a formality in the deed of settlement had not been observed; but I held that he was bound, whether there was any clause of dissolution in the deed of settlement or not, and whether, if there was, it had been observed in the deed of amalgamation or not."

From this decision Cocker appealed, having obtained the requisite certificate from Mr. Reilly, the present arbitrator, under the provisions of the European Arbitration Act 1875.

Waller, Q.C. and J. Wilkinson for the appellant.

—The court will probably be struck with the similarity between clause 191 in the deed of settlement of the Industrial Company and the corresponding clause in *Hort's Case* (33 L. T. Rep. N. S. 766; L. Rep. 1 Ch. D. 307), but there are material distinctions between that case and the present case. In *Hort's Case* the policyholder received a great deal more information than he did in this case; he received notice of the completion of the amalgamation, and was invited to send his policy for indorsement and did so. Nothing of the kind occurred in the present case. As a non-participating policyholder, not entitled to vote at the meetings of the company, and unable to control in any way the business of the company, Cocker is entitled to have his rights under the 191st clause of the deed of settlement strictly enforced. Under that clause he was entitled to have a specific portion of the assets of the company set apart for the specific purpose of meeting the liability on his policy. Unless some such effect be given to the 191st clause all its provisions would be mere waste paper. This view was taken in *Wood's Case* (Reilly's Albert Arb. Cas. 58), where, speaking of a similar clause, Lord Cairns says: "The clause contemplates that this fund should be earmarked and appropriated in some way when the amount should have been ascertained, so that there might be added to it the premiums on the policies transferred, and so that it might be ascertained that the fund transferred and the accruing premiums would be sufficient to pay the policies, the liabilities on which was transferred." [CAIRNS, L. C.] —If there was nothing peculiar in the deed in that case, the observations there reported would certainly be at variance with the decision in *Hort's Case*.

Higgins, Q.C. and J. Romer, for the joint official liquidator, were not called upon.

The LORD CHANCELLOR.—We have no hesitation in saying that we think this case is governed by the decision in *Hort's Case*. The case to which Mr. Waller has just now referred would not be binding on this court, necessarily so, being a decision in an arbitration, but my present impression is that the deed in that case had certain peculiarities, which do not appear in the present case. But, whether that be so or not, it appears to us that the deed in the present case is exactly the same for the present purpose as that which this court had to consider in *Hort's Case*. We think there was here a deed by which the policyholder was bound, and that the contract of the policyholder being that the assets of the company should be liable to him according, and only according, to the provisions of the deed of settlement, anything that was done with those assets, justified by the terms of the deed of settlement, was an appropriation of the assets to which the policy holder could not object. But there was here *bonâ fide* an arrangement agreed upon between the two companies, the Industrial and the People's Provident, for amalgamation. It was an amalgamation in the strictest sense of the term, for every shareholder in the Industrial was to become a shareholder in the People's Provident. The mode in which the amalgamation was carried out was by a dissolution of the Industrial, according to the terms of the deed of settlement, and after resolutions at general meetings, according to the deed, had been come to. A further mode in which the amalgamation was to be carried out was by a handing over, consequent upon a dissolution, of the whole of the assets of the Industrial Company to the People's Provident; and then the only diminution or subtraction from those assets was this, that inasmuch as the value of a share in the Industrial was upon calculation taken to be greater than the value of a share in the People's Provident, every shareholder in the Industrial was to receive, not merely a share in the People's Provident in exchange, but also a bonus of 1s. in cash, representing the greater value of the share which he gave up. The payment of that 1s. a share was in the nature of an advance, or distribution of the surplus assets as it were, of the Industrial Company after providing for all the claims upon it; and a distribution of surplus assets of that kind was warranted by the provisions of the deed of settlement. In our opinion, therefore, the provisions of the deed of settlement were complied with. I cannot read the clause of the deed now before us, at all events, as meaning that, upon an arrangement of this kind, the assets handed over to the transferee company were to be earmarked and kept separate for the purpose of being applied to the payment, and only to the payment, of liabilities accruing on policies of the old company. In my opinion, the meaning of the clause of the deed now before us is this: that the assets handed over to the company should become assets generally of the new company. Then Mr. Cocker having notice before, in the clearest and most express terms, that an amalgamation was about to take place, warranted, as the two companies conceived, by their deed of settlement, had notice subsequently within a year that the amalgamation had actually taken place; he had that notice by the receipt that was given to him on the next payment of his premium, and he continued to have that notice for many years afterwards. If he had desired to investigate the

details of the arrangement for amalgamation, still more if he desired to make any objection to those details, the time for him to do so would have been. on his receiving the notice that the amalgamation had taken place. In place of that he remained for fifteen years paying his premiums on the footing of the amalgamation, and during all that time he was entitled, if the amalgamated company had been a success, and had turned out prosperously, to the advantage he would thereby have derived, and it is not until after the state of insolvency of that company is ascertained that this claim is made, to go back on the old company, and to assert his right against them. I repeat, it is my opinion, and also the opinion of my learned colleagues, that the case is entirely governed by the *ratio decidendi* in *Hort's* case.

JAMES, L.J. and BAGGALLAY, J.A. concurred.

CAIRNS, L.C.—There will be the same order with respect to costs as in *Hort's* case.

Solicitors for the appellant, *Stevens, Wilkinson, and Harries*.

Solicitors for the respondents, *Mercer and Mercer*.

Saturday, July 15.

(Before JAMES and MELLISH, L.JJ.).

Re REYNOLDS. (a)

Practice—Fund in court—Proceeds of sale of settled estate—Payment out to tenant in tail—Disentailing deed.

Certain real estate of which a lunatic was tenant in tail was sold under a private Act of Parliament, and the proceeds were paid into court in the matter of the lunacy and invested in consols which the Act directed to be treated as real estate. The lunatic died, and the tenant in tail in remainder converted his estate tail into a base fee and subsequently died.

Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a properly executed deed enlarging the base fee.

Re Butler's Will (L. Rep. 11 Eq. 479) followed. Thus was a petition in lunacy for the payment out of court of a fund representing the proceeds of sale of certain real estate.

The real estate in question was settled on one Mary Reynolds for life, with remainder to her children in equal shares as tenants in common in tail, with cross-remainders between them. On her death in 1839, her son, Charles Cole Reynolds, became entitled under the settlement to one twelfth share of the estate as tenant in tail.

In 1848 Charles Cole Reynolds became a lunatic.

By a private Act of Parliament, passed in 1849, the estate was directed to be sold and the proceeds of sale paid into court, the one twelfth share of the lunatic being carried to his separate account; and it was provided that the said one twelfth share should be reinvested in the purchase of real estate to be settled to the same uses as the real estate which had been sold, and in the meantime to be invested in consols and treated as real estate.

In 1858, Charles Cole Reynolds died without issue, and without having done any act to bar the entail.

Thereupon, under the limitations of the settle-

ment, his share became vested in his brothers and sisters, his brother George Reynolds becoming entitled to one eleventh part of it.

George Reynolds by deed enrolled converted his estate tail in this one eleventh share into base fee, and died in 1860, leaving two daughters his co-heiresses, and his widow, to whom he had by will devised and bequeathed all his property, appointing her also executrix of his will.

In pursuance of an order made by the Lords Justices on the 25th June 1860, a sum of 443l. 6s. 4d. consols (which represented the eleventh shares of George Roberts in the deceased lunatic's one twelfth share of the settled estate), was carried over to an account intitled "share of George Roberts deceased," the account of the real estates.

The widow and the daughters, who had recently attained twenty-one, now presented a petition praying that this sum of consols might be sold, and that the money arising from the sale might, after payment of costs, be paid to them.

E. W. Byrne, for the petitioners.—The old practice was to pay out the fund in a case of this kind without requiring the production of a disentailing deed: (*Re Watson*, 10 Jur. N. S. 1011). But in *Re Butler's Will* (L. Rep. 16 Eq. 479) Lord Selborne, when sitting for the Master of the Rolls, refused to order payment of the fund out of court without the production of a disentailing deed. This decision Malins, V. C., declined to follow in *Re Row's Estate* (29 L. T. Rep. N. S. 824; L. Rep. 17 Eq. 300). There is a similar diversity of practice in payment out of court of moneys paid in under the Leases and Sales of Settled Estates Act, for in *Re Wood's Settled Estates* (L. Rep. 20 Eq. 372), Malins, V. C. followed the old practice, and ordered the fund to be paid out without the execution of a disentailing deed, while in *Re Broadwood's Settled Estates* (L. Rep. 1 Ch. D. 438), Jessel, M. R., required a disentailing deed to be entered.

JAMES, L.J. — I think we must follow the decision of Lord Selborne in *Re Butler's Will*. That was in truth a decision of the Lord Chancellor, though he was then exercising an original jurisdiction in a matter attached to the Rolls Court. The money, therefore, cannot be paid to the petitioners except upon the production to the registrar of a properly executed deed enlarging the base fee.

MELLISH, L. J., concurred.

Solicitor, *E. Byrne*.

Saturday, July 15.

(Before JAMES and MELLISH, L.JJ.)

Re THORP. (a)

Lunacy—Settled estate—Lunatic tenant for life—Consent of court to barring entail—Interest of lunatic.

A lunatic was tenant for life of certain real estates, including the advowson of a rectory. A lease of this property had been granted by order of the court for ninety-nine years, if the lunatic should so long live. This lease had become vested in a person who was also first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was over eighty

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years of age, and had never had any issue. The first tenant in tail in remainder wishing to sell the next presentation to the rectory presented a petition praying the court, as protector of the settlement, to consent to the barring of the entail of the advowson:

Held, that the court ought not to interfere, as the application was not made for the benefit of the lunatic's estate.

This was a petition in lunacy.

John Thorp, who was found lunatic by inquisition in Jan. 1816, was tenant for life of certain real estates, including the advowsons of the rectory of Snailwell, and the vicarage of Chippenham, in the county of Cambridge.

In 1864, in pursuance of an order of the court, the lunatic, by his committee, executed a lease of a part of the estates, including the advowsons, to two persons for ninety-nine years, if the lunatic should so long live, at a rent of 2500*l*.

This lease had become vested in W. M. Thorp, as administrator of the survivor of the two lessees.

W. M. Thorp, who was also first tenant in tail in remainder expectant on the death of the lunatic without issue male, desired to disentail the advowsons for the purpose of selling the next presentations to the rectory and the vicarage, and he presented this petition to obtain the consent of the court as protector of the settlement.

The lunatic was now eighty-two years of age, and had never had any issue.

The present incumbent of both livings was the next tenant in tail in remainder expectant on the death of the petitioner without issue male.

The petitioner was married, but had had no issue. The incumbent was seventy-one years of age, and in weak health.

A large sum had been offered for the next presentations.

J. Pearson, Q.C. and *W. B. Heath*, in support of the petition, urged that the application was a reasonable one, as the petitioner was in possession under the lease.

Langworthy, for the incumbent, contended that the application should not be entertained, as it was not for the benefit of the lunatic's estate, and could only benefit one collateral at the expense of another.

Without calling for a reply,

JAMES, L.J., said: I do not think we ought to interfere. There is nothing in the application that affects the interests of the lunatic or his estates. As for the lease, it was executed in order to put the family in possession of the family estates. I think the advowsons ought to be left to go with the estates.

MELLISH, L.J.—I am of the same opinion. The owner of an estate, as a general rule, does not wish to separate a family living from the estate. As it is, there is nothing to prevent the petitioner from selling the next presentation subject to the risk of his dying before the lunatic.

Solicitors for the petitioner, *Western and Sons*.
Solicitors for the respondent, *Ford and Lloyd*.

April 7, 8, 10, and 12.

(Before *JAMES and MELLISH, L.JJ.*, and
BAGGALLAY, J.A.)

Re THE SOUTH WALES ATLANTIC STEAMSHIP
COMPANY. (a)

Company—Winding-up—Unregistered company of more than twenty members—Companies Act 1862, ss. 4, 199.

Quere, whether a company consisting of more than twenty persons, and which is illegal by reason of its not having been registered under the Companies Act 1862, can be ordered to be wound-up under the 199th section of that Act on the petition of either a member or a creditor.

The solicitors of an illegal company of this kind presented a petition for the winding-up of the company as creditors in respect of a bill of costs which consisted partly of their professional charges in connection with the formation of the company, and partly of charges for work done on the retainer of the manager and committee of superintendence of the company.

Held (affirming the decision of *Malins, V.C.*), that as the solicitors, having been parties to the illegal act of forming the company, could not recover their charges in connection with its formation, and as the authority of the manager and committee to retain them for the other work could only be proved by the production of the deed constituting the company, which, owing to its illegality, could not be admitted as evidence, they could not establish a sufficient debt to support their petition, which was accordingly dismissed with costs.

THIS was an appeal from a decision of *Malins, V.C.*, who dismissed a petition for the winding-up of the above company under the following circumstances:

The South Wales Atlantic Steamship Company was formed under articles of agreement dated the 25th Jan. 1871, for the purpose of establishing a line of steamers between Cardiff and other ports in the Bristol Channel, and New York and other ports in the United States and in the British Dependencies in North America.

By these articles of agreement, the parties to which were therein called "the adventurers," it was provided that the capital of the undertaking should be 108,800*l*, divided into 256 equal shares of 425*l* each, and should be contributed by the adventurers in proportion to the number of shares set against their respective names in the schedule; that the adventurers should contribute such further sums as might be required for the purposes of the undertaking upon being called upon to do so by the manager acting on behalf of the committee thereafter named; that a member of the company failing to pay his contributions might be sued or his interest forfeited; that the adventurers should be entitled to the profits in proportion to the shares which they held; that the vessels of the company should be registered in such names as the majority of the adventurers might from time to time appoint, and that the registered owner should sign a declaration of trust, that the adventurers, should, as soon as might be after 75,000*l*. of the capital had been subscribed for, and subsequently from time to time as occasion might arise, hold a general meeting for the pur-

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pose of nominating a committee of superintendence to assist the manager, such committee to have power to arrange for the settlement and discharge of all preliminary costs and expenses incurred in the formation and establishment of the undertaking, and also subject to the terms of these articles of agreement, to provide for the general costs and expenses of the undertaking, and to make rules and regulations for carrying on the affairs thereof; that the committee should not consist of more than five, and that its decision should be binding on all the adventurers; that the general management of the undertaking should be vested in the manager, with the assistance of the committee, with whom he should consult in all cases of importance, and that the decision of the manager and committee should be binding on the adventurers.

After making a number of other provisions which are immaterial for the purpose of the present report, the articles of agreement went on to provide that the arrangement thereby made should continue for seven years from the 2nd Jan. 1871, and for such further terms as the adventurers or the majority of them should from time to time determine, but that the owners of two-thirds of the capital for the time being should have power to stop the concern at any time.

It appears to have been believed at the time of the formation of the association that the number of the members was immaterial, and seventy-four persons ultimately subscribed their names to the articles of agreement.

Calls to the amount of 420*l.* per share were made, and were paid upon a large number of the shares, the whole amount paid up being 83,160*l.* Two steamers, called the *Glamorgan* and the *Pembroke*, were built and made voyages; a committee of superintendence was formed in June 1872, and the association for some time carried on its business. But the earnings hardly covered the expenses, and in July 1873 the members, having apparently become aware that the association ought to have been registered, resolved to dissolve it and to transfer the business, assets, and liabilities of the association to a new company with limited liability, to be formed for the purpose, and to be registered under the Companies Act 1862 and 1867.

This resolution was carried into effect in May 1874, when the new company was formed and registered under the name of the South Wales Atlantic Steamship Company (Limited), and the ships and property of the association having been valued at 164,000*l.*, while its debts were estimated at 80,840*l.*, the balance of 83,160*l.* was treated as the price to be paid by the company to the association for the purchase of its ships and property, which were transferred to the company in consideration of the allotment to the late owners in proportion to their respective interest of a certain number of fully paid up shares of 10*l.* each in the new company. And the new company agreed to discharge all the debts and liabilities of the old association.

The shares were subsequently allotted to the members of the old association in accordance with this arrangement; but, with the exception of the shares thus allotted, only a few others were allotted, and the company having proved unsuccessful, a voluntary winding-up was in May 1875 resolved upon, and in the following Nov. an order

was made for continuing the winding-up under the supervision.

In the meantime a petition for the winding-up of the old association was presented in July 1875 by Messrs. Luard and Sherley, of Cardiff, who were employed as solicitors in the formation of the association, and subsequently as its general solicitors, and who had been unable to obtain payment of their bill of costs.

Messrs. Luard and Sherley had delivered two bills of costs, one of 122*l.* 15*s.* 6*d.* delivered in 1873 for their services to the end of 1872, and another 354*l.* 10*s.* 2*d.* for services down to the date of the dissolution of the association. Some of these charges were in respect of the formation of the association, others were in respect of the costs of defending actions brought against some of the members of the association for damage to goods carried in their ships, which actions Messrs. Luard and Sherley had been retained by the manager and committee of the association to defend, and the rest were in respect of services rendered in the carrying on of the association on the same retainer.

The petition came on for hearing on the 26th July 1875, before Malins, V.C., who dismissed it with costs.

In delivering his judgment the Vice-Chancellor said: This is a very important case, and I think it is most extraordinary that such a case should have arisen. It appears that a body of noblemen and gentlemen of the highest consideration—the Marquis of Bute at the head of them—such a body of men as I have scarcely ever seen associated together in a company—agreed in the month of January 1871, to form a company under which they entered into on the 25th Jan. 1871, recite these circumstances. The articles of agreement, that “whereas the trade and commerce of Cardiff, in the county of Glamorgan, has during the last forty years very rapidly increased and still is increasing; and whereas up to the present time no regular service of steamships has been engaged between any port in the Bristol Channel and the continent of North America; and whereas the trade between the manufacturing districts of South Wales and America has of late years increased, and still is very largely increasing; and whereas the parties who have hereunto subscribed their names have mutually agreed to join together for the purpose of establishing under the style or title of the South Wales Atlantic Steamship Company, a service of steamers between Cardiff and the other ports in the Bristol Channel and New York,” and so on, “and whereas the several parties hereto (who are hereinafter called the adventurers) have agreed to carry out the aforesaid undertaking, subject to the following provisions,” and then it is provided that the capital shall consist of 256 equal shares of 42*s.* each. There are many other stipulations to which it is not important to refer for the present purpose, and then come the names of the persons who executed the articles of agreement, as I have already stated, noblemen and gentlemen greatly interested in the port of Cardiff and the coal trade there carried on. Now this agreement was executed by far more than twenty persons, and indeed by more than forty persons, and the company has from the beginning, as I collect, consisted of at least seventy-five persons, and it must have intended to be an unlimited company,

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because I do not find the word "limited" used. It does not say that the amount of capital shall be limited; and we know perfectly well that unless they avail themselves of the Limited Liability Acts all persons entering into partnerships are liable to the last farthing they have in the world. Whether this association was intended to be formed on that basis or not, I cannot possibly know; but if it was intended, considering the enormous advantages afforded by the Companies Act 1862 to creditors and shareholders, and the facilities which it affords for winding-up in case of difficulty, it is a most extraordinary thing that such a body of men should have been associated together for such a purpose, involving an outlay of we know not how much, without availing themselves of the limitation of liability under that Act. But so it was. It is clear that the company was never registered, and has never been called a limited company; it is "The South Wales Atlantic Steamship Company." The Companies Act 1862, in its 8th section, provides that in all cases "where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things, that is to say, the name of the proposed company, with the addition of the word 'limited' as the last word in such name." All men are bound to know the law. Any man in any way connected with business, and who has business transactions with the world, must know, and does know, and must have attributed to him the knowledge of this Act of Parliament, which has, from various circumstances, become one of the most notorious that has ever been put on the statute book. These noblemen and gentlemen must have known, and the solicitors of the company, the petitioners, must have known that, if they intended this to be a limited company, they were bound to put in their title over the door-post or the window of the offices, or wherever the name was written, the word "limited" as the last word of the name. Not only the shareholders, but all the creditors are bound to know it, and therefore every person dealing with a company ought to ascertain how long it has existed, whether it existed before 1862 or came into existence afterwards, and whether it is a limited or an unlimited company. And as the shareholders are bound to use the word "limited" if they intend the company to be so, the creditors are bound to know it is an unlimited company unless the word "limited" is used. I must attribute to the petitioners the knowledge that it was unlimited, and was not registered under the Act, because if it was registered under the Act they could have found out the fact. If it is an unlimited company, that fact need not appear. All persons were bound to know whether it was a legal or illegal company. Now that this company was, in one sense of the word, an illegal association, can admit of no doubt, because the broad principle of the policy of the Act is clear. The 4th section has enacted that "no company, association, or partnership consisting of more than ten persons shall be formed after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parlia-

ment, or of letters patent; and no company, association, or partnership consisting of more than twenty persons, shall be formed after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries." All persons, therefore, who are connected with the company were bound to know, and I must attribute the knowledge to them, that the formation of a company consisting of more than twenty persons for the purpose for which this association was formed, namely, for the purpose of gain by sending coal by steamers from the Bristol Channel to the ports of North America, was a company which they were bound to register, and that if they did not register it, then, it was an illegal association. Now Mr. Glasse admits that, as it is an illegal association, no application by the share holders can be entertained. Why is that? Because they have been engaged in an unlawful association, and, being engaged in an unlawful association, this court will leave them to settle the question between themselves if they can, and will give no aid to them. Therefore it is conceded, as it is laid down by Mr. Justice Lindley in his treatise on Partnership, that "an illegal company cannot be wound-up at the instance of its own members, but there is no reason why they should not be wound-up at the instance of creditors." Now, why is it that they are not to be wound-up at the instance of their own members? Because they have been engaged in an illegal association. Why should the company be wound-up upon the application of a creditor who has notice that it is an illegal association? For the very fact of the omission of the word "limited" shows that it is unlimited, and if a man deal with such a company, knowing that the universal usage is to register, he is bound to inquire why the company is not registered, and of how many members it consists. If it consists of less than twenty, then the 199th section of the Act applies to it. I have made orders to wind-up unregistered companies consisting of more than seven and less than twenty members. When the Act of Parliament declares that the company is illegal, can the parties come into court and seek the aid of the very Act of Parliament which says that what they have done is illegal? A shareholder cannot do so. Why should a creditor be able to do so? I have said over and over again that, where creditors having notice of a limited liability will not make inquiries and avail themselves of the knowledge which it is within their power to obtain, they themselves are to blame for giving credit to a company unable to pay. So, if men will deal with a company that is unlimited, and which *prima facie* must be taken to be illegal because it is not registered, it is clear they have thrown upon them the burden of ascertaining whether it is a legal company or not; and if they choose to deal with it they must take the consequences, and recover their debts as best they can. Therefore, although my first impression was, and still is, that, as a matter of convenience, considering that there is no moral impropriety in the formation of such a

company, it would be better both for the creditors and for the shareholders that the liabilities should be ascertained, rateable contribution made, and the winding-up of the company carried on under the provisions of this Act of Parliament—and the great and overwhelming body of shareholders take that view of the case—still, as a few, represented by Mr. Pearson and Mr. Rogers, take a different view and resist the order to wind-up, it is my duty to attend to the legal argument, and make up my mind whether a case is established to wind-up this company upon the application of a creditor. Now I think the fatal objection to this petition is that it is presented by Messrs. Luard and Sherley, who were the solicitors of Lord Bute, drew the articles of agreement for the formation of the company, and took all steps to form the company, and therefore were parties to the formation of an illegal company, and whatever may be the position of other creditors, I cannot entertain the slightest doubt that upon an application of creditors so constituted it is impossible that the winding-up order can be made. It was their duty to tell these gentlemen who were associated together in numbers exceeding the permitted limit to form a company which was not to be registered, that the formation of such a company was prohibited by law, and prohibited upon broad principles of policy. The Act of Parliament says that such a company shall not be formed, and it was the duty of the petitioners to point out the illegality of the proceedings, and they cannot avail themselves of any right founded upon the position they occupy. Upon general principles, although my impression at the commencement was the other way, yet, upon full consideration of the authorities and the principle of the Act of Parliament, and the objects it has in view, I come to a conclusion very much in accordance with what was stated by the Master of the Rolls in *Re Arthur Average Association* (32 L. T. Rep. N. S. 525; L. Rep. 10 Ch. 545, n.), where although the point was not before him for direct adjudication, he was led to express an opinion upon the subject. There, although an order had been made to wind-up the company, he expressed his opinion upon this ground which I proceed upon, that, inasmuch as the formation of such a company is illegal by Act of Parliament, you cannot come under that Act, which says it is illegal and is prohibited, and avail yourself of that Act, and ask this court to aid you as if there had been a legal act done. Upon those grounds, it appears to me impossible that any order to wind-up can be made upon an application of either shareholders or creditors, where the company is illegal by the enactment of the Act of Parliament under which alone an order to wind-up can be made. Mr. Glasse says it must have been intended originally that this should be an unlimited company. I think so too. It is very odd that any body of men could be found to form themselves into an unlimited company when the protection afforded to the shareholders and the creditors under the companies' Act 1862 is so great. If, however, they chose to form a company with unlimited liability, the law does not prohibit it, but the law says that if you do form a company consisting of more than twenty persons, you must register it under the Act, or it is an illegal association. Then Mr. Glasse says, and with some show of reason, that honesty

and every feeling of propriety require that those who form such companies should pay the debts. I agree with that. In the well known case of *Ex parte Maymot* (1 Atk. 196), a clergyman, who is prohibited by Act of Parliament from going into commerce, did go into trade and incurred debts. The question was whether he could set up his own wrong in defence against the payment of the debts he had incurred. The rule of the court is that a man cannot avail himself of his own wrong, and that if he enters into trade he must take the consequences of so doing. Even if an infant conducts himself in a fraudulent manner, he may be held liable to pay debts contracted by him as if he were of full age. That was decided in a case before Lord Justice Knight Bruce, in which the liability to pay debts was established against an infant, because he represented himself of full age and had been guilty of fraudulent conduct. The authorities which were cited by Mr. Pearson all agree that where there is an illegal association the parties cannot, as between themselves, have any relief. The only exception is that case mentioned by Mr. Glasse of *Sharp v. Taylor* (2 Ph. 801), where Lord Cottenham allowed a suit to be sustained for obtaining contribution, not for relief under an illegal contract, but to adjust the rights of the parties after the transaction had taken place. It was a smuggling transaction. Those cases have no application to the present case, which depends upon a positive prohibition by Act of Parliament, and although Mr. Justice Lindley does say there is no reason why an illegal association should not be wound-up at the instance of creditors, I cannot think that in that particular passage Mr. Justice Lindley had his attention sufficiently drawn to the fact that the 4th section of the Act prohibits those associations. The case he relies upon as the best authority is *Ex parte Longworth's Executors* (Johns. 465), where it does not seem that the company was absolutely illegal. That, I think, appears plain from the judgment in both courts: (Johns. 465; and on appeal 1 De G. F. & J. 17; 1 L. T. Rep. N. S. 504). The company had done an illegal act. It had proceeded in business before obtaining half the capital, a course which was prohibited, but inasmuch as it had done so and incurred debts, the court refused to interfere with the proceedings of the creditors; but I cannot help thinking that if it had been a case like this where the machinery of the Act of Parliament was invoked by those who had been guilty of an illegal act in forming a company of this kind, the result would have been totally different. There is no other case that gives any sanction to this application, and I come to the conclusion that all such associations as this are illegal, and that, whatever the rights of the parties in other respects are it is impossible for those engaged in the matter to invoke the aid of the Act of Parliament, which itself declares the company illegal. It would be absurd to say that you could come into this court under an Act which says that your company is an illegal association, and get the same relief as if it was legal. No doubt the position of creditors is more favourable than that of shareholders; but still, in my opinion, both the shipbuilders and even the banking companies who are creditors for 31,000*l.* were bound to know that this was not a registered association, that there were more than twenty members, and that, therefore, it was an

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illegal association. The result will be that, having given credit, they must recover the money from those to whom they gave credit. If they make out a case against them all, and establish a liability, they will get their debts at law, but it is impossible for them to do so under the machinery of this Act. I very much regret it, but I feel myself constrained to dismiss this petition with costs.

A second petition for a winding-up order was presented before Hall, V.C., by the Great Western Railway Company, as creditors of the association on account of goods carried for them in 1873 and 1874; but although it was contended that, as outside creditors, having no knowledge of the constitution of the company, nor any suspicion of its illegality, they stood in a different position from the solicitors of the company, who were the petitioners before Malins, V.C., Hall, V.C. being of the opinion that there was no distinction between the two cases, dismissed the petition with costs, considering himself bound by the decision of Malins, V.C.

From these decisions appeals were now brought by both the Great Western Railway Company and Luard and Sherley.

Dickinson, Q.C. and *Grosvenor Woods*, in support of the appeal of the Great Western Railway Company.—The decision of Malins, V.C., which Hall, V.C. followed without expressing any opinion of his own, does not govern our case, for it proceeded upon the ground that Messrs. Luard and Sherley, as solicitors of the company, must have known that the company was illegal, while there is nothing to fix us with notice that the company consisted of more than the permitted number of members. Companies of this kind are not illegal at common law. Lindley, J., in his work on Partnership (3rd edit., p. 201) says "that the tendency was formally to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of Her Majesty's subjects. The legality at common law of such companies may therefore be considered as finally established. It is not easy to arrive at any other conclusion . . . for it is not illegal for persons, however numerous, to enter into an ordinary contract of partnership." [MELLISH, L.J.—Does not the question turn upon the 4th section of the Companies Act 1862, which prohibits the formation of any company or partnership consisting of more than twenty persons, unless it is registered as a company under the Act? That section clearly renders this company illegal, and then the question is whether a company which is illegal under the 4th section of the Act can be wound up under the 199th section.] The 4th section may render the company illegal as between its own members, but it cannot have been intended to deprive creditors of their remedies against such a company. The words of the 199th section of the Act are very wide: "Any partnership, association, or company . . . consisting of more than seven members, and not registered under this Act . . . may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to such company," with certain exceptions. There is nothing to exclude a company of this kind from the operation of the 199th section,

which was intended to provide a remedy for creditors as well as shareholders. It may be that the companies of this kind could not be wound up at the instance of their own members, but, as Lindley, J. says in his work on Partnership (3rd edit., p. 1268) there is no reason why they should not be wound-up at the instance of creditors. [MELLISH, L.J.—The court might perhaps refuse to stay an action against an illegal company under the 201st section of the Act, which is not compulsory, so that the presentor of a winding-up petition would not in such a case interfere with the remedy of the creditors at law.] Winding-up is the most convenient remedy for creditors. It is true that in *Re The Arthur Average Association* (32 L. J. Rep. N. S. 525; L. Rep. 10 Ch. 548 n.) Jessel, M. R. says: "It does not appear to me that the unregistered association pointed out in the 199th section was intended to include an illegal association formed after the passing of the Act. I think it must have meant that the unregistered association contemplated was a legal association which might have been registered, because it was formed before the passing of the Act, or because it was excepted, for it is not every association which requires registration. I think, therefore, that the court ought not to wind-up an illegal association." That, however, was a mere expression of opinion not necessary for the decision of the case, for his Lordship expressly says that he does not think he is absolutely compelled to decide the question. The case of *Ex parte Longworth's Executors* (Johns. 465; 1 De G. F. & J. 17; 1 L. T. Rep. N. S. 504) tends the other way and is in our favour.

Their Lordships, having heard the evidence as to the debt alleged to be due to the Great Western Railway Company, decided that there was no evidence of such a debt as would support a winding-up petition, even if the company were a legal one, dismissed the appeal with costs on that ground, and without deciding the question whether a company illegal under the 4th section of the Act could be wound-up under the 199th section at the instance of a creditor.

Glasse, Q.C. and *Grosvenor Woods*, in support of the appeal of Messrs. Luard and Sherley.—The illegality of the company may affect the rights of the members as between themselves, but cannot, it is submitted, affect the remedy of creditors. And surely the court cannot set up its own illegality as a defence to the claims of creditors. Many cases show that non-compliance with the requirements of the Act does not affect the liability of a company, though it does affect its rights and privileges:

Ex parte Longworth's Executors, 1 L. T. Rep. N. S. 504; Johns. 465; 1 De G. F. & J. 17;

Re West Surrey Tanning Company, L. Rep. 2 Eq. 737;

Re London and County Coal Company, L. Rep. 3 Eq. 355;

Re The Royal Victoria Palace Theatre Syndicate Company, 31 L. T. Rep. N. S. 83; L. Rep. 18 Eq. 661.

[BAGGALLAY, J.A.—Is not this petition really presented in the interest of those members of the company who are personally responsible to the solicitors, having retained them? Those who retained the solicitors are entitled in equity to contribution from the other members: (*Re Boulak Park Estate*, L. Rep. 15 Eq. 43.) Illegality on the part of the debtor has generally been held not to interfere with the rights of creditors. Thus in

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Cobb v. Symonds (5 B. & A. 516), a man who traded illegally was held to be a trader within the Bankruptcy Act, and in *Ex parte Lynch* (34 L. T. Rep. N. S. 34; L. Rep. 2 Ch. Div. 227), it was held that an infant who had represented himself to be of full age, could be made a bankrupt notwithstanding the Infants Relief Act. If a company can set up its own illegality as a defence to the claims of creditors, it will encourage people to form associations of this kind, and repudiate all liability if they fail, leaving their creditors to their remedy against the manager. They also cited

Re The Hertfordshire Brewery Company, 43 L. J. 358, Ch.

Ex parte Maymot, 1 Atk. 196;

Re Sanderson's Patent Association, L. Rep. 12 Eq. 188;

Re The Adanson Fibre Company, 31 L. T. Rep. N. S. 9; L. Rep. 9 Ch. 635;

Taylor v. Iffell, 8 L. T. Rep. N. S. 148; 1 N. Rep. 566;

Rolfe v. Flower, 14 L. T. Rep. N. S. 144; L. Rep. 1 P. C. 27;

Whitehorne, for the manager and committee of superintendence, supported the appeal.

W. Pearson, Q.C. and *B. B. Rogers*, for members who opposed the appeal.—The petitioners having acted as solicitors in the formation of an illegal company, have no good debt. *Duvergier v. Felloves* (1 Cl. & Fin. 39), and *Josephs v. Pebrer* (3 B. & C. 639), show that no legal demand can arise from the doing of an illegal act. That disposes of the petitioners' claim in respect of the formation of the company. Then, as to their claim for the costs of defending actions on the retainer of the manager and committee, the authority of the manager and committee can only be proved by the articles of agreement for the formation of the company, and those articles being illegal, cannot be regarded as legal evidence. [JAMES, L.J.—Suppose a pauper to be appointed manager of an association of this kind, can it be said that the only remedy of creditors is against the manager?] Yes; for everyone who deals with a company is bound to inquire whether it is legally constituted or not. A company made illegal by one section of the Act, cannot be wound-up under another section of the same Act. The words, "association or company," in the 199th section, must mean legal association or company. The only case upon this point under the Companies' Act 1862, is *Re the Arthur Average Association* (32 L. T. Rep. N. S. 525; L. Rep. 10 Ch. 545n.), and that is altogether in our favour. They also referred to

Harris v. Amery, 13 L. T. Rep. N. S. 504; L. Rep. 1 C. P. 148;

Le Kiche v. The Ashbury Railway Carriage Company, 31 L. T. Rep. N. S. 339; L. Rep. 9 Ex. 224;

Re The London Marine Insurance Association, 20 L. T. Rep. N. S. 943; L. Rep. 8 Eq. 178;

Melhado v. The Porto Alegre Railway Company, 31 L. T. Rep. N. S. 57; L. Rep. 9 C. P. 503;

Eley v. The Positive Government Security Life Assurance Company, 34 L. T. Rep. N. S. 190; L. Rep. 1 Ex. Div. 20;

Thomson v. Thomson, 7 Ves. 470;

Ewing v. Osbaldiston, 2 My. & Cr. 53;

Re The Family Endowment Society, 21 L. T. Rep. N. S. 775; L. Rep. 5 Ch. 118;

Borclay's case, 26 Beav. 177;

Fenn's case, 4 De G. M. & G. 285;

Grisewood's case, 4 De G. & J. 544;

Re The Bank of London and National Provincial Insurance Association, 23 L. T. Rep. N. S. 305; L. Rep. 6 Ch. 421.

[BAGGALLAY, J.A., referred to *Ex parte Williamson* (L. Rep. 5 Ch. 309).]

Grosvenor Woods, in reply, referred to

Brett v. Beckwith, 3 Jur. N. S. 31;

Sheppard v. Ozenford, 1 K. & J. 491.

Cur. adv. vult.

April 12.—JAMES, L.J.—In this case, in my opinion, the petitioners have failed to establish a sufficient legal debt to entitle them to the winding-up order which they seek. With regard to the first part of their bill of costs, it appears to have been in truth incurred in establishing a body which was illegal, in forming the constitution of that body, and assisting it in coming into existence. In my opinion, it is impossible to say that any legal demand could be founded on such an employment. With regard to the subsequent part of the bill of costs, it is alleged by the petitioners themselves that they did the work on the retainer and by the direction of the manager and committee of the association. Now, no doubt, a manager of such a body may possibly be held out to the world, like the manager of a manufactory, or a ship, or anything of that kind, as having authority to do what is the ordinary routine work of such an employment, and may bind his principals by the thing done in such ordinary work; but it is no part of the ordinary duty of a traffic manager to employ an attorney or solicitor, and the agency of the manager and of the committee must be shown. In this case it is shown merely by an article in the constitution of the body itself, which delegates to such manager and committee certain powers. Now, the whole constitution of the body being illegal and void, it appears to me that the agency created by such a constitution is void also, and therefore that the petitioners are unable to establish the retainer against the body of partners. That being so, it appears to me impossible that they sustain their demand against the whole body of partners. That would be sufficient probably for the disposal of this case; but having regard to the decisions in this matter and in others, having regard to the arguments which have been addressed to us, I think it right for myself to say that I am by no means satisfied that a body of persons such as are engaged in this particular business, can allege their own illegality as a means of escaping from a winding-up order. I should rather myself be disposed to think that the illegality would be an additional reason for winding them up. I think it right further to add, having regard to what one cannot but conceive to be the real object of these petitions, that, even if there were such a winding-up, it could not, as it appears to me, go beyond dealing with existing assets and providing for existing liabilities, and could not be made the means of enforcing contributions from some members who had not paid in order to reimburse other members who had paid, there being, as it seems to me, no right of contribution whatever either at law or in equity as between the members of such an illegal association as this was.

MELLISH, L.J.—I am of the same opinion. I think that the petitioners in this case have not established their debt. They cannot have established their debt unless they show that they could have maintained an action at law against all the members of the association who were members of the association at the time when each part of the debt was contracted. Whether, if they could make that out, they could go on further and wind-up the association is another question, but at any

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rate they cannot be entitled to do so unless they can prove a debt against the whole association. Now, with reference to the first part of their bill respecting the formation of the company, I think the petitioners must be taken from the outset to have perfectly well known this to be an association or partnership which was to consist of more than twenty persons. They plainly cannot avail themselves of their ignorance of the particular section of the Companies Act 1862, which makes it illegal to form an association of more than twenty persons, unless it is registered as a company under the Act. Though they may not have actually known at the very commencement that the company would consist of more than twenty persons they must have known from the explanation given to them of the objects of the association, and from the terms of the articles of association that in all human probability there would be more than twenty, and almost immediately after more than twenty had subscribed they knew as a matter of fact that they had subscribed. Therefore I am clearly of opinion that they could not maintain an action at law for any items of that first part of the bill respecting the formation of the company, nor for any of the other items which were directly connected with carrying on the illegal association, on the ground that they were parties to the illegality, and that the debt, being illegal, cannot be recovered. As to the subsequent bill, no doubt there are parts of it which were not in themselves illegal, particularly those relating to the actions, because, no doubt, however illegal the association might be, if an action was brought against the persons who were members of the association, they were entitled to defend themselves against that action. With regard to the action which was brought on account of damage having been done to goods carried on board one of the ships of the association, no doubt the persons against whom that action was brought were entitled to defend themselves against that action. But then the action was not brought against all the members of the association, but was brought only against some of them, and the question arises whether those against whom it was brought, or the committee, or the manager, were entitled to retain these gentlemen to act as solicitors, not on behalf of the defendants against whom the action was brought, but on behalf of all the members of the association. I am of opinion that they are not so entitled. It is impossible to prove that they were so entitled except by producing this illegal contract for the purpose of showing the authority. I am quite clear that the solicitors, who must be taken to have been fully aware of the illegality of that contract, cannot rely upon it for the purpose of proving that the members who had given no direct authority to defend that action had authorised the managers to retain these gentlemen to defend it, and that part of the bill they cannot recover. It is perfectly plain that if such an action was successful against the gentlemen against whom it was brought, and they were made personally to pay the damages in that action, they could not get contributions in respect of those damages from the other members of the illegal association, and there being no doubt about that, it seems to me necessarily to follow that they cannot be entitled to make the other members liable with them to the costs of the action. The costs follow the

principal; if there cannot be contributions respecting sums recovered, neither can there be contributions respecting the costs of the action. Then there was another claim in respect of proceedings against one of the captains. The captain of one of the ships of the association was summoned for having, contrary, as was alleged, to an Act of Parliament relating to the Bristol pilotage, omitted to take a pilot. Were the managers entitled on the credit of the whole association to retain a solicitor to oppose that summons? There might be some doubt whether, if it was a legal association, they would have such an authority, but, it being illegal, the members of the association, who gave no direct authority, were, in contemplation of law, entirely uninterested in that question. The law assumes that people never intend to go on with an illegal business, it assumes that they mean to stop it at once, and except on the assumption that they were going to continue the illegal business, the members of the association had no interest of any sort or kind in opposing that summons. Therefore it appears to me that they were not liable in point of law to have an action brought against them in respect of that. I do not think our particular attention has been called to any of the other items, but as far as I have gone through them, they all come within one or other of those two categories, that is to say, either they were perfectly illegal because they were for the purpose of carrying out the illegal objects of the association, or else they were for work done on the retainer of the managers who had no authority to retain the solicitors to act on behalf of all the members of the association. Therefore I am of opinion that the petitioning creditors' debt is not proved. With reference to the other question, I confess that I have had very great doubt as to how far there can be an order to wind up an association of this kind. I do not wish to give any opinion which will prevent me from fully considering it whenever the question may come before me for decision. I should be very unwilling to hold, unless I find myself absolutely compelled to do so, that a purely innocent person who employs a partnership of this kind can be prevented from maintaining an action against all the members of it who are practically interested in it, because, without his knowing it, they happen to be more than twenty. Suppose a common ordinary partnership were carrying on this business, it seems to me a very extraordinary thing that a creditor should have any obligation put upon him to inquire whether the partners were more than twenty or not. If an action could be maintained, I should have great difficulty in saying that there could not be a winding-up order on the application of a creditor, and I am not clear that in no case could a winding-up order be made on the application of a contributory. I do not wish to encourage anyone to make such an experiment in the present case, for I have no doubt that no contributory of this company could get a winding-up order in the state in which things now are, because the company's property has all been parted with, and the business put an end to, so that there is nothing to be done in the way of winding-up. I should wish, as far as I am concerned, to keep the question open whether when an illegal association is actually going on with its business if a man, who may have subscribed in ignorance of the law,

CHAN. DIV.]

DISNEY v. LONGBOURN—BROOKE v. BROOKE.

[CHAN. DIV.]

or not knowing that there were more than twenty members, finds out that he is engaged in an illegal company with more than twenty members, he cannot obtain a winding-up order. He must, somehow or other, be able to stop that state of things, and I have no doubt that such a person could sustain a bill to restrain all his companions from persisting in carrying on the illegal adventure, and to have the property, the ship, or whatever it might be, which were actually engaged in the illegal traffic, divided among them. For instance, in this case, supposing after one voyage had been made, and before the second voyage was begun, a man who had really a beneficial interest in equity in the ships wished to stop it, he must be entitled, somehow or other, to stop the ships from going on any further illegal adventure, and to have them divided among the persons who own them. Upon the question whether that could be done by a winding-up order, or whether it must be done by an action in the Chancery Division, I do not wish to give any conclusive opinion. As far as regards the present case, I am of opinion that the appeal ought to be dismissed with costs.

BAGGALLAY, J.A.—Agreeing, as I do, with the Lords Justices in thinking that no sufficient debt has been established by the petitioners in this case to entitle them to apply for or support an application for an order for the winding-up of the company upon the assumption that it was a company that could be legally wound-up under the 199th section of the Act, it becomes unnecessary for me to express any decided opinion upon the question whether a company, illegally constituted by reason of its want of registration, can be wound-up under that section. I only desire to say upon this point that I am not, as at present advised, satisfied that any such order could be made. It appears to me that a company of this kind, illegally constituted, and illegally constituted for the express purpose of avoiding the requirements of the Act of Parliament, could not be properly wound-up under that statute, though it is possible that under certain circumstances results equivalent to the winding-up might be obtained by means of other proceedings.

Solicitors for the appellants: *Radcliffe, Cator, and Martineau.*

Solicitors for the respondents: *B. B. Nelson.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Friday, May 6.

DISNEY v. LONGBOURN. (a).

Practice—Pleading—Discovery—Production of documents—Interrogation of plaintiff by defendant—Rules of Court 1875, Order XXXI., rule 1. The defendant to an action, after filing an affidavit to the effect that he was ignorant of the claim made by the plaintiff, and was unable to make a defence unless certain information was given and documents handed over to him by the plaintiff, applied for leave to deliver interrogatories to the plaintiff before putting in his defence.
Held, that leave must be refused, and the defendant must make the best defence he could and then interrogate.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

In this case an application was made by the executors of a deceased trustee, who were defendants in the suit, to be allowed to interrogate the plaintiff, and that the plaintiff might be ordered to make an affidavit with respect to certain documents.

The action was one to make the estate of the deceased trustee liable for breaches of trust of which it was alleged in the statement of claim that he had been guilty.

In support of the application the defendants, the executors, filed an affidavit to the effect that they were entirely ignorant of the alleged breaches of trust, and of the circumstances connected therewith, and were not in possession of any documents relating thereto. To the best of their belief they had a good defence to the action, but they had not the materials for making such defence unless certain information was afforded them and certain documents handed over which were in the possession of the plaintiffs to the action.

Fischer, Q.C. and Cust, for the present applicants, cited Order XXXI., rule 1.

H. A. Giffard, for the plaintiff, was not called upon.

JESSEL, M.R.—This is a useless application. The rule cited says: "A defendant may at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties." Now, I do not wish to limit the generality of the latter part of the order, which was put in to provide a remedy when a party to an action wished to interrogate after the close of the pleadings. But this case is different. The executors of a deceased trustee are sued for breaches of trust by their testator. They say they know nothing about it. If so, their course is plain. Let them file a statement of defence to that effect claiming the benefit of every defence which may hereafter be open to them. With that defence let them interrogate the plaintiff, for which they require no order. But I am asked to delay the plaintiff in his action, to enable the defendant to postpone his defence, and to deprive the plaintiff of knowing what the defence is until he has answered the interrogatories. I do not think I ought to do so. By the course which I propose the defendants will get every advantage which they propose to get by their present application. And if the answers to their interrogatories disclose any defence, they may obtain leave to amend their statement of defence accordingly. I am asked to let the application stand over till the defence is put in. What is the use of that, when the defendants will be able, without my leave, to file their interrogatories at the same time as their statement of defence? The application is refused with costs.

Solicitors: *Nicholl, Newman, and Co.; W. and A. Ranken Ford.*

Saturday, July 8.

BROOKE v. BROOKE. (a)

Will—Legacies—Charge on real estate—Residue—Trust for conversion—Mixed fund. A testatrix directed her debts and legacies to be paid by her executors. She devised and bequeathed

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

RAILWAY

PART. 21

1871, c. 11

Act of the Board of

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By the Great Western and Midland Railway Companies' Act 1871 (34 Vict. c. 11), power was given to abandon one of these railways, viz. the junction with the Midland Railway, and instead thereof the Midland and Great Western Railways were empowered to construct other lines, and the

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

powers of the Bristol Company were to be transferred for this purpose to a joint committee of the Midland and Great Western Railways; and this committee were empowered to use the portion of the Bristol Company's Railway, together with the stations, watering places, and other conveniences of the Bristol Company, lying to the north-west of the Sneyd Park junction, *i.e.*, from the junction of the Midland Railway along the Bristol Company's line (the Bristol and Port Pier Company) to Avonmouth. Sect. 40 of the last-mentioned Act provides that the two companies, in their uses of the said line, shall be subject to the conditions specified in Article 45 of the articles of agreement made between the Bristol Company and the Great Western and Midland Companies, which enables the two companies to enjoy free use of the Bristol Company's line, and all its conveniences, subject to the terms therein mentioned.

The joint committee have opened that portion of their line which lies between Bristol and Clifton Downs Station. They have since given notice of their intention to open the part which lies between Clifton Downs Station and Sneyd Park Junction. The line beyond Sneyd Park, which goes to Avonmouth, is a single line; the others are double lines.

The Board of Trade sent their inspector, Colonel Yolland, to examine the line thus proposed to be opened, and he reported that although the notice received from the joint committee limited his inspection to the line between Clifton Downs and Sneyd Park, still the opening of that portion of the line ought not to be sanctioned unless there were either a station at Sneyd Park or a sufficient station on the adjacent single line between Sneyd Park and Avonmouth, at a place called Sea Mills, closed to Sneyd Park Junction, the existing station at Sea Mills being insufficient for the purpose. The Board of Trade therefore directed the postponement of the opening of the proposed line for a month. The committee then objected, on the ground that no station was required at Sneyd Park, and that the enlargement and improvement of Sea Mills Station was a question which did not affect them, but solely concerned the Bristol Company.

The question, therefore, arose whether sect. 6 of the Regulation of Railways Act (5 & 6 Vict. c. 55) applied to a case where the new line to be opened provides sufficiently for the public safety, but where danger may arise from the want of sufficient accommodation on the old line into which this new line proposes to run; and whether the view to be taken is affected by the consideration that the new line has running powers over the old, and has an agreement with the old company by which the latter, if necessary, are to furnish additional accommodation for the new traffic.

The 5 & 6 Vict. c. 55, s. 6, provides "That if the officer or officers appointed by the Lords of the said committee (of the Privy Council) to inspect any such railway or portion of railway shall, after inspection thereof, report in writing to the Lords of the said committee that in his or their opinion the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railways, together with the grounds of such opinion, it shall be lawful for the Lords

of the said committee, and so from time to time, as often as such officers shall, after further inspection thereof, so report, to order and direct the company to whom such railway shall belong, to postpone such opening for any period not exceeding one calendar month at any one time, until it shall appear to the Lords of the said committee that such opening may take place without danger to the public."

The case came to a hearing on motion for an injunction to restrain the companies from opening the line until the expiration of one calendar month from the date of the notice sent by the Board of Trade, or of such further period as the Board of Trade might direct.

The *Solicitor-General* (Sir H. S. Giffard) *Miller, Q.C.* and *Rigby*, for the defendants.—The court has no jurisdiction in the question. The jurisdiction belongs to the Board of Trade, and no evidence can be admitted by this court as to the soundness or unsoundness of the inspector's reasons. Those reasons are to be submitted with the report to the Board of Trade, and they alone can decide on their validity.

Theisiger, Q.C., Davey, Q.C., and H. A. Giffard for the defendants.—Sect. 6 of 5 & 6 Vict. c. 55, has no application to the present case. The jurisdiction never arose, as there is no incompleteness of the works in this case. The incompleteness is in the works and accommodation of a neighbouring railway, which is already at work.

JESSEL, M.R.—The real question which I have to decide is the construction of the 6th section of the Regulation of Railways Act. That section might have been better worded than it is if it had been prophesied that the question would arise, as indeed all drafting is susceptible of improvement. But we must fairly interpret the language, and find out its meaning with respect to the evil against which the Legislature intended to provide. The 6th section says: (His Lordship then read the section as above set out). Now when the Act speaks of a "railway or portion of a railway," it means the whole thing—the entirety of the work constructed by the company—not the permanent way as distinguished from the bridges; not the watering sheds as distinguished from the stations, nor the stations as distinguished from the engine houses. It means the whole work. The inspector is to report and give the grounds of his opinion to the Board of Trade, who may order the opening of the railway to be postponed. The question is whether in this case that order has been properly made. If it has been properly made, nobody doubts that an injunction must be granted. That being so, the first question is, what is the meaning of the section? If it gives jurisdiction to the Board of Trade they are the only persons who are not bound by the report. They may stop the railway from being opened until it shall appear to them that it can be opened without danger to the public. The only preliminary is that they are not to exercise their jurisdiction without a sufficient inquiry. They have an officer to inspect the railway, to report and to give the grounds of his opinion. In my view, I am not empowered to go into the grounds of that opinion. If the Board of Trade thinks them sufficient, it will not act. It will either send another officer, or leave the matter alone. They are not to proceed without sufficient information, but the whole jurisdiction is given to the Board of Trade. Then again it is

CHAN. DIV.]

BUTCHER v. SIMMONDS.

[CHAN. DIV.]

said that to enable the Board to act, their officers must report incompleteness in the works; and it is argued that in the present case the officer has not reported incompleteness. But he has in words reported incompleteness. It is said that the report shows that it is the works on the other line which are incomplete, and not those on this line; and secondly, that no incompleteness in the proper sense of the term is reported at all. Now, first the officer reported that the works were incomplete because there was no station at Sneyd Park Junction on this line. No doubt if he had been satisfied with the existing station at Sea Mills, he would not have ordered a station at Sneyd Park. But it is quite within the powers of the Board to order works on one line because of the condition of another line. For example, the gradients might be so arranged where one line ran into another, that the Board might say that precautions must be taken on one line because of the gradient on a neighbouring line. As to the second point, it is said that the want of a station at Sneyd Park is not felt, and that therefore there is no incompleteness in the works. But the word "incomplete" is used in its largest sense. It may mean "unfinished." It is not so used here; but it may also mean "imperfect" or "defective." An imperfect flower, for instance, is one which is wanting in some of the organs with which most flowers are furnished. When, therefore, it is said that the works are incomplete, what is meant is that they are imperfect. All is done by the railway company. The permanent way is neither more nor less work than the station. Everything they do or have done for any purpose whatever, which is necessary for the public safety, is work within the meaning of the 16th section of the Railway Clauses Act (8 Vict. c. 20), consequently the second objection as to incompleteness entirely fails. Being therefore of opinion that the jurisdiction belongs to the Board of Trade alone, and that the inquiries preliminary to the exercise of that jurisdiction have been properly made, and that it is beyond my competence to inquire whether the jurisdiction has been properly exercised, I must grant the injunction as asked, with costs.

Solicitors: *Solicitor to the Board of Trade; R. B. Nelson.*

(Before Vice-Chancellor MALINS.)

Wednesday, May 17.

BUTCHER v. SIMMONDS.(a)

Settlement—Property, subject to a prior mortgage, settled upon A. in fee—Contingent charge in favour of B. upon attaining twenty-one—Arrear of interest.

By a settlement made in 1862 certain property, subject to a prior mortgage, was settled upon A. in fee, with a contingent charge in favour of B. upon his attaining twenty-one:

Held that A., during his life, and his estate after his death, was bound to keep down the interest on the mortgage, so that the property might remain a security intact for the benefit of B.

THIS was a summons taken out by George Archer and William Cock, the trustees of the settlement made on the marriage of Myrry Wilson (the testator in the cause) with Sarah Newton, widow, to vary the Chief Clerk's certificate by allowing their

claim, as such trustees; as creditors of the testator for the sum of 451l. 15s. 9d.

On the 11th Nov. 1874 a decree was made in the above suit (which was a creditor's administration suit), directing the usual accounts and inquiries to be taken and made.

On the 26th July 1875, the Chief Clerk made his certificate, disallowing the above-mentioned claim of the trustees. In answer to the inquiries as to the real estate of the testator, and the incumbrances affecting the same, the Chief Clerk had found as follows:

In 1857, William J. Newton, then the husband of Sarah Newton, was seised in fee of a certain farmhouse and lands, called Methwold Hall, in the county of Norfolk, subject to an annuity of 100l., issuing out of the said lands, for the life of Mary Newton, widow.

In 1859 W. J. Newton mortgaged the said premises, subject to the said annuity, to John Feltham and others, to secure 10,500l. and interest.

In 1861 W. J. Newton died, having devised the said premises to his wife Sarah Newton, in fee.

In 1862 Sarah Newton married the testator, Myrry Wilson; and by an indenture of settlement, dated the 5th June 1862, and made shortly before the marriage, the said premises, subject to the said annuity and mortgage, were conveyed to George Archer and William Cock, the trustees of the settlement, upon trust, to sell as therein mentioned, and to stand possessed of the moneys arising from such sale, upon certain trusts declared by an indenture of even date. And the said indenture contained the following proviso: "In case William John Newton shall attain the age of twenty-one years, the said George Archer and William Cock, or the survivor of them, or his heirs, or their or his assigns, shall, as soon as can be, after the said William John Newton shall have attained that age, by sale or mortgage of all or any part of the said hereditaments and premises then remaining unsold, levy and raise the clear sum of 1000l. sterling, and pay the same sum to the said William John Newton for his own use and benefit."

By another indenture of even date it was declared that the trustees should stand possessed of the moneys which should arise from the sale upon trust to invest as therein mentioned; and, during the life of Sarah Newton, to pay the income to her for her separate use, without power of anticipation, and after her decease to stand possessed of the trust funds upon trust for Myrry Wilson, his heirs, executors, administrators, and assigns.

In June 1871, Sarah Wilson died.

On the 22nd July 1874, John Feltham and others, the mortgagees, under their power of sale, entered into a contract to sell the said premises for 11,750l., subject to the payment of the said annuity.

On the 30th July 1874, Myrry Wilson died insolvent, having by his will appointed the defendant, Christopher William Simmonds, his executor.

It appeared from the evidence that Myrry Wilson, the testator, had during his lifetime regularly paid the annuity, and the interest on the mortgage down to Lady-day 1874.

When the sale of the premises was completed in Sept. 1874, the mortgages retained out of the purchase money (in addition to the principal sum

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

secured by the mortgage), a sum of 400*l.* 0*s.* 9*d.* for interest up to the 29th Sept. 1874, a sum of 50*l.* as half a year's payment of the annuity up to the same date, and a sum of 1*l.* 15*s.* for certain quit rents due at Michaelmas in respect of copyhold portions of the premises.

These three sums, amounting together to 451*l.* 15*s.* 9*d.*, the trustees now claimed by their summons.

Mary Newton, the annuitant, was about 88 years of age; and William John Newton, the son, was about 14 years of age.

Rogers, for Messrs. Archer and Cook, the trustees of the settlement.—After Mrs. Wilson's death, Myrry Wilson, the testator, was, under the settlement, owner in fee of the property, subject to the annuity and mortgage, with a proviso, in the nature of an executory devise over, in favour of William J. Newton, the son, on attaining twenty-one. He was, therefore, bound to keep down the interest on the mortgage, and pay the annuity. This he did during his lifetime; and his estate is, in like manner, bound to make these payments after his death. We are, therefore, entitled to claim as creditors for the amount stated in the summons.

Phear and Blake, for certain creditors of the testator.—The testator, being absolute owner in fee of the property, subject to prior charges, was not bound to keep down the interest on the charges. The claim of the trustees (as William J. Newton, the son, is still an infant) is only a contingent claim, and ought not to prevail against creditors, whose claims are ascertained. If William J. Newton dies under twenty-one the trustees can claim nothing.

Methold, for the executor.

Rogers was not called upon to reply.

The VICE-CHANCELLOR (after stating the facts) said: The result is, that, subject to the annuity and mortgage, Mrs. Wilson made her husband owner in fee; except that the settlement contains this proviso, that "in case William John Newton shall attain the age of twenty-one years, the said George Archer and William Cock, or the survivor of them, or his heirs or their or his assigns shall as soon as can be after the said William John Newton shall have attained that age, by sale or mortgage of any part of the said hereditaments and premises then remaining unsold, levy and raise the clear sum of 1000*l.* sterling, and pay the same to the said William John Newton." Wilson, therefore, was not sole owner; but, subject to the annuity, the mortgage, and the contingent charge in favour of his stepson, he could do what he liked with the estate. Now, where a person is only a tenant for life, or has only a partial interest in, property subject to a mortgage, it is his duty, as between himself and those entitled in remainder, to keep down the interest on the mortgage. If A. is owner in fee of property, subject to a mortgage, with an executory devise over in favour of B., A. cannot allow the interest on the mortgage to go on accumulating, but must keep down the charge on the property, so that the property may go over to B. in the same state in which A. received it. In this case, the security for the 1000*l.* was very precarious. I am of opinion that, for the sake of the charge, it was the duty of Wilson to keep down the annuity and the interest on the mortgage, so that the estate might remain a security intact for the benefit of the boy. While Wilson

lived he kept down the annuity and the interest on the mortgage. After his death, about half a year elapsed before the sale was completed. Surely it was the duty of his successors to keep down the charges on the property. Whatever the arrear of interest might be, whether it had accrued in his lifetime or after his death, it was clearly the duty of his estate to keep down the interest. At the time of completion, an arrear of interest was retained by the mortgagees; and, therefore, a portion of the fund, which ought to have stood as security for his 1000*l.*, was taken away from the boy. The question is whether the fund, which ought to have been appropriated to secure this sum, can be diminished in this way. I am clearly of opinion that it cannot. Wilson's estate has received more than it ought to have received. The summons to vary will, therefore, be allowed.

Solicitors: *Thomas Cress*; *Charles Blake*.

Saturday, May 20.

Re BROWN AND SIBLY. (a)

Will—Devise by trustee—Gift of legacies followed by a gift of "the residue of my unsettled property"—Legal estate in trust property held to pass—Vendor and Purchaser Act 1874, sect. 9.

A testator gave pecuniary legacies out of his unsettled property, and then gave "the rest and residue of his unsettled property" to A. The will contained no devise of trust estates.

Held, that although by this disposition the testator's own real estate was charged with legacies, an estate of which he was trustee passed under the residuary devise.

THIS was a summons under the Vendor and Purchaser Act 1874.

William Proctor Anderdon, by his will, dated the 21st Oct. 1857, after giving various specific and pecuniary legacies out of "his property which was not under settlement," bequeathed as follows:

"The rest and residue of my unsettled property I bequeath to my great nephew John E. Anderdon." And the testator, after giving certain specific and pecuniary legacies out of "his settled property after the death of his wife," and devising his freehold house in St. James's-square to his great niece Blanche Simmonds, gave "all the rest and residue of his settled property to his great nephew John E. Anderdon." The will contained no express devise of trust estates.

William Proctor Anderdon died on the 16th April 1859. At the time of his death he was the surviving trustee of a certain indenture of settlement of the 10th Nov. 1821. The property comprised in the settlement did not form part of his "settled property."

A contract had been entered into for the sale of certain real estate comprised in the settlement by Brown (the vendor) to Sibly (the purchaser). The purchaser had taken the objection that the legal estate, in trust estates did not pass to John E. Anderdon under the residuary bequest contained in the will of William Proctor Anderdon.

Joshua Williams, Q.C. and *Ingle Joyce*, for Brown, the vendor.—The legal estate in the trust property passed under the words of the will to John E. Anderdon: (*Lord Braybrooke v. Inskip*, 8

(a) Reported by JAMES E. HURNE, Esq., Barrister-at-Law.

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WHEATLY v. DAVIES.

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Ves. 417.) The tendency of modern authorities is to extend the cases in which the legal estate has been held to pass :

Re Stevens' Will, L. Rep. 6 Eq. 597,

Dunning for Sibly, the purchaser.—The testator begins by giving certain legacies, and these legacies are a charge upon the unsettled property. A charge of legacies will prevent the legal estate in trust property from passing by the will: (*Martin v. Laverton*, 22 L. T. Rep. N. S. 700; L. Rep. 9 Eq. 563). The charge of legacies shows that the testator intended to deal only with his own property, and not with that to which he was entitled only as trustee: (*Re Packman and Moss*, 34 L. T. Rep. N. S. 110; L. Rep. 1 Ch. Div. 214). This case is a direct authority in my favour. He also referred to

Roe v. Reads, 8 Term Rep. 118;

Ex parte Morgan, 10 Ves. 101.

Williams, Q.C., was not called upon to reply.

The VICE-CHANCELLOR said: I think, notwithstanding the decision of the Master of the Rolls in *Re Packman and Moss*, that the inclination of modern decisions is, that trust estates will pass under a general devise of real estate. The legal estate is not a substantial but an imaginary thing. Under a general devise of "all my real estate" the legal estate in trust property will undoubtedly pass. But then it is said that a devise of real estate charged with payment of debts will not pass the legal estate in trust property. Why not? Such a devise will pass the legal estate, and be a good charge (by the testator) upon the property, which is his to charge. Therefore, *reddendo singula singulis*, the rational construction is to say that such a devise will pass the legal estate in trust property. That is the substance of what was decided in *Lord Braybrooke v. Inskip*. The case of *Re Stevens's Will* seems to me to be inconsistent with the case of *Re Packman and Moss*. In the case of *Re Stevens's Will* the testatrix, after directing her just debts to be paid, gave pecuniary legacies, and then gave all the residue of her real and personal estate to J. T. for her own absolute use and benefit. It was there held that, although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee, was not excepted from the residuary devise. Giffard, V.C., there said, "This is not the case of a mere trust estate, but of the legal estate in a mortgage, the beneficial interest in which mortgage was vested in the testatrix. The charge of the legacies was the point insisted on as being a reason why the legal estate in this mortgaged property should not pass. I quite agree that in this will there is enough to charge both the debts and legacies on the testatrix's own real estate; but if the charge of debts would not prevent the legal estate in the mortgaged property passing, so neither would the charge of legacies. The modern authorities have extended the cases, in which the legal estate in a mortgage has been held to pass." I entirely agree. "Here, subject to the charge of debts and legacies, there was an absolute gift to Jane Toyer. I am not precluded by authority from holding that the legal estate passes in this case; and I do not hesitate to say that, in such a case as this, good sense and conscience require that a beneficial gift shall carry the legal estate in a mortgage as an incident, and a useful and necessary inci-

dent, to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that the legal estate in a mortgage should pass. I am of opinion that on this will there was no intention that the legal estate in the mortgage should pass, and there is nothing to rebut this intention." I quite agree with all that. If it happens that a man gives his real estate in strict settlement, or if the trusts or purposes for which the property is given clearly show that the testator is only giving that of which he is the beneficial owner, that he is only dealing with property recognised as his both at law and in equity, then it is impossible to say the intention could be that a trust estate should pass. That was the ground of my own decision in *Martin v. Laverton*, in which I fully considered the authorities on the subject. I cannot reconcile the cases of *Re Stevens's will* and *Re Packman and Moss*. I adhere to what I decided in a recent case (unreported), that where there is a general devise of real estate charged with debts and legacies, such a devise *reddendo singula singulis*, passes the legal estate in all that the testator has at law, but is only effectual to charge that which he has in equity as well as at law. There is no reason here why the legal estate in the trust property should not pass. The testator gives legacies, and then he says: "The rest and residue of my unsettled property I bequeath to my great nephew John E. Anderdon." That is a gift to him in fee simple. This is part of the unsettled property. It is his in a court of law, though not his in a court of equity. I hold that, whatever is his in a court of law, passes under this bequest. On these grounds I am of opinion that the legal estate in the trust property passed by the will of John Anderdon under the words, "the rest and residue of my unsettled property," and there will be a declaration to that effect.

Solicitors: *Reed and Lovell; Merediths, Roberts, and Mills.*

Wednesday, May 31.

WHEATLY v. DAVIES (a).

Will—Annuity charged on the corpus of personal estate—Arrears of—Interest.

An annuitant under a will of personal estate is not entitled to interest on the arrears of his annuity, whether the annuity be charged on corpus or income.

FURTHER consideration.

Henry Samuel Foley, by his will dated the 8th May 1830, appointed the Rev. Thomas O. Foley and the plaintiff Robert B. Wheatly executors and trustees of his will. And the testator devised and bequeathed unto his said trustees all the share and interest in the moneys and funds to which at the time of his decease he might be entitled, expectant on the decease of his mother under the trusts of her marriage settlement, and all the residue of his real and personal estate, upon trust to sell, and out of the proceeds of sale to pay his debts, and to invest the residue as therein mentioned, and to stand possessed of the same stocks, funds, and securities, upon trust to pay the interest and annual produce thereof unto his wife for her life, or so long as she should continue his widow, for

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

the support of herself, and maintenance and education of such of his children as should be living at the time of his decease; and, after her decease, in trust for all his children in equal shares.

The testator, by a codicil to his will dated 23rd May 1835, after appointing his brother to be a trustee and executor in the place of the Rev. Thomas O. Foley, who was then dead, directed his trustees to stand possessed of the trust estates, moneys, stocks, funds, and securities in his will mentioned, and the interest and annual produce thereof, in trust, out of such interest and annual produce to pay to his wife during her life, if she should so long continue his widow, "one annuity or clear yearly sum of 150*l.* in lieu of the interest and annual produce by his said will directed to be paid to her so long as she should continue his widow." And subject to and charged with the payment of the said annuity the testator directed his trustees to stand possessed of the said trust estates, moneys, stocks, funds, and securities, and the interest and annual produce thereof, in trust for the benefit of his children as therein mentioned.

The testator died in 1852, and the will and codicil were proved by the plaintiff, the surviving executor in Nov. 1853.

Hannah Louisa Foley, the widow of the testator, died on 30th Oct. 1874 without having married again, and on 1st Dec. 1874 letters of administration to her estate were granted to the defendant, Emily M. L. Davies, one of the testator's married daughters.

On the 17th Dec. 1874 the plaintiff filed his bill against Mrs. Davies and her husband and Thomas Griffiths and others (the trustees of Mrs. Davies' marriage settlement), praying for the administration of the testator's personal estate.

On the 23rd Jan. 1875 a decree was made directing the usual accounts and inquiries, and directing an account of the payments made in respect of the annuity of 150*l.* bequeathed to the said testator's widow, and what is the amount of the unpaid arrears of such annuity accumulated since the death of the testator.

It appeared from the chief clerk's certificate, dated the 23rd Dec. 1875, that the payments made in respect of the said annuity amounted to 910*l.* 6*s.* 5*d.*, and that the unpaid arrears of the said annuity accumulated since the death of the testator amounted to 2320*l.* 10*s.* 5*d.*

The following facts also appeared from the chief clerk's certificate:

In Nov. 1853, when the will and codicil were proved, Mrs. Foley, the testator's widow, was of weak mind. At that time the estate available for payment of the annuity, did not exceed 300*l.* As this sum was insufficient to pay the annuity, the plaintiff accumulated the income thereof.

In 1864 the share of the testator, expectant on the decease of his mother, under the trusts of her marriage settlement (amounting to about 4800*l.* Consols) fell into possession. From that time the plaintiff applied about 80*l.* a year for the maintenance of the widow, and accumulated the residue of the income.

It appeared from the evidence that the interest at 4*l.* per cent. on the arrears of the annuity, from the death of the testator to the death of his widow, would amount to 1192*l.* 2*s.* 9*d.*

A question was now raised, on further consideration, whether Mrs. Davies, as the widow's legal personal representative, was entitled to be paid

interest on the arrears of the annuity, as well as the arrears themselves.

Colt, for the plaintiff.

Holland, for Thomas Griffiths and others.—An annuitant, or her representative, is not entitled to be paid interest on the arrears of her annuity.

Booth v. Coulton, 2 Giff. 514;

Blogg v. Johnson, 16 L. T. Rep. N. S. 306; and L. Rep. 2 Ch. 225, 228.

Coxens-Hardy for Mrs. Davies, the legal personal representative of the annuitant.—The annuitant is entitled to be paid interest on the arrears of her annuity, where, as here, the annuity is charged on the corpus of the property: (*Playfair v. Cooper*, 17 Beav. 187). *Booth v. Coulton* has no application to the present case, because there the annuity was not charged on the corpus, but only on the "annual profits." In *Re Ashwell's Will* (Johns. 112), the court refused, but only on the ground of laches, to give interest on the arrears of an annuity charged on corpus.

Holland in reply.—It has been distinctly settled that interest is not payable on the arrears of an annuity: (*Booth v. Leicester*, 3 My. & Cr. 459, followed in *Lainson v. Lainson*, 18 Beav. 7). [The VICE-CHANCELLOR.—It would be very strange if the arrears of an annuity given by a will should carry interest, while the arrears of an annuity secured by a bond do not carry interest.] *Torre v. Browne* (5 H. L. 555) is conclusive on the subject.

The VICE-CHANCELLOR said.—I am at a loss to see why an annuity given by a will should carry interest; I have always understood the rule to be, that the arrears of an annuity do not carry interest. I think that the case of *Torre v. Browne* is conclusive on the subject. In this case the annuity was given as a provision for the wife; she became of unsound mind, and so the annuity fell into arrear. I think that the case of *Playfair v. Cooper* is quite contrary to the subsequent decision in *Torre v. Browne*. I remember arguing *Booth v. Coulton*. That case, and the earlier case of *Booth v. Leicester* settle this, that the arrears of an annuity do not carry interest. It was admitted in argument that the arrears of an annuity, charged on income, do not carry interest. It would be very odd if the arrears of an annuity, when charged on corpus, should carry interest, but not when charged on income. I am of opinion that the arrears of the annuity do not carry interest. There will, therefore, be a declaration that interest is not payable on the arrears of the widow's annuity.

Solicitors: *Abbott; Wheatley*.

Saturday, May 6.

FIRVET v. MANBY. (a)

Action of debt—Common Law Procedure Act 1852, sect. 11—Statute of Limitations—Administration summons.

Where an action of debt has been commenced in a common law court within six years from the debt accruing, and the writ has been duly renewed, pursuant to sect. 11 of the Common Law Procedure Act 1852, the renewal of the writ keeps alive the debt, but only for the purposes of the particular

(a) Reported by JAMES E. HOGG, Esq., Barrister-at-Law

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action, and not for the purpose of taking proceedings in another court.

In March 1869, A. died, indebted to the plaintiff.

In Jan. 1875 (within six years from the death of A.) the plaintiff commenced an action for debt against the defendant, the administrator of A., by issuing a writ out of the Court of Common Pleas. This writ was never served upon the defendant nor renewed.

In July 1875, while the writ remained in force (but more than six years from the death of A.), the plaintiff took out a summons against the defendant to administer the estate of A. :

Held, that as at the date of the summons the debt was kept alive, by virtue of the writ, only for the purposes of the action in the Court of Common Pleas, and not for the purpose of taking proceedings in another court, the Statute of Limitations was a complete bar to the plaintiff's claim.

ADJOURNED summonses.

On the 19th March 1869, one John Richard Manby, died intestate.

At the time of his death he was indebted to the plaintiff in the sum of 1181l.

On the 18th April 1869, letters of administration of the personal estate of the intestate were granted to the defendant, Charles Manby.

On the 7th Jan. 1875 (being less than six years from the death of the intestate), the plaintiff commenced an action of debt against the defendant, by issuing a writ of summons out of the Court of Common Pleas, against him in respect of the above debt.

This writ was never served upon the defendant, nor renewed.

The writ expired at twelve o'clock at night on the 6th July 1875.

On the 6th July 1875 (being more than six years from the death of the intestate), the plaintiff took out a summons to administer his personal estate.

The main question in argument was whether the plaintiff's debt was barred by the Statute of Limitations: in other words, whether the issuing of the writ out of the Court of Common Pleas only kept alive the debt for the purposes of that action, or whether it kept it alive for all other purposes.

A. H. Simpson, for the plaintiff.—The plaintiff might clearly have renewed the writ on the 6th July 1875, instead of taking out an administration summons, as the original writ had not then expired: (Common Law Procedure Act 1852, sect. 11.) Where an action has been commenced in due time in an inferior court, and is afterwards removed to a superior court, and plaintiff declares *de novo* in the superior court, the action in the court below is a sufficient answer to plea of the Statute of Limitations.

Matthews v. Phillips, 2 Salk. 424;

Story v. Atkins, 2 Str. 719;

Chitty on Contracts, 10th edit. p. 770.

The Statute of Limitations does not bar the debt itself, it only bars the remedy for recovering the debt. Any creditor, who has a debt recoverable at law, has a right to take out a summons in Chancery for the administration of his debtor's estate; and here the debt was kept alive by the operation of the writ, on the day when the plaintiff took out his summons. A court of equity is not bound by the Statute of Limitations to the same extent as a court of law, but will look at all the circumstances of the case to see whether "the

statute shall be allowed to operate:" (*Berrington v. Evans*, 1 Y. & C. Ex. 439.) He also referred to the Judicature Act 1875, Ord. VIII. r. 1.

Glasse, Q.C. and *Warmington* for the defendant.

—The plaintiff took out his summons more than six years after the death of the intestate. The Statute of Limitations is, therefore, a complete answer to his claim. Where a writ is renewed under sect. 11 of the Common Law Procedure Act 1852, it only keeps the debt alive for the purposes of the particular action: it cannot keep the debt alive for the purpose of commencing proceedings in a court of equity. They referred to the Common Law Procedure Act 1852, schedule B., No. 39.

Simpson, in reply.

The VICE-CHANCELLOR.—This summons raises a curious question, and a novel one. The intestate having died on the 19th March 1869, an action was commenced in the Court of Common Pleas on the 7th Jan. 1875, within six years from the death of the intestate. The writ, having been issued on the 7th Jan. 1875, remained in force, by virtue of sect. 11 of the Common Law Procedure Act 1852, for six months. It would, therefore, expire at twelve o'clock at night on the 6th July 1875. On that day the plaintiff took out an administration summons; and the question is whether, when that summons was taken out, there was an existing debt, the recovery of which could be enforced by proceedings in equity. The action having been commenced in the Court of Common Pleas, the plaintiff might have gone on with that action, and recovered his debt in that court. It has been argued that a suit could be maintained in equity for a debt barred by the Statute of Limitations; but a court of equity is as much bound by the Statute of Limitations as a court of common law. Every court has a disinclination to give effect to the defence of the Statute of Limitations; but here there was no excuse for changing the forum, for if the plaintiff's debt was a good one, the proper course was to have gone on with the action. The plaintiff has referred to the case of *Story v. Atkins*, but that case is no authority in his favour, because there there was a continuation of the same action, the proceedings having been removed from an inferior to a superior court. I have not been referred to any precedent of the debt being kept alive, by the issue or renewal of the writ, for the purpose of proceedings in another court. It is a pure fiction of law, and most unreasonable, that the mere issuing of a writ for a debt, within six years, should keep alive the debt, though the debtor did not know of the issue of the writ. The Common Law Procedure Act 1852, sect. 11, provided that the writ should remain in force for six months only; but if defendant had not been served therewith, the writ might be renewed at any time before its expiration, for six months from the date of such renewal, and so, from time to time, during the currency of the renewal writ, "and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons." That does not mean that the writ keeps the debt alive for all purposes.

If in this case the plaintiff had abandoned his proceedings in the Court of Common Pleas and had gone on in the Court of Queen's Bench or the Court of Exchequer, he would have been met by a plea that the alleged cause of action did not arise within six years. In this case the administrator says that the cause of action accrued more than six years before the suit was instituted. The answer is, "I commenced an action, in another court, within the six years." His Lordship was of opinion that the renewal of the writ could only keep alive the debt for the purpose of that action: that though, in one sense, the debt was kept alive, it was only kept alive for the purposes of that particular action. In all other courts it was a conclusive answer to say that the debt had been incurred more than six years ago. The Statute of Limitations is, therefore, a complete bar to the claim, and the summons must be dismissed with costs.

Solicitors: *Wilkinson and Howlett; J. Beattie.*

March 27, 28, 29; April 3, 4, 5, 10, 11, and June 2.
(Before Vice-Chancellor MALINS.)

NEW SOMBRERO PHOSPHATE COMPANY v.
ERLANGER. (a)

Syndicate—Purchase of property—Resale to company at increased price—Disclosure of amount paid by vendors—Promoters—Fiduciary relation—Misrepresentation in prospectus—Erroneous calculation as to value of property to be purchased by company—Quorum of directors.

A company being in process of winding-up under the court, its property, which consisted of the lease of an island containing phosphate of lime, was, on the 30th Aug. 1871, bought in chambers by E., the trustee for a syndicate, for 55,000*l.* The contract was confirmed by the judge on the 15th Sept.

On the 20th Sept., the syndicate agreed to sell the same property to P., the trustee for the plaintiff company, for 110,000*l.* The company was registered the same day, and the contract was adopted by the company at the first meeting of the directors on the 29th Sept. The company entered into possession on the 21st Oct. 1871.

There were five directors, all of whom were appointed by or through the principal member of the syndicate. Two of the directors were not in England when the company was formed, and took no part in the purchase or adoption by the company of the contract. A third was E., the trustee for the syndicate; a fourth, M., received his qualification shares from the principal member of the syndicate; the fifth, D., only was competent to act independently in confirming the contract.

The articles provided that three directors should be a quorum, and the three directors who confirmed the contract on the 29th Sept. were E., M., and D.

The principal member of the syndicate had, as early as the 12th Sept., begun negotiations with two of the directors with a view to forming a company.

Held, that the syndicate had purchased the property from the 30th Aug., and were then at liberty to sell at what price they pleased. That the company could not hold the syndicate to be trustees

for them of the increase of the purchase money on the resale to the company. That the syndicate were not promoters of or in a fiduciary relation towards the company. That the confirmation of the contract on the 29th Sept. by the quorum of three was valid, and that the company could not set aside the purchase on the ground that E., being trustee for the syndicate, and also a director of the company, was both vendor and purchaser.

The prospectus, founded on the report of the liquidator of the old company, contained misstatements as to the workings on the island, which made the workings appear more valuable than they were, and it appeared from the prospectus as if the survey had been made for the purposes of the company, whereas it had been made several years before, and the island had been since worked. It appeared, however, that there was still more phosphate on the island than could be worked out during the lease.

Held, that there was no case for setting aside the contract on the ground of misrepresentation in the prospectus.

THIS suit was instituted by the New Sombrero Phosphate Company (Limited) against Baron Emile Erlanger, Julius Beer, Louis Ferdinand Floersheim, Colonel Napier Sturt, Maurice Joseph Posno, William Morris, Frederick Vilmet, Alexander McEwen, Lawrence Thomson McEwen, William Abbott, Henry Raphael, Lionel Lawson, Sir James Anderson, John Marsh Evans, Maria Helen Wanklyn, widow, Jane Westall, widow, Sir Thomas Dakin, and Ronald John Macdonald. The first thirteen defendants, together with T. B. Wanklyn, deceased, whose estate was represented by Maria Helen Wanklyn, formed the syndicate hereafter mentioned; Jane Westall represented the estate of James Westall, deceased, who had been solicitor to the syndicate and to the plaintiff company. Sir Thomas Dakin, Macdonald, and Evans were three of the original directors of the company. The bill prayed a declaration that under the circumstances appearing in the bill a contract of the 20th Sept. 1871 for the purchase by the company for the sum of 110,000*l.* from the trustee of a syndicate (who had previously purchased the same from the official liquidator of a former company) of the residue of a lease of twenty-one years from the 16th March 1865 of the Island of Sombrero, in the West Indies, together with certain fixtures, machinery, and plants, &c., was not binding on the company, and that the same might be rescinded, and that such of the defendants as were members of the syndicate, together with Mrs. Wanklyn and Mrs. Westall, out of the estates of their husbands, might be declared jointly and severally liable to pay to the company the sum of 110,000*l.* and interest at 5*l.* per cent., the company offering to deliver up possession of the island, and to account for the profits. Or, in case the court should not think fit to set aside the contract altogether, that such of the defendants as were members of the syndicate, together with Mrs. Wanklyn, out of the estate of her deceased husband might be declared jointly and severally liable to make good to the company the sum of 55,000*l.* being the difference between the price paid by the company and the price at which the syndicate had purchased from the liquidator, with interest thereon at 5*l.* per cent.

By an indenture dated the 16th March 1865, the island of Sombrero, in the West Indies, (a

(a) Reported by F. GOULD, Esq., Barrister-at-Law.
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which were contained large deposits of phosphate of lime was demised by Her Majesty the Queen to Francis Kuper Dumas for the term of twenty-one years at the yearly rent of 1000*l*.

In or about the month of Nov. 1865, this lease, with the factory, buildings, and other works on the island was assigned to a company called the Phosphate of Lime Company, and by them subsequently assigned to the old Sombrero Phosphate Company.

The old Sombrero Phosphate Company proved unsuccessful, and by an order of the court, dated the 3rd June 1870, it was wound-up. Mr. Henry Chatteris was, on the 4th July 1870, appointed the official liquidator, and he for some time continued the works at the island, certain shareholders and creditors having been appointed to act as a committee with him. He stated in an affidavit filed on behalf of the defendant Erlanger that if he could have carried on the concern he could, he believed, have made sufficient profit to pay off all the liabilities of the company; but, the creditors requiring immediate payment of their claims, it became necessary to realise the company's property.

On the 7th July 1871, Chatteris made an affidavit for the purpose of enabling the judge in chambers to determine the amount of the reserve price to be put upon the property. The scheme of a sale of the property by public tender, however, failed, the only offer made within the time appointed being 21,000*l*., and it was, therefore, notified that the property would be sold by private contract.

The defendant, Baron Emile Erlanger, was one of a firm who carried on business as bankers in Paris, under the style of Emile Erlanger and Co., and he also carried on the same business in London by himself under the same style. It appeared from the answer of Erlanger that about the middle of the month of July 1871, he received an intimation that a project had been set on foot to purchase the island of Sombrero and the phosphate mines therein. This intimation, Erlanger believed, came from Thomas M. Mackay, who called upon Erlanger and stated that he was a friend of the defendant Sir James Anderson, with whom Erlanger was on intimate terms.

On the 4th Aug. 1871, Mackay, together with Westall, who was afterward solicitor to the company, called upon Erlanger bringing with them the following letter from Sir James Anderson:

My dear Baron,—You really should see Mr. Mackay and his solicitor, Mr. Westall, about a company in liquidation, which the solicitor says is sure money, and as I know Mr. Westall I attach great value to his opinion. I think ten minutes would comprehend the whole thing. Yours very truly,
JAMES ANDERSON.

Erlanger thereupon promised to consider the proposal, stating that he should confer with his friend, the defendant Julius Beer, who was a merchant in the City of London, and on the following morning Erlanger received another letter from Sir James Anderson intended for himself and Beer, as follows:

My dear Baron or Beer,—Westall, the solicitor, has been here just to give me details about phosphate, and I really think it is a good thing. He is not a schemer, and his facts are hard legal arithmetic. When do you go hence? I will call before you go if I can see you. Yours very truly,
JAMES ANDERSON.

An interview subsequently took place between Erlanger, Sir James Anderson, Mackay, and

Westall, when papers were produced relating to the property, including a return made by Chatteris, as to the working of the phosphate quarries. Erlanger afterwards showed the papers to Beer, who thought the proposed purchase an advantageous one. Shortly afterwards another interview took place between Westall, Mackay, and Erlanger when Westall informed Erlanger that he thought that he (Westall) would be able to purchase the property for 35,000*l*. or 40,000*l*., and that he represented a party of his friends who wished to be interested to the extent of one half of risk and profits. Erlanger objected to their taking so large a share, and the exact extent of their share was not then determined; at this interview Westall claimed that if the proposed purchase should be brought about by him, he should receive from the purchasers a special fee of 500*l*. for his professional services.

Shortly after this interview Erlanger consulted with Sir James Anderson and the defendants Beer, Floorsheim, Lawson, and Morris, and it was agreed between them and also Westall, as the representative of his party, that they should form a syndicate to purchase the property on joint account if it could be obtained for 35,000*l*. or thereabouts, and Westall was authorised to see Chatteris, and make him an offer to that effect. This offer was not accepted by Chatteris, and ultimately a syndicate was formed, and a sum of 55,000*l*. was offered by Westall on behalf of the syndicate, and with the approval of Erlanger (who was at the time in Scotland) as the price of the property, with an additional 5000*l*. for certain stores, making in the whole 60,000*l*.

The proportions in which the purchase was to be shared was as follows:

Julius Beer.....	27,500
Louis Ferdinand Floorsheim.....	3500
Colonel Napier Sturt	360
Maurice Joseph Posno.....	900
William Morris and Frederick Vilmet	1800
Alexander M'Ewen	5500
Raphael and Sons.....	2000
Lionel Lawson	3500
Thomas Westall (for Sir James Anderson and his friends).....	16,600
Emile Erlanger and Co.	18,340
	260,000

The offer was accepted by Chatteris subject to the approval of the judge, and a provisional contract, dated the 30th Aug. 1871, was entered into between Chatteris, as vendor, and Evans, the agent of the syndicate, as the purchaser of the property for 55,000*l*., the purchaser, at the time of signing the contract to pay a deposit of 5500*l*., and the remainder of the purchase money and the purchase money for the stores to be paid within two months from the date of the approval of the contract by the judge.

The provisional contract was signed the same day, and the deposit was paid by a cheque of Erlanger and Co.

The provisional contract was approved by the judge on the 15th Sept. 1871, on an affidavit by Chatteris, stating that in his judgment it was the best offer which could be obtained. On the 16th Sept., Erlanger sent to the members of the syndicate requesting them to pay their respective shares of the purchase money.

The plaintiff company was registered on the 20th Sept. 1871, with the sanction of Chatteris, and on the following day the sum of 49,500*l*., being

the balance of the purchase money of 55,000*l.*, was paid to him by a cheque of Erlanger and Co., who also gave a guarantee for the payment of the valuation of the stores on the island.

The memorandum of association of the company provided as follows :

1. The name of the company is the New Sombrero Phosphate Company (Limited).

2. The registered office of the company is to be situate in England.

3. The objects for which the company is established are :

The purchasing or leasing and working of mines or quarries of phosphate of lime and other minerals or products of a like or similar nature in the island of Sombrero, in the West Indies. The rendering marketable, manufacturing, transportation, and sale of phosphate of lime and other minerals or products of whatever kind obtained by such working. The acquiring, making, providing, maintaining, and using of buildings, roads, railways, tramways, canal, stock, plant, and other works and conveniences for the purposes aforesaid, and otherwise in connection with the property operations or business of the company.

It also stated that the capital of the company was 130,000*l.* divided into 13,000 shares of 10*l.* each.

The articles of association contained the following provisions :

5. The business of the company shall include the business specified in the memorandum of association, and all incidental matters and such business shall be managed by the directors, who may exercise all such powers of the company as are not by the statutes or these articles declared to be exercisable by the company in general meeting, subject nevertheless to the regulations of these articles, and to such rules and regulations not being inconsistent with these articles as may be prescribed by the company in general meeting.

9. No person, except the directors and persons thereto expressly authorised by them, shall have any authority to enter into any contract so as to impose thereby any liability on the company.

19. The company may forthwith issue the 130,000 shares of 10*l.* each into which its nominal capital of 130,000*l.* is divided, and may from time to time, with sanction of a special resolution, increase the capital beyond the sum of 130,000*l.*, by the creation of new shares, provided that such new shares shall, in the first instance unless the company, on the creation thereof, shall otherwise determine, be offered to all the members of the company for the time being in proportion to the numbers of their respective shares, and such of them as are not taken by themselves may be disposed of to such other persons as the board shall determine. The company shall not, under any circumstances, purchase its own shares.

20. To each original share shall be attached a bonus warrant of 10*l.* Each year 9000*l.* of the net profits will be set aside, and the bonus warrants will be redeemed to that amount. The bonus warrants for redemption will be drawn by ballot in such manner as the directors may determine.

65. The number of directors shall from time to time be determined by the company in general meeting. Until any other number is so determined there shall not be less than four directors nor more than seven. The first directors shall be His Excellency Monsieur Drouyn de L'Huys, E. B. Eastwick, Esq., the Right Hon. Thomas Dakin, John Marsh Evans, Esq., and Rear-Admiral R. John Macdonald.

74. Every director shall vacate his office upon ceasing to hold in his own right the prescribed number of shares, or becoming bankrupt, or suspending payment, or making any statutory arrangement, or compounding with his creditors, or being found lunatic, or holding any office or place of profit in the company, or being concerned or participating in the profits of any contract with the company, but no director shall vacate his office by reason of his being employed by the company, or the board in any professional capacity, or as a manager of the business, or any part thereof, or of his being a director, or member or shareholder, or otherwise interested in any company or partnership which has entered into contracts with, or

done any work for the company, nevertheless, he shall not vote in respect of such contract or work, and if he does so vote his vote shall not be counted.

82. In their management of the business of the company the directors may, without any further power or authority from the members, do the following things, viz. (amongst other things) : They may adopt and carry into effect the contract for the assignment to the company, bearing even date herewith of the island of Sombrero, in the West Indies, and the factory buildings and works thereon for the residue of a term of twenty-one years from the 16th March 1865, subject to the provisions contained in the lease thereof.

It was also provided that the quorum of the directors for the management of the business of the company should be three.

The contract referred to by article 82 was so far as material as follows :

Articles of agreement made this 20th Sept. 1871, between John Marsh Evans, of Leamington, in the county of Warwick, Esq., of the one part, and Francis Pavy, of Wroughton, in the county of Wilts, Esq., of the other part.

Then followed a recital of the agreement of the 30th Aug. 1871, between Chatteris and Evans above-mentioned, but without stating the price agreed to be paid by the syndicate and proceeded :

Now these presents witness that the said John Marsh Evans agrees to sell, and the said Francis Pavy agrees to purchase, all the leasehold interest in the said island of Sombrero, and in the fixtures, machinery, and plant, &c.

The time for completion of the said purchase shall be on the 15th Nov. 1871, and the consideration for this contract shall be the sum of 110,000*l.*, to be paid, as follows : 80,000*l.* part thereof in cash on completion, and 30,000*l.* the remainder thereof, in fully paid up shares of a company now in process of formation, to be called the New Sombrero Phosphate Company (Limited) to be paid at the same time, or as soon after as the said shares shall be allotted.

This contract is entered into subject to the above-named New Sombrero Phosphate Company (Limited) now in process of formation, being duly formed and registered before the day fixed for completion and to the said recited contract being duly performed.

The contract also provided that the purchaser should take to certain stock then on the island, and should perform all contracts made by the official liquidator or the vendor, and should be entitled to possession on completion of the purchase.

The material part of the prospectus was as follows :

The New Sombrero Phosphate Company (Limited), Capital 130,000*l.* in 13,000 shares of 10*l.* each, with power to increase, of which 10,000 are offered for subscription, 1*l.* per share payable on application and 2*l.* on allotment the remaining 7*l.* on the 1st Nov.

DIRECTORS.

His Excellency Drouyn de L'Huys, President of the Société des Agriculteurs de France ;
The Right Hon. Sir Thomas Dakin, Lord Mayor of London ;
E. B. Eastwick, Esq., C.B., M.P. ;
John Marsh Evans, Esq., Leamington ;
Rear-Admiral R. John Macdonald, 1, Ovington-square, London.

PROSPECTUS.

This company is formed for the purpose of purchasing the island of Sombrero, in the West Indies, and working its well known and important deposit of phosphate of lime. The island is held on lease granted by Her Majesty. The property formerly belonged to the Sombrero company, which is now being wound-up under the Court of Chancery. The sole cause of this liquidation was the insufficiency of capital, and the consequent forcing of the produce at unremunerative prices. This is proved by the following statement, which has been certified as correct by the official liquidator, Mr. H. Chatteris, under whose able management the island has been worked, and which shows the profit made in the ten months during which the cargoes received have been realised. The sub-

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sequent shipments will produce a still higher rate of profit, but as the account sales have not been closed they are taken from the statement. The particulars of shipments annexed show that there were raised and shipped by the liquidator in ten months July 1870—May 1871, thirty-six cargoes of phosphate producing 16,127 tons 3 cwt. 1 gr. 5 lb. at prices varying from 85s. to 95s. delivered in England, and from 40s. to 42s. 6d. free on board, and which produced net proceeds 38,960l. 3s.

The cost of realising this was 11,300l.	£	s.	d.
in cash and in stores 4579l. 2s. 8d.—			
in all	15,879	2	8
Leaving in hand a net profit at 28s. 7½d. per ton for ten months	23,081	0	10
Or per annum	27,697	5	0
The present price and which has been obtained by the liquidator is, however, 5l. per ton which would have produced in addition on the above returns	14,502	14	3
Equal to an annual clear profit (subject to 1000l. per annum for rent) of	42,199	19	3

In the above result the basis of the present ratio of production under liquidation in Chancery is taken, but with a sufficient capital and the prudent management of experienced commercial men, this produce may be easily increased by 5000 tons per annum, which would yield an annual profit of 50,000l. after payment of rent and expenses management. The results and figures of the ten months' of liquidation have been carefully checked, and may be absolutely relied upon. A report made after careful survey estimates the deposit at 700,000 tons at the least and for ten years there has been a steady and continuous supply proportionate to the labour and capital employed.

The company entered into possession on the 21st Oct. 1871. The first meeting of the directors of the company was held on the 29th Sept. 1871, at which were present Sir Thomas Dakin, Admiral Macdonald, Evans, and Westall, when, according to the minute book, Westall produced the certificate of incorporation of the company, also the contract of the 30th Aug. 1871 between Chatteris and Evans, and the articles of agreement dated the 20th Sept. 1871 between Evans and Pavy, the trustee of the company. At this meeting a resolution was passed confirming the contract of the 20th Sept. 1871, though it did not appear that it was discussed, and, in fact, Sir Thomas Dakin and Admiral Macdonald both alleged by their answers that according to their belief it was not produced. A resolution was also passed at this meeting that Pavy should be authorised to proceed to Sombrero to report on the company's property, and to take a complete and correct inventory of the stores, &c. of the company, and further that the prospectus be approved and issued to the public.

The prospectus was accordingly issued and the applications for shares were so numerous that on the 6th Oct. 1871, 10,325 shares were allotted to the public, and the directors, thus leaving only 2675 which could be issued towards the 3000 to be allotted to Evans for the syndicate under the contract of the 20th Sept. 1871.

At a meeting of the directors on the 2nd Nov. 1871, at which the defendants Sir Thomas Dakin, Admiral Macdonald, Evans, and Westall were present, the following resolution was passed:

The transfer of the island and property from Mr. Evans to the company, having been completed. Resolved that a cheque for 80,000l. be drawn forthwith. . . .

The assignment of the island had not, in fact, been executed to the company, but the cheque was drawn and endorsed to Erlanger and Co., who cashed it and divided the proceeds among the syndicate.

At the first general meeting of the company on the 2nd Feb. 1872, presided over by Sir Thomas

Dakin, it was stated by the chairman that the operations of the company for the first three months down to the 31st Dec. 1871, showed a profit of about 6000l. The proceedings of that meeting were in evidence, and it appeared that after the observations of the chairman, Mr. Stephenson, a shareholder spoke as follows:

I am sure I am very much pleased with the statement you have submitted to the shareholders, but there are a good many rumours that are antagonistic to the company out of doors. I came to the meeting with a feeling of dissatisfaction, which your statement has allayed. I mention these rumours that you should have an opportunity of contradicting them. It is stated this company was not bought direct from the liquidator, but from a third party, an intermediate party between this company and the liquidator; bought one day at a little over 50,000l. and within a few days afterwards sold to this company at 110,000l. Now, if the directors entering into this matter were satisfied the thing was a good bargain at 110,000l., I do not know that we have much to do with the matter except this; it is stated that one of our present directors was the buyer and the seller in this matter, and I think that is very material to us. I mention that in order that I may ascertain whether one of our directors on this board was really the man who bought the company one day at 50,000l. and within a short time afterwards was both buyer and seller at 110,000l. I think, if that was the case we ought not to sanction the continuance of the director on the board. I do not know the name.

The chairman.—You allude to the gentleman named in the prospectus, Mr. John Marsh Evans.

The shareholder.—I think it was an improper transaction that one of the directors should be both the buyer and the seller of the property. That requires a little explanation on the part of the board.

The chairman then made some remarks, in the course of which he stated that he had heard some rumours as the shareholder had, that he had made some inquiries, and he was told Mr. Evans bought this with other gentlemen, fully a month before the company was thought of or projected, and he further stated as follows:

It appears to me the contracts between Mr. John Marsh Evans and Mr. Pavy on behalf of the company were stated in full in the prospectus, and all those persons who joined the company were invited to look at them. Whether it cost 50,000l. or 100,000l. I do not think is material to the question. It was not bought by one of our members. The gentleman was not a director then, but bought in concert with other people. What it was bought for I do not know.

The shareholder.—Out or doors they say 55,000l. was the sum paid for it.

Some more discussion took place, and the business was concluded with a vote of thanks to the chairman.

The annual meeting of the company was held on the 19th June 1872, by which time it had become manifest that the concern was not so successful as had been expected, and neither dividend nor bonus was announced. A committee of five shareholders was appointed to examine into and report to the shareholders the circumstances under which the property of the company was purchased, and for other purposes. This committee presented a report, the result of which was that the board was reconstituted, and the new directors were authorised to take proceedings which resulted in the present suit, but, previously thereto, letters were sent to the members of the Syndicate inviting them to some negotiation, so as to bring about, if possible, a settlement in an amicable manner.

Baron Erlanger, on his firm's behalf, wrote in answer, that, though repudiating all legal liability, which they should be prepared to resist to the

utmost, yet his firm was quite willing under the disappointing circumstances which had occurred to give the company the benefit of the full amount of profit which his firm personally derived in cash and in shares from the transaction. His offer, however, was not accepted. No arrangement was made with the other members of the syndicate.

At a subsequent meeting on the 30th Aug. following, it appeared that the working had, up to the 30th June 1872 resulted in a loss of 4090*l.* 19*s.* 3*d.*, and the Company continued to lose money while being carried on after the institution of the suit, the total loss up to the 31st Dec. 1874 being 7620*l.* 15*s.*

The original bill was filed on the 24th of Dec. 1872, against Erlanger, Evans, Westall, Sir Thomas Dakin, and Admiral Macdonald. Erlanger by his answer submitted that the other members of the syndicate should be made parties, who were accordingly added by amendment.

The plaintiffs rested their title to relief mainly on three grounds; first, that the company and syndicate were so closely connected as to put the syndicate in a fiduciary position towards the company, which rendered it inequitable for them to retain the benefit of the difference between the prices at which the syndicate bought and resold the property; secondly, that there had never been a valid *bonâ fide* purchase by the directors of the company; thirdly, that the prospectus contained material misstatements and misrepresentations, and other statements calculated to mislead.

1. As to the first ground of relief. It was alleged by the bill that in the month of Aug. 1871, Erlanger, Sir James Anderson, and Westall, formed the design of promoting a company for acquiring the property and working it, and that with this view Erlanger determined to form a syndicate; Westall stipulating that his firm of Westall and Roberts should be solicitors to the company, and that Westall should receive a commission of 500*l.* for introducing the business to the syndicate. The bill then gave the names of the syndicate, and proceeded to allege that the object of the syndicate was to provide the purchase money payable to the liquidator of the old company in the first instance, and then to divide between the members of the said syndicate in proportions agreed on between themselves the profit that should be made on a pretended and apparent resale of the same property at an enhanced price in cash and shares to the company to be formed. That Erlanger should, as it was called, manage the syndicate, i.e., superintend all the arrangements for the promotion and formation of the intended company, and the division of the cash and shares to be received from the company (after providing for the repayment of the original purchase-money and the expenses of the syndicate), amongst himself and the other members of the syndicate; and that it was part of the arrangements that Erlanger should expend such sums as he should consider expedient in the purchase on the market of the shares of the company when formed, so as to raise the price thereof to a fictitious premium, and thereby increase the value of the shares to be divided between the members of the syndicate as part of their profit.

It appeared that the contract of the 30th of Aug. was not in fact executed by Evans until the 11th Sept., and the plaintiffs relied upon the fact which they alleged that previously to this

date the formation of the company had been agreed upon.

It was admitted that Erlanger had been the principal agent on behalf of the syndicate.

Erlanger by his answer stated as follows:

Par. 32. "Up to and at the time when the said contract" [i.e. the contract of the 30th of Aug.] "was entered into, no design had been formed by me, or, as I believe, by any other member of the syndicate, of selling the property to a public company, nor, in fact, was any such design formed, nor any steps taken to sell the property until some time afterwards. We were not, nor to the best of my information and belief were or was any or one of us at that time, or till some time afterwards, promoters or a promoter of the plaintiff or any company. Nor did we or any of us make our purchase for the purpose of selling the property to the plaintiff or any company. We made such purchase simply at our own risk, and with a view to our own profit. . . . The advisability of selling the property to a public company had been discussed, as also the propriety of retaining the property and working the same on our own joint account. We were all agreed in any case to retain an interest in the property, but for the purpose of limiting our responsibility, it was always understood, that as is usual in such cases, it would be necessary to convert the syndicate into a company with limited liability, but whether we should retain the whole benefit of the purchase, or offer to the public to share with us in it was not decided until some time after the purchase had been made. In any case it was considered that the property would yield a very large profit."

Par. 37. "I am unable to state at what precise time the syndicate determined to sell the aforesaid property to a public company, but to the best of my recollection and belief, they did not do so until a few days before the 20th Sept. 1871, the day on which the plaintiff company was registered."

Par. 45. As soon as it was determined by the syndicate to offer the property for sale to a public company, the said Thomas Westall prepared the memorandum and articles of association of such a company, and applied to the Registrar of Joint Stock Companies to register the same. This, however, he refused to do without the consent of the said Henry Chatteris. . . . In order to obtain the consent of the said Henry Chatteris to the registration of the plaintiff company, my said firm acting as bankers of the syndicate on the 21st Sept. 1871, signed and sent to the said Henry Chatteris a cheque for 40,500*l.*, the residue of the purchase-money of 55,000*l.*, and also a letter of guarantee for payment of the value of the said stores when ascertained."

He denied that he had taken any part in preparing the prospectus of the company.

Sir James Anderson by his answer stated

Par. 11. "Shortly before the 20th Sept. 1871, I was informed by the defendant, Emile Erlanger, as I believe, according to the fact, that the members of the syndicate had determined to sell the property to a public company, and I assented to that method of dealing with the property. I am informed and believe that the syndicate did not determine to sell the property to a public company till shortly before said 20th of Sept. 1871. If they did so it was without my privity or consent. I never interfered personally in the measures taken by the syndicate either for the purchase of the property or for realising a profit on the purchase. I left the whole matter, as far as I was concerned, in the hands of the defendant, Emile Erlanger, who, I felt confident, would do what he thought would be most beneficial for me and for all the members of the syndicate."

The defendant Evans, by his answer, alleged that he had no beneficial interest in the purchase or in the subsequent resale to the company, but that he had acted merely as trustee for the syndicate. He also alleged that he was not aware when it was finally settled to offer the island to the public and form a company. To the best of his recollection and belief the syndicate had not, on the 11th Sept. 1871, any settled design to that effect, although it was generally contemplated to

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convert the syndicate into a company with limited liability.

2. As to the allegation that the purchase by the directors was not a valid *bonâ fide* purchase. All five directors had been appointed by or through Erlanger. Drouyn de L'Huys and Eastwick were not in England when the company was formed. Drouyn de L'Huys never acted, and resigned soon after the formation of the company. Eastwick took his seat at the board for the first time on the 29th Dec. 1871, and resigned on the 8th April 1872. Admiral Macdonald's shares to qualify him as a director, or some of them, were sent to him by Erlanger. Evans received his qualification by the allotment to him of 100 of the shares reserved for the syndicate. Sir Thomas Dakin was the only director really competent to act independently. The plaintiffs also relied on the fact that the contract of the 30th Aug. was not produced or sufficiently considered at the meeting of the 29th Sept. 1871.

3. As to the alleged misrepresentations in the prospectus. It was alleged that the calculation of profits was erroneous, and calculated to mislead and to make the value of the island appear greater than it was. In particular, that the representation as to the amount of the phosphate raised by the liquidator during ten months was untrue, a portion of the cargoes shipped during that time having been then already raised and in stock.

It appeared from Erlanger's answer, par. 39, that inquiries having been made by the syndicate from Messrs. Pickford and Winkfield, the brokers of the old company, Westall had received the following letter:

Thos. Westall, Esq.

6th Sept. 1871.

Dear Sir,—With this I send the statement of cargoes of phosphate sold by Mr. Chatteris, together with a letter from that gentleman, showing a net profit of 28s. 7½d. per ton. I may mention this was the result of working from July 1870, to May 1871. The cargoes since that date not being completed, I should also draw your attention to the prices being much below present rates, the last cargoes having been sold at 5½d. per ton of 70 per cent. If the whole had been sold at this price, at which, probably, future sales can be made, there would have been 12,065½l. 14s. 1d. more to add to the 23,081½l. 10s.—Yours faithfully, Wm. PICKFORD.

Please return the documents when done with.

Inclosed with the said letter were the statement and letter therein referred to. Such letter was as follows:

London, 5th Sept. 1871.

Messrs. Pickford and Winkfield,

148½, Fenchurch-street.

Dear Sirs,—Since I have been liquidator I have sold and received the proceeds of thirty-five cargoes, representing tons 16,127 : 5 : 1 : 5, which have realised the sum of 38,960½l. 3s. 6d. To raise and ship these cargoes there have been sent to the island 11,300½l. in cash, and in stores 45,79½l. 2s. 8d., so that the cost has been 15,879½l. 2s. 8d., and the profit 23,081½l. 10s., or 28s. 7½d.—I am, dear Sirs, yours truly,

HY. CHATTERIS, Official Liquidator.

It appeared that in fact only something over 13,000 tons had been raised within the ten months mentioned in the prospectus, the rest that was shipped being at the time that which was already in stock on the island, and a wrong inference had been drawn from the liquidator's letter on which the prospectus was framed.

It was also relied upon as a misleading statement in the prospectus that the inference naturally to be drawn from it was, that the estimate as to the amount of phosphate to be obtained from the island had been made for the purposes of the

company, whereas the report had been made in 1865, since which time the phosphate had been worked. The result of the evidence, however, was to show that there was still more than could be worked during the lease.

Also the plaintiffs maintained that the statement that "the directors" had entered into the provisional contract for the purchase of the island amounted to a statement that all the directors were parties to the contract, whereas the only three who acted in that transaction were Sir Thos. Dakin, Evans, and Admiral Macdonald.

The cause now came on on replication filed.

Higgins, Q.C., Davey, Q.C. and Alexander Young, for the plaintiffs.—The case is obviously one of great suspicion against the defendants. The sum of 55,000½l. paid for the property in the first instance was considered a fair price, and the property could not therefore be worth the 110,000½l. paid for it immediately after. The whole transaction was effected by the defendant Erlanger, and if, as we contend, Erlanger was a promoter of the company, the members of the syndicate were in the position of trustees for the plaintiff company, and are not therefore entitled to retain the 55,000½l., the difference in price; and unless the most open dealing towards the company can be shown, they are entitled to set aside the purchase altogether. There was never any independent investigation by the company at all. The meeting of the 29th Sept. 1871, was not a real meeting of the company. The syndicate had the entire control over the company, and appointed the directors and prepared the memorandum and articles of association. As to the meeting of the 29th Sept., Sir Thos. Dakin was the only member of the board competent to act. Drouyn de L'Huys and Eastwick were away. Neither Admiral Macdonald nor Evans paid for his shares. Sir Thos. Dakin made no inquiry with respect to the contract adopted at the meeting, and we submit that the resolution was not binding on the company. The payment of 500½l. to Westall, the solicitor, out of the funds of the company cannot be supported. We submit that Erlanger was a promoter of the company, and that *Gover's case* (33 L. T. Rep. N. S. 619; 32 L. T. Rep. N. S. 301; L. Rep. 1 Ch. Div. 182; 20 Eq. 114) does not apply. It was not proved in that case that Mappin was a promoter. Moreover, a shareholder might not be entitled as against creditors to have his name removed from the list, and yet the company might have a right to rescind a contract obtained by misrepresentation. There was no valid contract for purchase of the island before the 15th Sept. 1871, when the provisional contract of the 30th Aug. was approved by the court, and before that time Erlanger was in communication with the persons who became directors of the company. Although Erlanger was not on the board of directors, he must be treated as if he had been, as the votes of Admiral Macdonald and Evans were in fact his, and in that case the contract with the liquidator ought to have been disclosed. They cited

Aberdeen Railway Company v. Blaikie, 1 Macq. 461; *Imperial Mercantile Credit Association v. Coleman*, 29 L. T. Rep. N. S. 1; L. Rep. 6 H. of L. Cas. 189; *Linkley on Partnership*, 4th edit. pp. 595, 597; 599; *Phosphate Sewage Company v. Hartmont*, 34 L. T. Rep. N. S. 154; 24 W. Rep. 530; *Lindsay Petroleum Company v. Hurd*, L. Rep. 5 P. C. 221; *Fawcett v. Whitehouse*, 1 Russ. & My. 132;

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Tyrell v. Bank of London, 6 L. T. Rep. N. S. 1; 10 H. of L. Cas. 26;
Charlton v. Hay, 31 L. T. Rep. N. S. 437; 23 W. Rep. 129;
Cornell v. Hay, 28 L. T. Rep. N. S. 475; L. Rep. 8 C. P. 328;
Beck v. Kantorowicz, 3 K. & J. 230;
Great Luxembourg Railway Company v. Magnay, 31 L. T. Rep. O. S. 293; 25 Beav. 586;
Hichens v. Congreve, 1 Russ. & My. 150;

Gover's case turned entirely on sect. 38 of the Companies Act 1867. But we say there never was a contract binding on the company. The articles required a *quorum* of three directors for the ordinary business of the company. Even assuming that this *quorum* was sufficient for such an important matter as the adoption of this contract, which we say it was not, yet there was not even such *quorum*. Evans was disqualified under article 74. Admiral Macdonald had no *bonâ fide* share qualification:

Kirk v. Bell, 16 Q. B. 290;
Howard's case, 14 L. T. Rep. N. S. 747; L. Rep. 1 Ch. 561.

We contend, also, that there were misrepresentations in the prospectus. The accounts show that the phosphate alleged to have been raised during the liquidation was in part an accumulation of previous workings; and the report as to the amount of phosphate on the island was made in 1865, and the island has been continuously worked since. This statement is misleading, as it would naturally be supposed that the report had been made for the purposes of the company more recently. Again, it would be assumed on reading the prospectus that all the five directors named had carefully considered the matter before entering into the contract, which was not the fact. It is for the defendants to settle their individual responsibility among themselves. Evans is made a defendant both as agent of the promoters and as a director. The case of *Overend, Gurney, and Co. v. Gibb* (L. Rep. 5 H. of L. 480), decides that a director is not liable for mere negligence; but there they were real directors acting within their authority.

Cotton, Q.C., Fry, Q.C. and Ingle Joyce, for Erlanger.—Erlanger accepts the full responsibility for all that has been done; he acted in good faith for the benefit of all parties. No connection has been shown between the purchase by the syndicate and the formation of the company. No one could have alleged on the 30th Aug. that Erlanger was in a fiduciary position as regarded the company. The syndicate were responsible for the purchase-money payable to the liquidator. The syndicate intended to buy with their own money, as is shown by Erlanger on the 16th Sept., calling upon the various members of the syndicate to pay their portion of the purchase-money. The purchase-money was paid in cash, and the contract was not conditional on the company being formed; they were perfectly at liberty afterwards to form a company, and the minutes of the meeting of the 29th Sept. must be taken as showing that the company knew of the contract of the 30th Aug. Then, as to the alleged misrepresentations in the prospectus. The prospectus itself showed that the vendor, Evans, was one of the directors, and gave everyone the opportunity of looking at the contract of the 20th Sept., which recited that of the 30th Aug., as to which inquiries might have been made. It is for the company to make out the misrepresentation; they have been in posses-

sion since Oct. 1871, and the transactions were not questioned until the 2nd Feb. 1872. The fact that the report as to the amount of phosphate was made in 1865 is immaterial, as there is, as a matter of fact, the actual quantity of phosphate on the island. It is said that it would be assumed from the prospectus that all the five directors had entered into the contract with Evans, but it was not necessary that they should: (*Thames Haven Dock Company v. Rose*, 4 Man. & Gr. 552.) The prospectus itself shows that Evans was disqualified. The company cannot object that there was any fraud, and the question is not raised on the pleadings, but in fact the articles fixed a *quorum* at three, and if Evans was disqualified, it was for voting only, and not from making one of the *quorum*. There was no valid objection to Macdonald. Westall's fee of 500*l.* cannot be objected to. The main question is, whether Evans was agent of the company at the time of the original contract. We contend he was agent only for the syndicate. The company was not then in existence. *Gover's* case applies in principle to this. The fact of the increased price at which the sale was made to the company was known in Feb. 1872, and the company ought to have commenced proceedings at once, if they considered they could establish their claim. There was no attempt at concealment; it was shown that the same person was vendor and one of the directors. If the sale to the promoters and the sale to the company are distinct, agency cannot be attributed, because one of the parties to the first transaction subsequently becomes a director of the company when formed. They cited also

Foss v. Harbottle, 2 Ha. 461.

Bristowe, Q.C. and Kekewich, for Julius Beer.

J. Pearson, Q.C. and Romer, for Floersheim, Posno, Morris, Raphael, and Lawson.

Bristowe, Q.C. and W. W. Karslake, for Mrs. Vilmet.—Mrs. Vilmet is not liable to be sued for the wrongdoing of her testator:

Peek v. Gurney, 10 H. of L. Cas. 32.

Bristowe, Q.C. and Kekewich, for Admiral Macdonald.—There was no previous arrangement for providing Admiral Macdonald's qualification, and the articles expressly provide for carrying into effect the contract for the assignment of the property.

Bush, for Sir Thomas Dakin.—No such charge of fraudulent neglect as is alleged against Sir Thomas Dakin is proved, and it appears that he still holds an interest in the company.

Benjamin, Q.C. and Everitt, for Col. Sturt and Sir James Anderson.—No attempt has been made to prove any fraud against these defendants, who were not originally parties. The members of the syndicate acted *bonâ fide*, and they still retain a large number of shares.

Glassey, Q.C. and Winile, for Evans, submitted that no fraud was proved against him.

Whitehorne, Macnaghten, F. A. Lewin, and Ford North, for other parties.

Higgins, Q.C., in reply.

Cur. adv. vult.

June 2.—The VICE-CHANCELLOR.—This case was very fully and most ably argued before me at the end of March and the first days of April. The object of the suit is to have it declared that a contract of the 20th Sept. 1871, for the purchase of the island of Sombrero for 110,000*l.* is not binding upon the company, and that the

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same may be rescinded and the purchase money repaid by the defendants, Baron Erlanger and the others, who are associated with him, or in the alternative that the defendants are bound to repay to the company the sum of 55,000*l.* and interest, being the difference between the price that was given for the property, and that at which it was sold to the company. It will be necessary to state rather fully the transactions which have given rise to this litigation. [His Lordship then proceeded to state the facts of the case, and after referring to the answer of Erlanger denying that at the time of the purchase of the property by the syndicate, there was any design of reselling to a company, continued.] I am of opinion that the claim of the company to have the purchase money reduced to 55,000*l.*, on the ground that Baron Erlanger, and those associated with him were their agents in making the purchase at that price, cannot be sustained. If they had been such agents, it would have been clear that they could not against their principals have stipulated for any advantage to themselves, and *Fawcett v. Whitehouse*, *Hichens v. Congreve*, *Tyrrell v. Bank of London*, and *Imperial Mercantile Credit Association v. Coleman*, which were so much relied upon by the plaintiffs' counsel, would have applied against the defendants. But that the purchase of the property, with the view to the formation of a company, does not make the purchaser a promoter of the company after it is formed, or oblige him to sell the subject of the purchase at the price he gave for it or upon any other terms than he thinks proper, has been recently decided in *Gover's* case, which was cited on both sides, and very much relied upon, more particularly, no doubt, as was natural on the part of the defendants. That case came first before Vice-Chancellor Bacon, who puts the case with remarkable clearness, and all that was done in the Court of Appeal was to confirm what he had decided. The fact there was that Miss Gover sought to have her name taken off the list of contributories, because she stated there had been no disclosure. The point turned on whether one Mappin, who had bought a patent for 65,000*l.*, and resold it to the company for 120,000*l.*, partly in money and partly in shares, was to be considered as the promoter of the company, and bound, therefore, to state in the prospectus and disclose the contract under which he had acquired the property. That was the point to be decided, and the only point to be decided. Now in that case, Mappin did not pay 65,000*l.* in cash for the purchase of the patent. It was a small amount of cash, and the rest to be paid in shares of a company to be formed; therefore there were strong indications that he was in the beginning promoting a company, and the circumstance that he was to be paid in shares was a strong indication that such was the real motive and object. However, Vice-Chancellor Bacon did not take that view of the case, nor did the Court of Appeal differ from his decision. In this case the price was paid in money, and it is therefore much stronger than *Gover's* case in favour of the vendors, because there the price was to be paid, or the greater part of it, in shares of the company to be formed. I am therefore of opinion, as well on principle as on the authority of that case, that Baron Erlanger and his associates were the absolute owners of the property, and were at liberty to retain it, or to form a company to buy it, and

had a right to demand and receive from the company, or from any other purchaser, whatever price they chose to demand for what they had to sell. In the exercise of this right they determined to form a company to work the island, and to charge the company 110,000*l.* for that which they had within a month bought for just half the price. The main and difficult question I have to decide is whether the company was formed and conducted in such a manner as to make the contract a binding one, as the defendants contend it is, or whether it ought to be rescinded, as the plaintiffs contend it ought to be. In pursuance of the plan for the formation of the company, the contract for the sale of the island to a trustee for the company was entered into. The contract is set out at page 14 of the bill, and begins, "Articles of agreement made this 20th Sept. 1871, between John Marsh Evans, of Leamington, in the county of Warwick, esquire, of the one part, and Francis Davy of the other part." It then recites the contract between Mr. Chatteris, the liquidator, and Mr. Evans, the present vendor, of the 30th Aug. It does not recite the price that he paid, but it recites that he bought the property, and it goes on to contract that Evans would sell and Davy would buy, on behalf of the company, the lease of the island and certain things specified for 110,000*l.* The contract is very much in the same form as the contract of the 30th Aug., and the 17th clause of it is in these words, "This contract is entered into subject to the above-named New Sombrero Phosphate Company (Limited), now in process of formation, being duly formed and registered before the day fixed for completion, and to the said recited contract being duly performed." That is the 20th Sept. Then there is the memorandum of association, which is dated the same day, and was probably signed and registered before the contract was signed. [His Lordship then referred to the terms of the memorandum of association and the prospectus, and continued.] Now, considering that John Marsh Evans is one of the directors named, and is referred to in the prospectus as one of the directors, anybody reading it must have inferred that he was the vendor, and therefore at the same time vendor and director, because he sells and Francis Davy buys. Anybody looking at the contract would have found that out, for it is as plain as possible. This prospectus proved very attractive. No doubt it held out the greatest expectations, and was likely at that time to procure subscriptions. Applications were forthwith made by the public for many more shares than the company had to dispose of. I think the present chairman of the company states that he applied for thirty or fifty shares, but that he got only five; and to show that he was so much satisfied with the prospect of the company, he afterwards bought more in the market, and made up the number to fifty. The whole of the shares were allotted on the 6th Oct. following, so that within a fortnight of the issuing of the prospectus the whole capital was actually taken up and allotted, and on the 2nd Nov. 80,000*l.*, the part of the purchase-money to be paid in cash, was paid with a cheque for that amount, drawn by Sir Thomas Dakin, the chairman of the company, and Admiral Macdonald, countersigned by the secretary, upon the bankers of the company, which was received by Erlanger and Co., the accredited agents of the syndicate,

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the vendors to the company. The company entered into possession of the property on the 21st Oct., and for a time it was considered to be going on most satisfactorily. At the first meeting, of the company, on the 2nd Feb. 1872, presided over by Sir Thomas Dakin, it was stated that the operations of the company, for the first three months down to the 31st Dec., showed a profit of about 6000*l*. The proceedings at that meeting appearing from the transcript of the shorthand writer's notes, have been referred to. [His Lordship then read the statements as to what took place at the meeting above set out, and continued.] Everything then had a brilliant prospect. But at the next meeting, held in the following August, it unfortunately turned out that the accounts showed that the operations of the company up to the 30th June 1872, had resulted in a loss of 4090*l*. 19*s*. 3*d*. It has been proved that it has continued to lose money ever since, and the total loss up to the 31st Dec. 1874 is 7620*l*. 15*s*., and it is confidently stated on the part of the company that there is no prospect of improvement. There have, of course, been no dividends, and the shares on which 10*l*. have been paid are stated not to be worth 2*l*. in the market. This is a lamentable and disastrous result for all parties concerned, and it is not surprising that it should have led to litigation. It is contended on the part of the company, which, of course means the shareholders, that the contract to take the property at 110,000*l*. ought to be wholly rescinded, and that the defendants or some of them ought to be directed to pay the whole sum and interest. It is asked on the ground of wilful misrepresentation and suppression of facts on the part of Baron Erlanger and the other persons who were engaged in the formation of the company. I do not find that they are in express terms charged with fraud; but wilful misrepresentation and suppression of known facts, to induce persons to act in the belief of the facts which are misrepresented, and in ignorance of others which are suppressed is clearly fraud, and the bill must therefore, I think, be treated as founded on fraud. I expressed an opinion at the close of the argument, to which I adhere, that it could not be justifiable on the part of the promoters to charge a company double the price which had been given for the property without clearly satisfying themselves that it was worth the increased price. Was there, then, on this subject of value any representation made which there was not reasonable ground for believing to be true? [His Lordship then read from par. 37 of Erlanger's answer, and continued.] Messrs. Pickford and Winkfield were the brokers employed by the old company, and were gentlemen who, of all persons in the world, must have known what the value of the property was, for every cargo of phosphate, as I gather, which had come to the British dominions had been sold by them, and Erlanger says, "Inquiries were also made by or on behalf of the syndicate of Messrs. Pickford and Winkfield, the brokers employed by the old company in the sale of the phosphate, and on the 6th Sept. 1871," that is a fortnight before the company was registered, "Thomas Westall received from William Pickford, a member of the firm of Messrs. Pickford and Winkfield, a letter which he communicated to me, and which was as follows." [His Lordship then read the letter of the 6th Sept. 1871, and the inclosure above set out, and

referred to the two affidavits of Mr. Chatteris, stating as regards the latter that he kept in mind the fact that Mr. Chatteris had not been cross-examined on it, and continued.] Considering the very favourable opinions which were entertained in all quarters of the probable success to be derived from the working of the island, I am unable to come to the conclusion that the prospectus contains any statement as to the valuation of the property which there was no reasonable ground for believing to be true. The statements are certainly highly coloured and sanguine; but everyone knows that this is the case with all prospectuses issued on the formation of joint-stock companies. That they are not fraudulent, and that they were believed to be true is, I think, shown by the fact that the vendors took 30,000*l*., part of the price of 110,000*l*., in shares; and that Baron Erlanger and those associated with him still have a favourable opinion of the ultimate prospects of the company is, I think, shown by the fact to which my attention was drawn by Mr. Benjamin, that at the time this bill was filed they continued to hold more than 2000 shares. The case is, therefore, not like the one I recently decided of the *Phosphate Sewage Company v. Hartmont*, where the shares were evidently taken merely for the purpose of traffic, and almost everybody concerned, and particularly the principal defendant, sold, I think, three times over the amount of the whole capital of the company. Here, as far as I can see, a part of the price was taken in shares because they were believed to be good, and they were retained for the same reason; so far, therefore, as the bill is founded on this ground, I am of opinion that it fails. The next statement in the prospectus which was much relied upon by the plaintiffs is that the directors had entered into a contract to purchase the property for 110,000*l*. "The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from 29th Sept. 1871, together with all buildings, plant, fixed and rolling stock, machinery, steam engines, lighters, &c., now at the island, complete and in full working order, for the sum of 110,000*l*." It was contended that this was a false statement or misrepresentation; that the "directors" meant all those who were named in the prospectus—those were five. The only three who acted in the transaction were Sir Thomas Dakin, Mr. Evans, and Admiral Macdonald. M. Dronyn de L'Huys did not act, and Mr. Eastwick was then in Canada, or on his way there, and it was contended that in consequence this was an untrue statement. I think that this statement cannot be read in the strict sense which is contended for by the plaintiffs, but that the true meaning is that the company was formed on the basis of paying 110,000*l*. for the property. This point has given me much anxious consideration, and I cannot say that I am perfectly satisfied that the construction I have put upon the statement does not admit of doubt. There is much force in the contention of the plaintiffs, that when the prospectus gives the names of five directors and says that "the directors" have entered into a contract, the fair meaning is that the five have done so; and if that be the proper view of the statement it is clearly untrue, as it is certain that two out of the five had nothing whatever to do with the contract; and with regard to the three who did sanction it at the first meeting of the directors of the 29th of Sept.

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it is plain that only one of them was in a situation to exercise an impartial judgment, namely, Sir Thomas Dakin, who took his seat on the basis of having taken fifty shares in the company for which he paid in cash. With regard to Mr. Evans, he was at once the vendor and purchaser, and was the agent of Erlanger, and interested on his behalf in obtaining the 110,000*l.*, which he fixed as the price to be paid for the property. Admiral Macdonald was also disqualified, as the shares he held were the property of Erlanger, and he was under the circumstances necessarily bound to act in his interest, and was not in a situation to act impartially for the protection of those who might take shares in the company. I find nothing to blame in the conduct of Sir Thomas Dakin, except a singular want of caution in not inquiring into the price at which the property had been acquired by the promoters of the company, and also in signing the minutes in which it is stated that the contract of the 30th Aug. was produced. It appears he did that. [His Lordship then read from the answer of Sir Thomas Dakin his statements with reference to the contract of the 30th Aug., the prospectus, and the meetings of the 29th Sept. 1871 and the 2nd Feb. 1872, and continued.] Having read those passages in the answer of Sir Thomas Dakin, I am perfectly satisfied that in the whole transaction he acted with perfect good faith, but I have stated that it is possible that greater vigilance on his part as the only independent director, might have prevented the formation of this unfortunate company, or led to its being formed on a more satisfactory basis as to price and otherwise. It was contended on the part of the plaintiffs that although three directors were by the articles of association to be a quorum, that must mean three of the full number of the directors required, which was at least four; and as the three who attended the meeting were the only directors, they were not capable of binding the company, and that their contract could not therefore be enforced. For this contention *Kirk v. Bell* and *Howard's case* were relied upon. If I had a case before me in which the contract of the three directors was attempted to be enforced, I should probably be bound by those cases to say that it could not be. But this is a bill to rescind a contract which has been performed, and where the parties who performed it, by entering into possession of the purchased property, had ample means of ascertaining the facts before they performed it. I cannot, therefore, apply those cases to the present, and it is not necessary, therefore, to consider whether the *Thames Haven Dock Company v. Rose*, cited by Mr. Fry, is still law, where it was decided that a clause in an Act of Parliament that there should be twelve directors, and that five should be a quorum was directory only, and that a call made when there were seven directors only could be enforced. It was also contended that the prospectus is defective, because it omits any reference to the contract of the 30th Aug. by which Evans on behalf of Erlanger purchased the property. I have already stated that in my opinion the company had nothing to do with the acquisition of the property by Erlanger and the syndicate, and the shareholders were invited to inspect the contract of the 20th Sept. which recites that of the 30th Aug., although it does not state the price to be paid for the property; that could have

been readily ascertained by inquiry on asking for an inspection of the contract, and I cannot think that persons who join joint-stock companies are justified in forbearing all inquiry and investigation as to documents which they are told may be seen. Upon this point the judgments in the case of *Overend Gurney and Company v. Gibb* are strongly against the plaintiffs. The last mentioned misrepresentation relied upon by the plaintiffs is that in the prospectus it is said that a report made after careful survey estimates the deposit at 700,000 tons at the least, and that for ten years there has been a steady and continuous supply in proportion to the labour and capital employed, the fact being that the report referred to was made in 1865. But it appears there was still more than the quantity stated to be upon the island, and certainly more than could be worked during the continuance of the lease. [His Lordship then referred to the evidence in support of that conclusion, and continued:] Upon the whole case, it cannot be denied that the result has been disastrous to the shareholders, and I am glad to find that Baron Erlanger appears to have felt that they had a strong claim upon him in consequence of the way in which they have been misled, and that he offered a considerable concession to them before the institution of this suit. [His Lordship then referred to the letters proposing a settlement, and continued:] I am bound to say I think the whole body of the syndicate would have acted very wisely and only fairly on that occasion if they had done the same as Baron Erlanger, who offered to give up all the profit he had made. I believe that was an offer which involved on the part of Baron Erlanger not less than 16,000*l.*, which was his share of the profit made by the resale of the property to the company. If the other members of the syndicate had concurred in that view it is plain that the company would have been satisfied, and this litigation would have been saved. That was not accepted, and the operations of the company have been continued. Then comes a very material circumstance which the learned counsel for the defendants, and particularly Mr. Benjamin, pressed upon me—that the losses and the disastrous condition of the company are to be attributed to a great fall in the price of the phosphate. It seems that the price rapidly went down, that it fell from 5*l.*—which the evidence shows that they received and might reasonably expect to be the price at the time—to 4*l.*, and even less, and now, according to the evidence of Mr. Mackay, in cross-examination, the price is improving, and the prospects are somewhat improving also. That is the result of what he stated. There is one thing which I ought not to pass over, and that is the very forcible remarks which were made with regard to Mr. Westall. It was argued that this was a case in which I ought to set aside the contract, because Westall—as far as I know, a very respectable solicitor, who died in June 1872—was to receive a sum of 500*l.* But I do not on the whole see any reason to question the honesty of the transaction on the part of Mr. Westall. I think the sum of 500*l.* was a fair remuneration, which he might expect to receive for carrying the business into complete effect. I cannot consider that, therefore, as a bribe given to him for the purpose of deceiving others, nor do I find anything improper in that transaction. Upon the whole case I find it im-

possible to make a decree which would do complete justice. It would not, in my opinion, be just to make the extreme decree which is asked for by the plaintiffs, and I can find no ground for the alternative relief which is asked for in the return of the difference between what was given and received for the property. Looking at all the circumstances of the case, the large profits made by Baron Erlanger and the members of the syndicate, the rigging of the market which took place with their sanction, and in which operation 6000*l.* or thereabouts was expended, I cannot dismiss the bill with costs. Upon the whole, the nearest approach to the justice of the case I can make is to dismiss it without costs against all parties. Sir Thomas Dakin has had no connection with the transaction to which I have just referred—such as the rigging of the market—but the want of caution on his part obliges me to come to the conclusion that I cannot give him any costs. The bill, therefore, will be wholly dismissed without costs.

Solicitors: *John Holmes; Bischoff, Bompas, and Bischoff; Davidson, Carr, Bannister, and Morriss; Kearsey; White, Broughton, and White; Westall, Roberts, and Barlow; Freshfields and Williams; Cunliffe and Beaumont.*

June 26 and 27.

HOLDSWORTH v. DAVENPORT. (a)

Charitable bequest—Pure or impure personality—Debenture of waterworks company—9 Geo. 2, c. 36.

Debenture of a waterworks company held to be pure personality.

DANIEL HOLY made his will, dated the 23rd Sept. 1869, and thereby bequeathed all the residue of his personal estate to the plaintiffs Albert Holdsworth and Walter Brown, upon trust to convert and get in the same, and the testator declared that his said trustees should hold the money arising from the conversion of such parts of his personal estate therein before bequeathed as might not by law be given by will for charitable purposes (subject as therein mentioned), upon trust thereout in exoneration of all his other property both real and personal, to pay the costs of and incident to the conversion into money of all his personal estate and his just debts, funeral, and testamentary expenses, and subject thereto as aforesaid upon trust for his sister, Caroline Davenport absolutely, and the testator declared that his trustees should hold the moneys which should arise from the conversion into money of such parts of his personal estate as might by law be given by will for charitable purposes upon trust to invest the same as therein mentioned, and out of such investments to pay certain annuities therein mentioned, and subject thereto to pay and transfer the trust fund to the burgesses or free tenants and trustees of certain messuages and hereditaments vested in them for charitable and public purposes, within the town of Sheffield, commonly called the Sheffield Town Trustees, upon and for the trusts and purposes thereafter in the second part of his will expressed, contained, or referred to (the particulars of which it is not necessary to state.)

The testator died on the 31st Dec. 1870, and a

suit was instituted by the trustees for the administration of the estate.

The decree for administration was made on the 22nd July 1871, and inquiries were directed as to the testator's personal estate which might not by law be given for charitable purposes.

By the chief clerk's certificate it appeared that part of the testator's residuary personal estate consisted of two sums of 2275*l.* and 200*l.* owing on two mortgage debentures of the Sheffield Waterworks Company.

The mortgage debentures were in the form following:

ACT OF 1864.

Company of proprietors of the Sheffield Waterworks. Debenture No. 69 under Act of 1864, 2275*l.* By virtue of the Sheffield Waterworks Act 1864, the Company of Proprietors of the Sheffield Waterworks, in consideration of the sum of 2275*l.* paid to us by Daniel Holy, of Newbould, near Chesterfield, in the county of Derby, gentleman; Francis Hobson, the elder, of Sheffield, in the county of York, merchant, Francis Hobson, the younger, of Sheffield, aforesaid, merchant; and William Fisher, of Sheffield, aforesaid, horn merchant, out of moneys belonging to them on a joint account, do assign unto the said Daniel Holy, Francis Hobson, the elder, Francis Hobson, the younger, and William Fisher, their executors, administrators, and assigns, the undertaking called the Sheffield Waterworks, and all future calls on shareholders, and all the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, and all the estate, right, title, and interest of the said company in and to the same, to hold unto the said Daniel Holy, Francis Hobson, the elder, Francis Hobson, the younger, and William Fisher, their executors, administrators, and assigns, until the said sum of 2275*l.*, together with interest for the same at the rate of 5*l.* for every 100*l.* by the year shall be fully paid and satisfied. And it is hereby stipulated that the said principal sum of 2275*l.* shall be repayable and repaid on the 21st day of June, which will be in the year 1868, and that in the meantime the said company shall in respect of the interest on the said principal sum pay to the bearer of the coupons of interest warrants hereto annexed respectively, the several sums mentioned in such warrants respectively at the several times therein respectively specified.

Given under our common seal this 21st day of Dec. A.D. 1865. Sealed by order of the Board of Directors.

WILLIAM WATERFALL. (L. S.)

Registered this 22nd day of Dec. 1865.

ALBERT SMITH, Clerk.

The debenture fell due on the 21st June 1868, but by agreement the time for payment was extended to the 21st June 1871. It was paid off in August 1871.

The debenture for 200*l.* was paid off in June 1871.

On the hearing on further consideration the question to be determined was whether the two sums of 2275*l.* and 200*l.* were pure personality which could be bequeathed by will for charitable purposes, or impure personality, in which latter case they would become the property of the testator's sister, Caroline Davenport.

Miller, Q.C. and Chapman Barber, for the plaintiffs.—The debentures are a charge on the land of the waterworks company, and are, therefore, impure personality, and could not be bequeathed for charitable purposes. They cited

Taylor v. Linley, 2 De G. F. & Jo. 84; 1 Giff. 67;

32 L. T. Rep. O. S. 232;

Ashton v. Lord Langdale, 4 De G. & Sm. 402;

Re Langham's Trusts, 10 Ha. 446;

Thornton v. Kempson, 23 L. T. Rep. O. S. 185; *Key* 592.

Cary, for an annuitant, supported the plaintiffs' view.

Glasse, Q.C. and Bunting, for the Sheffield Town Trustees.—The debentures are pure personal

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estate, and not within the Act 9 Geo. 2, c. 36. The instrument itself gives no right of entry on the land, but merely a right to have a receiver of the tolls appointed in case the company makes default.

Bunting v. Marriott, 19 Beav. 163;

Myers v. Perigal, 16 Sim. 533;

Gardiner v. London, Chatham, and Dover Railway Company, 15 L. T. Rep. N. S. 552; L. Rep. 2 Ch. 201;

decided what is the true nature of these bonds. *Ware v. Cumberlege* (25 L. T. Rep. O. S. 138; 20 Beav. 503) was expressly overruled in *Edwards v. Hall* (26 L. T. Rep. O. S. 170; 6 De G. Mac. & Gor. 74). Debenture holders have only a right to a share in the profits after keeping down the expenses; their right is like that of the shareholders. The profits of the company which are the subject of the mortgage do not arise from land at all; they arise from the water which the company collect and sell at a certain place. They also cited

Walker v. Milne, 11 Beav. 507;

Jarm. on Wills, 3rd edit. 205.

Miller, Q.C. in reply.—*Myers v. Perigal* was heard on appeal before Lord St. Leonards (2 De G. M. & G. 599). The true test is there laid down at page 620. The whole corporation can do just what the Lord Chancellor there says an individual shareholder cannot do.

Hayter v. Tucker, 4 K. & J. 243.

The whole question is, can the debenture holder get a receiver appointed? If he can he differs from a shareholder, and must be held to have an interest in the land of the company.

The VICE-CHANCELLOR.—My own view is very clear, but I will look into the authorities before giving judgment.

June 27.—The VICE-CHANCELLOR.—The question in this case is whether certain debentures of the Sheffield Waterworks Company are or are not within the operation of the Mortmain Acts? The testator in the suit by his will so bequeathed his residuary personal estate as to leave all of it which could not be lawfully given by will for charitable purposes to his sister, Caroline Davenport. Part of his estate consisted of a debenture of the company already mentioned for securing the sum of 2275*l.*, and also of a debenture to secure the sum of 200*l.* The debentures themselves are in the ordinary form. In the case of *Sparling v. Parker* (9 Bea. 450) shares in a gaslight and in a dock company, which possessed real estate for the purpose of their undertaking, were held by Lord Langdale not to be within the Statutes of Mortmain, and in the case of *Tomlinson v. Tomlinson*, decided in 1823, and of which a report is published in the same volume of Beavan, p. 458, canal shares, which by Act of Parliament were declared to be personal estate and transmissible as such, were held by Sir John Leach to be within the Mortmain Acts. The more recent authorities, however, have held that such shares as those are not within the Acts. In *Walker v. Milne* dock and canal shares and bonds secured by an assignment of the rates were held not to be an interest in land within the Statutes of Mortmain. The question arose also in *Myers v. Perigal*. There it was in the first instance held that a debenture of the Newcastle and Carlisle Railway Company was not within the Statutes of Mortmain, but shares in a joint-stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of

years, were held to be within the statutes; on appeal, however, Lord St. Leonards reversed the latter part of that decision, and held, in accordance with the certificate of the Court of Common Pleas, that the bequest of the shares to the charities in that case was a valid legal bequest within the 9 Geo. 2, c. 36. Lord Truro took the same view of the law in that case. In *Taylor v. Linley* a bequest for charitable purposes of shares in a railway company, which at the testator's death had granted a lease of its railway property, and undertaking for 999 years to another railway company at a fixed rent and with an option of purchasing on notice, was held not to be void under the Statutes of Mortmain. Lord Campbell there thought that the shares retained their quality of pure personal estate, and so were not an interest in land under the statutes. The contrary view of the law, however, as taken by Lord Romilly in *Ware v. Cumberlege*, was reversed by Lord Cranworth in *Edwards v. Hall*. In *Ashton v. Lord Langdale*, Lord Justice Knight Bruce, when Vice-Chancellor, held that mortgages of turnpike tolls and of railway undertakings were interests in land within the Mortmain Acts, but that railway debentures (not being mortgages), shares in railway, canal, waterworks, and banking companies, and scrip shares in projected railway companies, were not within the Acts. So in *Langham's trusts*, a bequest of shares in a canal navigation company for charitable uses was held to be good, but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the company created by assignment thereof by way of mortgage, as being a charge upon land, was held to be void under the statutes. But, whatever might have been till recently the correct view of the law on this subject, the case of *Gardiner v. The London, Chatham, and Dover Railway Company* decided these very important points, viz., that an ordinary debenture issued by a railway company in the form given in Schedule C of the Companies Consolidation Act 1845, gives the holder a charge upon the undertaking generally as a going concern, and the tolls and sums of money earned by the company, but does not give any specific charge upon the surplus lands or upon the rolling stock. The railway is to be considered to be mortgaged as a going concern not to be interfered with or broken up by the mortgagees, and the right of the mortgagees is to have a receiver of the earnings of the company only, and not to have a manager appointed by the court. That case is really conclusive on the subject, and as it appears from the decision there that the debenture holders have no charge upon the lands, the interest which a debenture holder has cannot be an interest in land within the Statutes of Mortmain. The result on the whole is that, as the testator here has only given his sister such of his personal estate as cannot by law be given by will for charitable purposes, and as I am clearly of opinion that these debentures can be so given, I must make a declaration that they pass to and are now the property of the Sheffield Town Trustees.

Solicitors, *Walter Moojen and Son* (for *Brown and Son*, Sheffield); *J. W. Hickin*.

Q.B. Div.]

BOWER v. PEATE.

[Q.B. Div.]

QUEEN'S BENCH DIVISION.

Jan. 19 and Feb. 25.

BOWER v. PEATE. (a)

Adjoining landowners—Liability for support—Acts done by contractor.

Defendant contracted with a builder to rebuild his house, the latter agreeing to take upon himself the risk and responsibility of shoring and supporting, as far as might be necessary, the adjoining buildings affected by this alteration during the progress of the works, and to make good any damage which might be sustained by the said buildings during the progress or in consequence of the said works contracted for, and to satisfy any claims for compensation arising therefrom which might be substantiated.

In consequence of the insufficiency of the contractor's shoring, the adjoining land of the plaintiff, which was supported by the defendant's land, became injured, and this action was brought to recover damages:

Held, that the defendant was liable.

THIS was an action tried before Field, J., at Liverpool, during the Spring Assizes 1875, when a verdict was entered for the plaintiff, leave to move being reserved to the defendant.

The declaration alleged in one count that the plaintiff was possessed of land with a house thereon, and was entitled to have the same supported by the land adjacent thereto; and the defendant wrongfully removed the adjacent land without leaving sufficient support for the plaintiff's land and house, whereby the land gave way and the house was injured.

The declaration alleged in another count that the defendant, by his agents and workmen, conducted himself so negligently in excavating the ground adjacent to the plaintiff's house for the rebuilding of a house of the defendant, and in underpinning the party wall, and removing a part of the same, that the plaintiff's house was damaged.

The defendant pleaded: First, denial of plaintiff's possession; secondly, as to the first-mentioned count, denial of the plaintiff's right to support; thirdly, not guilty.

The defendant had entered into a building contract with a man named Rae for the work which caused this injury to the plaintiff. Besides the parts of the contract referred to in the judgment of the court, the following clause in the specification is material:

6. The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility and to make good any damage occurring thereto.

Defendant obtained a rule to enter a verdict in pursuance of the leave reserved, on the ground that the contractor was liable, if anyone, and not the defendant.

Jan 19.—*H. H. Bremner* (with him *Day*, Q.C.), for the plaintiff, showed cause.

Herschell, Q.C. and *T. H. James*, supported the rule.

The following authorities were cited and discussed.

Dicey's Parties to an Action, p. 452;

Hole v. Sittingbourne Railway Company, 6 H. & N. 488;

Ellis v. Sheffield Gas Company, 2 E. & B. 767;

Gray v. Pullen, 5 B. & S. 970, 981;

(a) Reported by *M. W. McKellar*, Esq., Barrister-at-Law.

Pickard v. Smith, 10 C. B., N. S., 470;

Fletcher v. Rylands, L. Rep. 3 E. & Ir. Rep. 330;

Bonomi v. Backhouse, 9 H. of L. Cas. 508;

Rolle's Abridgment, tit. "Trespass I.," pl. 1;

Wyatt v. Harrison, 3 B. & Ald. 871.

The facts, the contract, and the arguments sufficiently appear in the judgment.

Cur. adv. vult.

Feb. 25.—The judgment of the court (Cockburn, C.J., Mellor and Field, J.J.), was written by Cockburn, C.J., and delivered by

FIELD, J.—The facts of this case, which involves a point of considerable importance, were as follows: The plaintiff and defendant were the owners and occupiers of two adjoining houses, and it appears that, prior to the rebuilding of the defendant's house, as hereinafter mentioned, the walls and foundations of the plaintiff's house went to a lower level than those of the defendant's. The defendant having determined to pull down his old house and build another on the same site, proposed to carry the foundations and walls of his new house to a lower depth than those of the plaintiff, for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. In order to do this without injury to the plaintiff's house, the well-known practice of underpinning, or some other safe mode of supporting or shoring the plaintiff's soil and walls during the operations, would, as was well known, have to be resorted to. For the purpose of this rebuilding the house and executing the other necessary works, the defendant entered into a contract with a builder named Rae, by which Rae contracted to do all the necessary works. The contract contained the following clause: "And the said Thomas Rae further agrees to take upon himself the risk and responsibility of shoring and supporting, as far as may be necessary, the adjoining buildings affected by this alteration during the progress of the works, and to make good any damage which may be sustained by the said buildings during the progress or in consequence of the said works hereby contracted for, and to satisfy any claims for compensation arising therefrom which may be substantiated." After the execution of this contract, Rae, the contractor, pulled down the defendant's house and excavated the soil to a lower depth than the foundation of the walls of the plaintiff's house, and rebuilt the defendant's house. But owing to defective underpinning or want of other support to the plaintiff's soil and walls in the course of these operations, injuries occurred to the plaintiff's house which gave rise to the present action. No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house, nor was it doubted that the injuries to the house of which the plaintiff complained had been occasioned by the removal of such soil in the execution of the defendant's works. But it was contended that the defendant having committed the execution of the work to a contractor, both as regarded the taking down and rebuilding his house, and the measures necessary for the protection of the adjoining house, the contractor and not the defendant became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus:

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According to the doctrine in *Bonomi v. Backhouse* (9 H. of L. Cas. 503), the taking away the soil, to the support of which an adjoining owner is entitled, is not in se wrongful. It only becomes so when followed by injurious consequences to the neighbour. And if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here the defendant in one and the same contract employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorised him to do the former only on consideration of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instructions of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. The injuries complained of have arisen from the negligence of the contractor alone. The defendant is therefore entitled to the benefit of the general rule, that when a person employs a contractor to do a work lawful in itself and involving no injurious consequences to others, and damage arise to another party from the negligence of the contractor or his servants, the contractor and not the employer is liable. It appears to us that upon a correct view of the facts this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do, except so far as was necessary to satisfy his obligation to provide the necessary support of the plaintiff's house. In addition to which the defendant stipulates that the contractor shall "take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations," and shall "make good any damage which may be sustained by the said buildings in consequence of the works," and shall "satisfy any claims for compensation arising therefrom." The effect of this is, not that the defendant orders or stipulates for any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damages to the adjoining property. He is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is therefore not to be held responsible if while the work is going on injury arises from the negligence of the contractor or his servants. The answer to the defendant's contention may, however, as it appears to us, be

placed on a broader ground, viz., that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which if properly done no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorising the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate; there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise. It is true that according to the doctrine in *Bonomi v. Backhouse*, the removal of the soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, and becomes so only when damage to the adjoining property results, whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises. But it is equally clear that if effectual means of prevention fail to be applied and damage once results, the act of removal becomes wrongful and an action can be at once maintained. In the present instance preventive measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to the plaintiff's house, and the act of removal was therefore wrongful as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the defendant, in other words was the act of the defendant, and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act. The agent may no doubt be responsible, but the responsibility of the principal is none the less. The cases of *Pickard v. Smith* (10 C. B., N. S., 470), and *Gray v. Pullen* (5 B. & S. 970, 981), are in point to the present question. In *Pickard v. Smith* the defendant having employed a coal merchant to put coals into his cellars, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. The law is well stated by Williams, J., in delivering the judgment of the court. "Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answer-

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able. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor by a parity of reasoning to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now in the present case the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open, and to close it when the coals are all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant, and the defendant having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law." In *Gray v. Pullen* the Court of Exchequer Chamber carried this principle still further. An Act of Parliament having authorised the cutting a trench across a highway for the purpose of making a drain, but having attached to the exercise of the right the condition of filling up the trench after the drain had been completed, the defendant had employed a contractor to do the whole work. Owing to the negligence of the latter in filling up the trench, the plaintiff's wife had sustained personal injury. It was contended that the contractor alone was liable, and it was so held in this court; but the Court of Exchequer Chamber held otherwise, and reversed our judgment. It is true that in that case the obligation to make good the road was one imposed by statute, but it can make no difference in point of principle whether the obligation was imposed by statute or existed at law, and the case is therefore an authority for saying that where a work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor. In the case of *Tarry v. Aston* (34 L. T. Rep. 97), where the defendant had become occupier of premises from which a large lamp was suspended over the highway, and the lamp, before he became occupier, had become worn out, and the defendant, having notice of this, was therefore under an obligation, if he continued to maintain the lamp, to take care that it was not a nuisance to the highway, and the lamp had fallen down and injured a person passing, this court on a like principle held the defendant liable, though he had employed a contractor to attend to the condition of his lamps. Both on authority and principle, therefore, we are of opinion that our judgment should be for the plaintiff, and that consequently this rule to enter the verdict for the defendant should be discharged.

Judgment for plaintiff.

Solicitors for plaintiff, *G. L. P. Eyre and Co.*, for *E. Cotton*, Liverpool.

Solicitors for defendant, *Gregory, Rowcliffe, and Co.*, for *Payne and Son*, Liverpool.

Tuesday, May 2.

DAWKINS v. PRINCE EDWARD OF SAXE WEIMAR. (a)
Stay of proceedings—Cause of action decided to be groundless—Judge's privilege—Abuse of process.

Plaintiff had brought an action of defamation against a witness at a Military Court of Inquiry, and the House of Lords, upon appeal, had held that the witness enjoyed the same privilege as if he had given his evidence in a court of justice. Plaintiff now brought an action for conspiring to make a false representation to the Commander-in-Chief against a member of the same Court of Inquiry in respect of the judicial report made by that court.

Upon application by the defendant, further proceedings were stayed on the ground that this action was groundless, and, under the circumstances, an abuse of the process of the court.

THIS was a summons referred to the court from Chambers by Baron Pollock.

The summons called upon the plaintiff to show cause why all further proceedings should not be stayed on the ground that the action was frivolous and vexatious and an abuse of the powers of the court.

The declaration stated that at the time of committing of the grievances hereinafter mentioned the plaintiff was a lieutenant-colonel in the army and a captain in Her Majesty's regiment of Coldstream Guards, and the defendant wrongfully and maliciously and without any reason or probable cause whatsoever combined, confederated, and conspired together with divers other persons by falsely and without any reasonable or probable cause whatsoever, and then well knowing the same to be false and without any reasonable or probable cause, represent to His Royal Highness George, Duke of Cambridge, then being the commander-in-chief of Her Majesty's land forces, that the plaintiff was unfit to command in the said regiment of Coldstream Guards, and that the plaintiff's command in the said regiment was not beneficial to the service, by means of which said false, malicious, and unfounded representation of the defendant, and the said other persons so made as aforesaid in furtherance and execution of the said unlawful combination, confederacy, and conspiracy, and not otherwise, the said commander-in-chief was persuaded and induced to, and did advise Her Majesty to, and Her Majesty, in consequence of such advice, and not otherwise, did deprive the plaintiff of his said rank of lieutenant-colonel in Her Majesty's army, and of his commission of a captain in Her Majesty's said regiment of Coldstream Guards.

And the plaintiff also sues the defendant for that the defendant wrongfully and maliciously, and without any reasonable or probable cause whatsoever, combined, confederated, and conspired, together with divers other persons, by falsely, and without any reasonable or probable cause, representing to His Royal Highness George, Duke of Cambridge, then being commander-in-chief of Her Majesty's land forces, that the plaintiff was unfit to command in the said regiment, and that the plaintiff's command in the said regiment was not beneficial to the service, to deprive the plaintiff of his rank of lieutenant-colonel in Her Majesty's army, and of his said commission of a captain in Her Majesty's regiment of Coldstream Guards, and in performance, furtherance, and execution of

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the said unlawful combination, confederacy, and conspiracy, the defendant and the said other persons did falsely and maliciously, and without any reasonable or probable cause whatsoever, and then well knowing the same to be false, and without any reasonable or probable cause represent to His Royal Highness George, Duke of Cambridge, then being commander-in-chief of Her Majesty's land forces, that the plaintiff was unfit to command in the said regiment of Coldstream Guards, and that the plaintiff's command in the said regiment was not beneficial to the service, by means of which said false, malicious, and unfounded representation of the defendant and the said other persons so made as aforesaid in furtherance of the said unlawful combination, confederacy, and conspiracy, and not otherwise, the said commander-in-chief was persuaded and induced to, and did advise Her Majesty to, and Her Majesty in consequence of such advice, and not otherwise, did compel the plaintiff either to sell his said commission in Her Majesty's regiment of Coldstream Guards, or to be placed on half pay, and because the plaintiff, as he lawfully might decline and refuse to sell his said commission, the said duke, in consequence of the said false, malicious and unfounded representation of the defendant and the said other persons so made by them to the said duke as aforesaid, did advise Her Majesty to, and Her Majesty, in consequence of such advice, so induced and persuaded as aforesaid, and not otherwise, did deprive the plaintiff of his said commission in Her Majesty's regiment of Coldstream Guards, and did without the plaintiff's consent place him on half pay, by means whereof, and in consequence of the committing of the said wrongs and injuries by the defendant and the said other persons, the plaintiff was injured in his character and reputation as an officer and soldier, and the plaintiff was deprived of his said rank in the army, and of his said commission in the guards, and was otherwise injured and damnified.

When the action had reached the delivery of this declaration the proceedings were stayed until the decision of the appeal in *Dawkins v. Lord Rokeby* (L. Rep. 8 Q.B. 262, and L. Rep. 7 E. and L. App. 753) by plaintiff's notice to the defendant, as explained in the letter mentioned in defendant's affidavit following.

Although the ultimate decision of that case was against the plaintiff, he nevertheless then gave notice that he should proceed with this action.

The defendant's affidavit was:—

I, Edward of Saxe Weimar of 16, Portland-place, in the county of Middlesex, a major-general in Her Majesty's army, Commander of the Bath, make oath and say as follows:

1. I am the general commanding the Home district of Her Majesty's army.

2. More than ten years ago I was one of the members of a military court of inquiry upon the conduct of the plaintiff, then a lieutenant-colonel in the Coldstream Guards, which court in the discharge of its official and judicial duties reported in due course to the commander-in-chief.

3. The writ in this action was served on or about the 3rd Aug. 1871, and the declaration was delivered on or about the 22nd July 1872, it was accompanied by a letter from the plaintiff's solicitors, a copy of which marked A is shown to me herewith.

4. This action is brought against me for and in respect of the official and judicial acts done by me as member of the court of inquiry, and for and in respect of no other matter or thing whatsoever. When I became a

member of the said court of inquiry I knew nothing of the plaintiff personally, and I have since had no communication with him. The allegations in the declaration charging me with conspiracy and false representation are absolutely untrue and without a shadow of foundation, and refer wholly to the official and judicial acts done by me as aforesaid.

5. I believe this action to be brought and prosecuted vexatiously and in abuse of the process of the court.

The following was the plaintiff's affidavit in answer:

I William Gregory Dawkins, of 12, Arlington-street, Piccadilly, in the County of Middlesex, lieutenant-colonel, the above named plaintiff make oath and say as follows:

This action is not brought by me against the above named defendant vexatiously or frivolously or in abuse of the process of the court, but on the contrary is perfectly *bona fide*, and brought to vindicate my position and character, and I am prepared to support the same by evidence in my possession.

Bowen argued in support of the summons on behalf of the defendant.—The action of *Dawkins v. Lord Rokeby* was brought against a witness at the Court of Inquiry of which the defendant was a member. This action is brought upon the report made by the defendant and the other members, which was the judicial result of the evidence given before them by Lord Rokeby and other witnesses. *A fortiori*, therefore, if action cannot lie against the witnesses, the defendant is privileged as a judge. In *Fray v. Blackburn* (3 B. & S. 576), it was held "that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly." In *Dawkins v. Lord Rokeby*, the Exchequer Chamber and the House of Lords both proceeded on the ground that the Court of Inquiry, about which this action is brought, was for the purpose of privilege the same as a public court of justice. Proceedings have been stayed in *Jacobs v. Mellor*; and the court's right to do so was admitted in *Corbett v. Morrish* (both in the Exchequer, but unreported). The latest reported authority for staying proceedings on this ground is *Castro v. Murray* (L. Rep. 10 Q.B. 213). There the facts differ from the present case, the action being against the clerk of the petty bag office for refusing to seal a writ of error on the ground that the Attorney-General had not issued his fiat, but Baron Bramwell's judgment applies equally to any such case as this; he said at p. 218, "This action, therefore, is pretenceless, and has been properly stopped. I do not say it was malicious—in one sense it may be said to be vexatious—but it is absolutely groundless, and it is one in which the court, in the exercise of its discretion, ought to stop the proceedings, as being an abuse of the process of the court. It is always a strong measure to prevent a plaintiff from going on with his action; and we, therefore, decided not to confirm this order till we had consulted the Lord Chief Baron and my brothers Pollock and Amphlett, all of whom concur in the opinion which I have delivered." After the decision of the House of Lords concerning this very Court of Inquiry, this action is pretenceless and absolutely groundless, and therefore ought to be stopped.

H. Mathews, Q.C. and *Holl* for plaintiff, opposed the motion.—This is an application wholly without precedent; the declaration shows a good cause of action, and the affidavits raise a dispute of fact; the plaintiff therefore has a right to have the action tried. Further, upon the affidavits, this action does not depend upon the same point

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of law as that decided in *Dawkins v. Lord Rokeby*. The judgments both in the Exchequer Chamber and the House of Lords were based entirely on the privilege of witnesses. The case was brought by way of appeal from *Dawkins v. Lord Paulet* (L. Rep. 5 Q.B. 94), in which the Court of Queen's Bench differed on the question of military privilege which was there raised. Upon the admitted facts there can be no question of the privilege of witnesses; and upon the authority of *Dawkins v. Lord Paulet*, a question of military privilege may very well arise.

Bowen was not heard in reply.

BLACKBURN, J.—I think there is no doubt we must stay these proceedings. Notwithstanding Mr. Matthews' arguments, the affidavits taken together show clearly what the admitted facts of the case are. The declaration charges a cause of action against the defendant for maliciously, and without reasonable or probable cause, confederating and conspiring to make a false representation to the Commander-in-Chief, in consequence of which the plaintiff lost his position in the service. Now the defendant's affidavit, upon which this motion is made, says this action is brought against him in respect of the official and judicial acts done by him as member of a military court of enquiry upon the plaintiff's conduct, and for and in respect of no other matter or thing whatsoever. The plaintiff's affidavit does not meet that statement at all, but merely in general terms asserts that the action was not brought vexatiously, but in good faith for the purpose of vindicating his character. He does not say that there is any other cause of action besides the report of this military inquiry, nor does he deny that this report was his matter of complaint. The defendant's affidavit being uncontradicted as to the material point of it, we must take it to be admittedly true. A more important question for us to consider is whether, under the circumstances, we have the power to stop the action summarily upon the ground that it is an abuse of the process of the court. Generally we should not interfere to prevent an action from being brought before it has come to an issue, but this is an exceptional case. We have an authority for stopping these proceedings, which it seems to me is a stronger exercise of this summary power than our granting this motion will be. *Castro v. Murray* was said by the Court of Exchequer to be pretenceless and absolutely groundless. So is the substance of this action, as appears by these affidavits, and not only upon the opinion which we entertain of it, but upon the authority of the Exchequer Chamber and House of Lords. *Dawkins v. Rokeby* was not a decision upon this precise point, but the judgments were all based on the ground that this court of inquiry, of which defendant was a member, and for his conduct as such this action is brought, was a court of justice to which the rules of privilege applied. I think we can, under the circumstances, stop this action, and we ought to do so.

MELLOR, J.—I am of the same opinion. I think the plaintiff does not deny the defendant's assertion of the cause of action, and it is to his credit that he limits his complaint to that which he desires to prosecute. The privilege of a judge clearly covers this case, and if not stopped now, there can only be nonsuit when the plaintiff's case is stated at the trial. Time and costs would be wasted if any further proceedings were taken.

We have the authority of all the Judges of the Exchequer in staying the proceedings of a groundless action; and we have a stronger reason for saying this action is groundless than they had for so saying in *Castro v. Murray*.

Motion granted without costs.

Solicitors for plaintiff, *Guscottle, Wadham, and Daw.*

Solicitors for defendant, *Duncan, Murton, Warren, and Gardner.*

Friday, May 5.

ROBERTS v. PAGE. (a)

Compromise to pay costs—Cause of action—Proceeding concerning property—Secretary of friendly society—18 & 19 Vict. c. 63—21 & 22 Vict. c. 101.

Plaintiff, a solicitor, sued the secretary of a friendly society upon a compromise in a county court application for relief by plaintiff's client against the society under 18 & 19 Vict. c. 63, s. 41. The terms of the compromise were that the application should be withdrawn, that the society's appeal committee should entertain the complaint which they had previously refused, and that the society should pay the plaintiff's costs.

Held, on demurrer, that a breach of this compromise was a good cause of action, and that this action was a proceeding concerning the property of the society within 18 & 19 Vict. c. 63, s. 19, so as to justify its being brought, under 21 & 22 Vict. c. 101, s. 7, against the secretary.

This was a demurrer to a declaration.

The declaration stated that O. W. Roberts sued J. F. Page, secretary of the Eye and West Suffolk District of the Ancient Order of Foresters Friendly Society, and W. Baker, secretary of Court Brave Old Oak, No. 3658, held at Mendlesham, a branch of the said Ancient Order of Foresters Friendly Society, established in pursuance of the statutes relating to friendly societies, the rules of which society have been duly certified by the Registrar of Friendly Societies in England. For that before and at the time of the making of the agreement hereinafter mentioned, one Thomas Hipperson, being a member of the said society, had preferred a claim before the appeal committee thereof, and upon the neglect and refusal of the said committee to hear the said claim, had according to the statute in that behalf made an application for relief against the said society to the County Court of Suffolk at Stowmarket, and had employed the plaintiff to act as attorney and solicitor on his behalf in and about preferring the said claim before the said committee, and in and about making and conducting the said application to the said County Court, and transacting all necessary and proper business in connection therewith; and the plaintiff, acting as such attorney and solicitor, as aforesaid, had incurred divers costs and expenses in and about preparing the said claim and conducting the said application as aforesaid.

Whereupon it was agreed by and between the plaintiff and the said society that in consideration that the plaintiff would advise the said Thomas Hipperson to withdraw from the said application to the said County Court, and would

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procure a stay of proceedings therein, the aforesaid claim of the said Thomas Hipperson should be forthwith heard by the said committee of the said society, and that the said society would pay the costs and expenses then already incurred by the plaintiff in and about preferring the said claim before the said committee as aforesaid, and so much of the costs and expenses so incurred in and conducting the said application to the said County Court as should be ascertained and found to be payable upon a taxation as between party and party. And the plaintiff did so advise the said Thomas Hipperson to withdraw from the said application to the said County Court, and did procure a stay of proceedings therein; and a taxation was duly made as between party and party in respect of the said costs and expenses as agreed; and the sum of 25*l.* 14*s.* was thereupon ascertained and found to be payable to the plaintiff, and all conditions have been fulfilled, and all events have happened and times elapsed necessary to entitle the plaintiff to maintain this action; yet the said society have not paid the said costs and expenses as agreed, nor the said sum of 25*l.* 14*s.*, and the same remain wholly due and unpaid to the plaintiff.

And for a second count the plaintiff repeated the allegations contained in the foregoing count so far as they relate to the circumstances existing before and at the time of the making of the agreement therein mentioned, and sued the defendants for that thereupon it was agreed between the plaintiff and Arthur Frederick Vulliamy on behalf of the said Ancient Order of Foresters Friendly Society in the words and figures following:

Debenham, Suffolk, Nov. 18th, 1874.

A. F. Vulliamy, Esq., Ipswich.

Hipperson v. Foresters Friendly Society.

Dear Sir,—I have received and am obliged for your letter of the 17th inst. I have no wish to take this case into court, if we can come to a satisfactory arrangement without. My client is a very poor man, and has been put to very heavy expenses, and if you will agree to pay my counsel's fees with brief, which are already incurred, and my costs of attending the appeal committee of Mendlesham with my client Mr. Hipperson on the 26th Aug. last, and the costs as between party and party, and also undertake that the case shall be forthwith heard, I shall be happy to stay further proceedings. I will come over to Ipswich by the first train to-morrow morning from Stowmarket, and hope to be with you about half-past ten; but as it is market day at Stowmarket, must return very shortly, and hope your client will be in the way and a satisfactory arrangement completed. This letter is without prejudice.—Yours truly,

OSCAR W. ROBERTS.

Ipswich, Nov. 19th, 1874.

O. W. Roberts, Esq., Solicitor, Debenham.

A. O. F. against Hipperson.

I have seen my clients this morning, and they have instructed me to consent to your letter of the 18th inst. The appeal will be heard within three weeks, of which your client will have due notice.—Yours truly,

A. F. VULLIAMY.

And the plaintiff thereupon did stay proceedings as agreed, and the said costs as between party and party were duly taxed, and the sum of 25*l.* 14*s.* was thereby ascertained and found to be payable to the plaintiff, and all conditions have been fulfilled, and all events have happened and times elapsed necessary to entitle the plaintiff to recover in respect of the breaches herein complained of; yet the said society has not paid the said sum of 25*l.* 14*s.*, and the other costs, fees, and expenses as agreed, nor any part thereof, to

the plaintiff, nor to any person on his behalf; and the same remain wholly due and unpaid.

And for a third count the plaintiff repeated the allegations contained in the first count so far as the same relates to the circumstances existing before and at the time of the making of the agreement therein mentioned, and the plaintiff further said that by reason of the purchases the said Thomas Hipperson became indebted to the plaintiff to the extent of the costs and expenses so incurred by the plaintiff on his behalf, and the plaintiff sued the defendants for that thereupon in consideration that the plaintiff would advise the said Thomas Hipperson to withdraw from the said application to the said County Court and renew his said claim before the said committee, the said society guaranteed and promised that so much of the said costs and expenses should be paid to the plaintiff as should be ascertained upon a taxation of the said costs and expenses by consent as between party and party in like manner as if the said application had not been withdrawn, and a decision had been pronounced thereon against the said society in favour of the said Thomas Hipperson, and the said County Court had ordered the costs of the said Thomas Hipperson of and incidental to the said application to be borne and paid by the said society. And the plaintiff, relying upon the said guarantee and promise of the said society, did advise the said Thomas Hipperson to withdraw from the said application and to renew his claim before the said committee, and the amount of the said costs and expenses so guaranteed has been ascertained by a taxation by consent as between party and party in the manner agreed, and the sum of 25*l.* 14*s.* found to be the sum payable to the plaintiff thereon, and all conditions have been fulfilled and events have happened and time elapsed necessary to entitle the plaintiff to maintain this action in respect of the breaches hereinafter mentioned; yet the said Thomas Hipperson has not, nor has the society, paid to the plaintiff the sum of 25*l.* 14*s.*, but the same remains wholly due and unpaid.

And the plaintiff further sued the defendants as such secretaries as aforesaid for money payable to the plaintiff by the said society for money found to be due from the said society to the plaintiff upon accounts stated between them and the said society.

The ground of demurrer to the whole of the declaration was that the declaration showed no causes of action against the defendants as secretaries.

Merewether argued for the defendants.—The contract upon which the action is brought is alleged to be for the benefit of the plaintiff at the cost of his client. [BLACKBURN, J.—Not at all; it may be that the plaintiff's advice was the best possible under the circumstances.] The declaration does not say so; and as alleged, the contract might be against public policy. Another objection is that the defendants, as secretaries of a friendly society, are not liable in such an action as this, which, if the society can be held responsible at all, ought to have been brought against every member of it. No doubt the secretary is a proper person to be sued in most cases. By sect. 7 of 21 & 22 Vict. c. 101, "In any proceeding under the said recited Act, or under this Act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or

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complaint being entered or made, the defendant in such proceeding by his name and the title of the office he holds in the society, and the proceedings on such plaint or complaint shall be commenced and carried on against such officer on behalf of the society, and shall not be abated or prejudiced by the death resignation or removal, or by any act of such officer after the commencement thereof, and the summons to be issued to such officer may be served by leaving the same at the usual place of business of the society." But there is nothing in that Act itself nor in the Act it recites (18 & 19 Vict. c. 63), which authorises such a proceeding as this against a society. The only section relating to actions which can govern the provision mentioned, is the 19th of 18 & 19 Vict. c. 63, "The trustee or trustees of any such society are hereby authorised to bring or defend, or cause to be brought or defended, any action, suit, or proceeding, in any court of law or equity, touching or concerning the property, right, or claim to property of such society, for which he or they are such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead, and be impleaded, in any court of law or equity, in his or their proper name or names, as trustee or trustees of such society, without other description." There is no authority to compromise an action, or at all events to enforce a compromise by action against the trustees or secretary. Such an action does not touch or concern the property, right or claim to property of the society, nor is it a case concerning the real or personal property of such society.

A. K. Loyd appeared for the plaintiff, but was not heard.

BLACKBURN, J.—I think in this case our judgment must be for the plaintiff. The declaration states a contract between the plaintiff as solicitor for a member of the defendant's society, and the solicitor acting for the society. They were opposed to each other upon an application to the County Court for relief against the society under 18 & 19 Vict. c. 63, s. 41, in respect of a refusal to hear a claim of the plaintiff's client by the appeal committee of the defendant's society. The terms of the contract were that the plaintiff should withdraw his client's application to the County Court, and that the defendant's society should entertain his claim through their appeal committee, and also pay all the plaintiff's costs. This seems to have been an equitable and just arrangement, and a breach of it certainly constitutes a cause of action. Then the question arises how this arrangement can be enforced. These societies are creatures of the statutes, and they can only be liable in actions against their officers by express enactment. No argument has to-day been directed to the question whether this contract was *ultra vires*; but assuming the defendants to have power to enter into such a contract, it has been contended that it cannot be enforced by action against the secretaries or officers of the defendant's society. Sect. 19 of 18 & 19 Vict. c. 63, says trustees may bring or defend actions touching or concerning the property, right, or claim to property of their society; and by sect. 7 of the Amendment Act, 21 & 22 Vict. c. 101, in any proceeding under the recited Act (that is the first mentioned Act) against a society, it shall be sufficient to make the

secretary or the officer at the time of the plaint or complaint being entered or made the defendant in such proceeding. Is this, then, such a proceeding as sect. 7 of the later Act alludes to? I think it is an action concerning a claim to property of the society. Persons authorised to bring and resist actions must have power also to compromise them, and an action to enforce a compromise is an action concerning the subject of the compromised action. I think this is a proceeding under the earlier Act, and the action therefore lies against the secretary. Our judgment must be for the plaintiff on both points taken by the defendants.

LUSH, J.—I am of the same opinion. There are several contracts which it is competent for these societies to make; one, for example, is to employ a solicitor. The power to bring and defend actions includes the power to compromise, and the object of the statute must surely have been to do away in all cases with the inconvenience of making all the members parties to an action. I agree that sect. 7 of the later Act must be read with sect. 19 of the Act it amends, and that the defendants were in this case rightly sued.

FIELD, J.—I also think our judgment must be for the plaintiff. This is an action which will lie, and the right person to be sued in the present case is now the secretary under the Amendment Act.

Judgment for plaintiff.

Solicitor for the plaintiff, G. J. Brownlow.

Solicitor for the defendant, A. F. Vulliamy.

Saturday, May 6.

LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) v. CHURCHWARDENS OF IRTHLINGBOROUGH (resps.) (a)

Rateable value of railway—Competing lines—Enhanced value by traffic on other part of line.

Part of the appellants' line of railway passes through a district where there are two other competing lines for the carriage of passengers and goods. The appellants' gross earnings in the respondents' parish, a part of this district, were more than absorbed by the expenses chargeable for the working thereof, plus the deduction allowed by the Parochial Assessment Act; but on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system, the rateable value of the appellants' line in the parish was equal to 45 per cent. of the gross receipts.

Held, upon a case reserved by quarter sessions, that the appellants were rightly rated at this amount.

THIS was an appeal against a rate for the relief of the poor made by the churchwardens and overseers of the parish of Irthlingborough, allowed according to law on the 9th Oct. 1874, whereby the appellants were rated for their railway in the said parish on the gross estimated rental of 1278*l.*, and of the rateable value of 1150*l.* The appeal was heard at the Epiphany Quarter Sessions, 1875, for the county of Northampton, when that court confirmed the rate, subject to the opinion of the Court of Queen's Bench on the following case:

The said parish of Irthlingborough is situate on the Blisworth and Peterborough line of the appellants' system, and the line passes through the said parish for a distance of three miles, four furlongs, and 205 yards, or thereabouts.

(a) Reported by W. M. McKELLAR, Esq., Barrister-at-Law.

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The said line was made by the London and Birmingham Railway Company, under Parliamentary powers obtained in the year 1843, and formed part of the undertaking of that company.

In 1846 an Act (9 & 10 Vict. c. 204), was passed to consolidate the London and Birmingham Railway Company (including the said line mentioned), the Grand Junction Railway Company, and the Manchester and Birmingham Railway Company, into one undertaking.

No separate account has been kept as to the said line, and it is in all respects dealt with as part of the company's system.

Since the construction of the said Blisworth and Peterborough line, the country through which it passes has been also occupied by the Midland Railway Company and the Great Northern Railway Company, and the said companies are in fact competing lines for the carriage of passengers and all kind of goods in this district with the London and North-Western Railway Company. The Great Northern Railway Company's main line intersects the Blisworth and Peterborough Railway at Peterborough, and the Midland Railway Company's main line intersects the Blisworth and Peterborough Railway at Wellingborough.

Upon the hearing of the appeal the court found: First, that if the appellants were willing to let the line, it might reasonably be expected to fetch a yearly rent equal to 45 per cent. of the gross receipts, the tenant paying all expenses of working and maintenance, as is customary in the cases of "working agreements" between railway companies. Secondly, that the said Blisworth and Peterborough line was constructed at a cost of 17,000*l.* per mile. Thirdly, that the gross earnings of the Blisworth and Peterborough line within the respondents' parish at the time of the making of the rate, the subject of this appeal, were more than absorbed by the expenses chargeable against the said line for the working thereof, *plus* the deduction allowed by the Parochial Assessment Act. But that if neither of the above contentions is right, the rateable value of the line within the respondents' parish as land is to be taken at 40*l.* per mile, by agreement between the parties.

The respondents contended: First, that the rateable value of the line in the respondents' parish is 45 per cent. of the gross earnings in accordance with the first finding of the court. Secondly, that where, as in this case, there are no direct rateable profits, the said line is liable to be rated upon its structural cost of 17,000*l.* per mile. Thirdly, that when, as in this case, there are no direct rateable profits, the said line is liable to be rated on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system.

The court decided in favour of the respondents upon their first contention, and held that the rateable value of the line in the respondents' parish was 45 per cent. of the gross earnings of the line in the said parish.

The question for the opinion of the court is: Whether either of the three contentions of the respondents is right. If the court shall be of opinion that either of the above contentions is right, then the rate is to stand, and judgment upon this case is to be entered for the respondents. But, if the said court shall be of opinion that no one of the said contentions is right, then

the rateable value of the line in the respondents' parish is to be taken at 40*l.* per mile, and the rate is to be reduced accordingly to the sum of 144*l.* 15*s.*, and judgment upon this case is to be entered for the appellants.

Staveley Hill, Q.C. (with him *Erwins Bennett*), for the appellants.—The conclusion of the quarter sessions is at variance with all the principles of parochial rating. [BLACKBURN, J.—I suppose the respondents' second contention will scarcely be supported; but reading the first and third together, what objection can be made to them?] The respondents bring into the calculation of rates for this parish earnings of the company which have been made elsewhere. [BLACKBURN, J.—Surely we have decided this very point concerning this railway.] The case of *Reg. v. London and North-Western Railway Company* (L. Rep. 9 Q. B. 134), merely determined that the existence of competing lines might be taken as an element in ascertaining the rateable value of a line of railway. We admit this, but we say that when there are no rateable profits in a parish the profits outside cannot be made the basis of the rate. The judgment in that case goes no further than this: if the occupiers of a line are not getting the most they can out of it, the rating authorities may take into consideration the larger amount other persons might get out of it. In *Reg. v. Llantrissant* (L. Rep. 4 Q. B. 354), it was held that a railway company was to be rated in a parish through which their branch passed only in respect of the profits which the branch earned within the parish; and that the value of the traffic contributed by the branch to the main line ought not to be taken into consideration. Mellor, J., in his judgment at p. 357, said: "It appears to me to be immaterial whether the line be a branch or a main line. The true principle on which that ought to be made is by ascertaining what is the rateable value in each particular parish through which the railway passes, and that is to be based on what a hypothetical tenant would give for the line in that particular parish." This, too, was the effect of the *Haughley* case (L. Rep. 1 Q. B. 666), which was cited and followed in *Reg. v. Llantrissant*.

Maule, Q.C. and *Sills*, appeared for the respondents, but were not heard.

BLACKBURN, J.—I do not think we can say upon the facts, as we find them in this badly stated case, that the quarter sessions have been wrong. In the previous appeal concerning this line, we determined that in consequence of the competition of other lines, one element for fixing the rateable value was the enhanced traffic which the tenant would enjoy elsewhere. Now the facts here are found according to the law as we there laid it down, and we can only say that the application to such a case as this is what we intended. There is still left the apportionment amongst the several parishes, about which our opinion is not asked. The second finding of the quarter sessions is, that this line was constructed at a cost of 17,000*l.* per mile; this, however, is quite irrelevant to the question of rating, which depends only upon what a hypothetical tenant would pay by the year. Then the quarter sessions find, thirdly, that the gross earnings of the line in this parish were less than the expenses; this may be right or wrong as a matter of fact, but no question is raised upon it for our consideration. In my opinion, the third contention of the respondents, taken with the first

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finding of the quarter sessions, is perfectly right. When there are no direct rateable profits, the line in a parish is liable to be rated on the basis of receipts derived from traffic on the other parts of the line; and this is the test of the hypothetical tenant's rent. The respondents' second contention is wrong, but the quarter sessions were right in finding upon their first and third contention that the appellants were properly rated for their occupation of land in the respondent parish in proportion to the profits calculated upon the whole Blisworth and Peterborough line. This was the principle we established in *Reg. v. London and North-Western Railway Company* (L. Rep. 9 Q. B. 134), and although this may be a stronger case, the principle has been here rightly applied.

QUAIN, J.—I am of the same opinion. The quarter sessions find that the line, if let, might reasonably be expected to fetch a yearly rent equal to 45 per cent. of the gross receipts. There is some difficulty in understanding the exact question left for our consideration, but I take it that this 45 per cent. is arrived at by a calculation of the value of the piece of line in this parish as enhanced by the more valuable traffic in other parishes. I agree with my brother Blackburn that the quarter sessions were right in adopting that calculation.

BLACKBURN, J.—I wish to guard our decision in this case from being misunderstood. We are not deciding how this enhancement of traffic should be apportioned between various parishes. We are not asked for any opinion on that point.

Judgment for respondents.

Solicitor for appellants, *R. F. Roberts.*

Solicitors for respondents, *Sharman and Jackson, Wellingborough.*

Saturday, May 13.

ST. LUKE'S VESTRY v. NORTH METROPOLITAN TRAMWAYS COMPANY (LIMITED).

Tramway repairs—Level—Repair of road—Superintendence of road authority—33 & 34 Vict. c. 78.

The plaintiffs, as the road authority under the Tramways Act 1870, claimed against the defendants the expenses of superintending their opening and breaking up of roads under sect. 26, for the maintenance and renewal of their tramway.

Held, that so far as [the defendants merely raised the sleepers and rails to the level of the road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining and keeping the road in good condition and repair under sect. 28, and were not liable to the superintendence of the road authority under sect. 26.]

THIS was an action brought to recover the amount of an award, and moneys alleged to be recoverable under the Tramways Act 1870, in respect of the superintendence by the plaintiffs of works in connection with the defendant's tramways. And upon demurrer in the action coming on for argument, it was, by consent of all parties, ordered by the court that the facts should be stated for the opinion of the court in the form of the following case:

1. The plaintiffs are the road authority for the

parish of St. Luke, Middlesex, in the county of Middlesex.

2. The defendants were incorporated as a tramway company by the North Metropolitan Tramways Act 1869, and are subject to the regulations of part 2 of the Tramways Act 1870. A portion of their tramway made under the powers conferred on them by the North Metropolitan Tramways Companies Act 1870, and completed before Midsummer 1872, runs through the parish of St. Luke, Middlesex.

3. The mode in which the tramway is constructed and laid is as follows: The rails are laid on longitudinal timber sleepers, about 16ft. to 26ft. in length, connected together at intervals by transverse tyerods of iron. The sleepers rest in and upon a bed of concrete about 6in., in thickness, extending under the whole distance between the sleepers, and for a considerable distance on each side. Upon this concrete also rest, both between and on each side of the rails and sleepers, granite paving stones of about the same thickness as the concrete, and which also form the surface of the roadway for general traffic, the upper surface of the stones being level with the surface of the rails.

4. A tramway constructed as mentioned in the last preceding paragraph could be used for a few days, but would not be permanently stable or durable without there being for the whole distance between the sleepers and for a distance of about 18in. on each side either granite paving stones or some other solid packing.

5. During the year commencing at midsummer 1872, and ending at midsummer 1873, the defendants on some occasions lifted and relaid paving stones between and within 18in. on either side of their rails in the plaintiff's parish, sometimes one or two, sometimes more, sometimes as many as a dozen stones at a time, in order, by slightly lifting the sleepers with a lever and thrusting ballast or other material under it, to raise to a proper level a sleeper which had sunk, and so brought the surface of the rail below the level of the stones, or for some other purpose directly connected with the sleepers and rails themselves.

6. On many occasions during the same year the defendants in like manner lifted and relaid stones, because the stones had sunk below the level of the rails, and it was necessary to raise them by placing ballast or other material underneath them.

7. Where stones have sunk as mentioned in the last preceding paragraph, it would be a prudent thing for the security of the sleepers and rails, to make good the defects, because if such defect were to spread and become extensive, it might in time endanger the stability of the sleepers and rails; but the sinking of a few stones would cause no immediate danger to them. For the safety of the general traffic over the road it is necessary that any such sinking of the stones below the level of the rails, and any sinking of the rails below the level of the stones, should be immediately made good. It would not be possible consistently with the safety of the general traffic to wait for the expiration of a seven days' notice before doing so, and a gang of men is constantly, or almost constantly, employed by the defendants for this purpose up and down their tramway lines, under the superintendence of the defendants' engineers.

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8. Unless the matters mentioned in paragraphs 5 and 6 amount to opening or breaking up of the road there was no opening or breaking up of any road by the defendants in the parish of St. Luke during the year from midsummer 1872 to midsummer 1873.

9. During that year Mr. Joseph Niblett was surveyor to the parish of St. Luke, and as such he was paid a salary by the plaintiffs; and it was his duty as such surveyor, among other things, to superintend, and he did superintend all the roads in the parish under the charge of the plaintiffs. Mr. Niblett, was frequently up and down the line of the defendants' tramway, and from time to time inspected the condition of the tramway and the road. He from time to time called the attention of the defendants to any defects which he thought existed in the tramway or the paving for which the defendants were responsible, and called upon them to make them good; and he from time to time inspected and examined the work being done by the defendants as mentioned in paragraphs 5 and 6.

10. No notice was ever given by the defendants to Mr. Niblett or to any other person on behalf of the plaintiffs of their intention to do any of the things mentioned in paragraphs 5 and 6, nor was any such notice ever demanded or any complaint made of its not being or having been given, nor, except as mentioned in the last preceding paragraph, was any notice ever given to the defendants that Mr. Niblett or any person on the part of the plaintiffs, was superintending or claimed to superintend any work done by the defendants.

11. The plaintiffs claimed from the defendants the sum of 25*l.*, alleging that they were entitled to recover that sum as the reasonable expense of superintendence for the year from midsummer 1872 to midsummer 1873, under part 2 of the Tramways Act 1870. This sum of 25*l.* was paid by the plaintiffs to Mr. Niblett before such claim was so made made upon the defendants.

12. The defendants declined to pay the sum so claimed, and thereupon the plaintiffs, alleging that a difference had arisen between them and the defendants with reference to the said claim within the meaning of the 33rd section of the Tramways Act 1870, applied to the Board of Trade to appoint a referee to settle such matter in difference; and the Board of Trade appointed Mr. Gabriel Prior Goldney, barrister-at-law, as such referee.

13. The defendants protested to the Board of Trade against the appointment of the said referee, and against his proceeding to hear or determine the matters in difference. The defendants in like manner protested to the said referee against his so proceeding, and all the proceedings before him were subject to such protest.

14. The facts proved before the said referee were those hereinafter stated. And it was contended on the part of the plaintiffs, and denied on the part of the defendants, that the plaintiffs were entitled to recover from the defendants a sum of money as the reasonable expense of superintending the opening and breaking up of roads by the defendants within the meaning of the 26th section of the Tramways Act 1870.

15. The said referee made his award on the 14th July 1874, by which he awarded to the plaintiffs the sum of 15*l.* and the costs of the reference.

16. The court may draw inferences of fact.

17. It is agreed that the amount of costs, if any, recoverable under the said award, and the amount, if any, recoverable in respect of superintendence apart from that award, shall be ascertained, if necessary, by the arbitrator by whom this case is stated.

The questions for the opinion of the court are: First, whether the plaintiffs are entitled to recover upon the said award; secondly, whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in the fifth paragraph; and, thirdly, whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in the sixth paragraph.

If the court shall be of opinion in favour of the plaintiffs upon the first question, judgment is to be entered for the plaintiffs for 15*l.*, and a sum for costs of the said reference to be ascertained as hereinbefore proved, and costs of suit. If the court shall be of opinion against the plaintiffs upon the first question, and shall be of opinion in favour of the plaintiffs upon the second or third question, judgment is to be entered for the plaintiffs for a sum to be ascertained in the manner hereinbefore provided. It is agreed that in such case the costs of this action, so far as relates to the last-mentioned claims, shall be in the discretion of the arbitrator by whom this case is stated. If the court shall be of opinion in favour of the defendants upon all the questions, judgment is to be entered for the defendants for their costs.

Finlay (with him *Day*, Q.C.), argued for the plaintiffs.—The three questions in the case may be considered as two only: First, whether the award is final; secondly, whether any of the matters in respect of which the plaintiffs' superintendence is charged can be subject to the provisions of the Tramways Act 1870 (33 & 34 Vict. c. 78). [*BLACKBURN, J.*—You had better first satisfy us that the Act applies to these matters.] Paragraph 3 shows that the granite paving stones and the concrete, together with the rails and sleepers, all form parts of the tramway. By sect. 25, "Every tramway shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road, and shall not be opened for public traffic until the same has been inspected and certified to be fit for such traffic, in the prescribed manner." By sect. 26, "The promoters from time to time, for the purpose of making, forming, laying down, maintaining, and renewing any tramway duly authorised, or any part or parts thereof respectively, may open and break up any road, subject to the following regulations: (1) They shall give to the road authority notice of their intention, specifying the time at which they will begin to do so, and the portion of road proposed to be opened or broken up, such notice to be given seven days at least before the commencement of the work. (2) They shall not open or break up or alter the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority, unless that authority refuses or neglects to give such superintendence at the time specified in the notice, or discontinues the same during the work. (3) They shall pay all reasonable expenses to which the road authority is put on account of such superintendence. (4) They shall not, without the consent of the road authority, open or break up at any one time, a greater length than 100 yards

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of any road which does not exceed a quarter of a mile in length, and in case of any road exceeding a quarter of a mile in length, the promoters shall leave an interval of at least a quarter of a mile between any two places at which they may open or break up the road, and they shall not open or break up at any such place a greater length than 100 yards." It is for the superintendence charged under the 3rd sub-section that this award was made and this action brought.

Beresford (with him *Benjamin*, Q.C.), for the defendants.—At the rate charged for this superintendence, it would cost the defendants about 750*l.* a year if they were liable under the circumstances stated in paragraphs 5 and 6. It is clear from sub-sect. 1 of sect. 26, that if the contention of the plaintiffs be correct, the defendants would be subject to indictment for every stone lifted and relaid without seven days' notice to the road authority. But it is not only by reason of its inconvenience that such an interpretation of the Act is improbable, it is at least consistent with all its provisions to limit the superintendence of the road authority to those occasions of opening and breaking up the road which interfere with the general traffic. The 4th sub-section of sect. 26, by requiring the consent of the road authority to the opening or breaking up of a greater length than 100 yards, evidently contemplates the independent action of the company in repairs of a smaller description. The provisions of sect. 27 are not applicable to such matters as those described in paragraphs 5 and 6; the words of the section are, "When the promoters have opened or broken up any portion of any road, they shall be under the following further obligations, namely: (1) They shall with all convenient speed, and in all cases, within four weeks at the most (unless the road authority otherwise consents in writing), complete the work on account of which they opened or broke up the same, and (subject to the formation, maintenance, or renewal of the tramway) fill in the ground and make good the surface, and to the satisfaction of the road authority restore the portion of the road to as good condition as that in which it was before it was opened or broken up, and clear away all surplus paving or metalling material or rubbish occasioned thereby. (2) They shall in the meantime cause the place where the road is opened or broken up to be fenced or watched, and to be properly lighted at night. (3) They shall bear or pay all reasonable expenses of the repairs of the road for six months after the same is restored, as far as those expenses are increased by the opening or breaking up." Sect. 28, however, which omits any mention of superintendence by the road authority, and, therefore, intends that no charge shall be made for it in respect of the matters therein provided for, deals with all the proceedings of the defendants described in this case: "The promoters shall, at their own expense, at all times, maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway, and (where two tramways are laid by the same promoters in any road at a distance of not more than 4 feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends 18 inches beyond the rails of and on each

side of any such tramway. [BLACKBURN, J.—What do you say to the plaintiffs' contention that this award is final under sect. 33?] That section is only in respect of any tramway or work, "or with respect to any other subject or thing regulated by or comprised in this Act;" and the appointment of the referee is with respect to the claim of the plaintiffs for one year's superintendence by their surveyor "of the taking up and laying down the tramways of the said company;" if, therefore, these are not matters for which the plaintiffs have any claim, the award is not valid.

Finlay, in reply.—Sect. 28 provides for the repair of the road between the rails and 18 in. beyond. Paragraph 5 does not relate to any such repair. The defendants' object in doing what is there described was to raise the sleepers to the level of the road, "or for some other purpose directly connected with the sleepers and rails themselves. Sect. 28 excludes from its application the rails and the sleepers, which form part of the tramway. [BLACKBURN, J.—I do not agree with you on that point, although language more definitely including them might certainly have been used.] Sect. 25 distinguishes between the rail and the road, and provides that they shall be on the same level. I admit that the matters described in paragraph 6 are within the application of sect. 28, but I contend that the whole of that section is governed by sects. 26 and 27. [BLACKBURN, J.—What is the meaning of the last line of paragraph 5, "some other purpose directly connected with the sleepers and the rails themselves?"] That is not explained, but if the award can be justified as to any part of the plaintiffs' claim, the amount fixed by it must be final.

BLACKBURN, J.—I think we must say that the plaintiffs cannot recover on this award, but they may possibly have a valid claim against the defendants for superintendence of some of the matters mentioned in paragraph 5 of the case. First, as to the award being final if any part of the amount determined by it be within the jurisdiction of the referee. We must take it upon the statement of this case that the amount awarded relates partly to the 5th paragraph and partly to the 6th; and unless all the matters described in those two paragraphs are subject to the provisions of the 26th section of the Tramways Act 1870, the award cannot in our opinion be binding on the defendants. We have therefore next to consider how the provisions of that Act of Parliament are to be applied to the repairs described in the case. Sect. 25 requires the uppermost surface of the rail to be on a level with the surface of the road, and I can only construe that to mean that the road must be so kept in repair as to preserve that level. Sect. 26 relates, not to any repair of the road, but to the maintaining and renewing of the tramway; for this purpose the company may open and break up any road, subject to regulations which create the plaintiffs' claim in this case. Among the regulations there is one requiring seven days' notice to the road authority before the commencement of the work; another forbids the opening, breaking up, or altering the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority; whilst another directs the expenses of such superintendence to be paid by the company. Now when the defendants or any tramway company do anything treated of by this section, I think the

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road authority is entitled to be paid for superintendence, even if the company should find it necessary or expedient, as is stated in paragraph 7, to make the repairs without seven days' notice. Afterwards, the 28th section provides for the repair of the road whereon a tramway is laid, and I have already said that must include the level of rails. This section requires no superintendence by the road authority. I am of opinion that no superintendence can be charged nor recovered for repairs done by the defendants which come only under this section. The matters mentioned in paragraph 6 of the case are clearly within this section; they are merely the raising of stones forming part of the road to the level of the rails. This indeed is admitted by the plaintiffs, the contention on this paragraph being that sect. 28 is governed by sect. 26. Paragraph 5 raises a more difficult question; so far as the acts described in that paragraph relate to the mere preservation of the level of the surface of the rail and the surface of the road, I think they were repairs of the road within sect. 28, and did not justify the superintendence of the road authority. But it is found that these acts were done either for this purpose "or for some other purpose directly connected with the sleepers and rails themselves." What this alternative purpose may be is I think important, and the case must be sent back to the arbitrator who stated it in order that he may determine how much of what is described in the 5th paragraph was done by the defendants "for the purpose of making, forming, laying down, maintaining, and renewing" the tramway as provided for in sect. 26. The plaintiffs may or may not be entitled to recover a part of the amount charged by them for superintendence in accordance with these principles which we lay down; and the arbitrator can fix the amount, if any, to which they are entitled.

QUAIN, J.—I am entirely of the same opinion. I think the whole of the matters in paragraph 6, and also, with the exception of those done for the other purpose connected with the sleepers and rails which is not sufficiently described, the matters in paragraph 5, are within sect. 28 of the Act, and need not be superintended by the plaintiffs.

Per CURIAM.—The first and third questions answered in the negative. Case sent back to arbitrator to ascertain if under second question anything is due for superintendence of lifting sleepers for some other purpose directly connected with the sleepers and rails themselves.

Solicitor for the plaintiffs, *W. W. Hayne*.

Solicitors for the defendants, *Tahourdins and Hargreaves*.

Saturday, May 20.

ROGERS (app.) v. ST. GERMAN'S UNION (resps.) (a).

Poor rate—Right of sporting—Severed from occupation—Reservation of right—37 & 38 Vict., c. 54, ss. 2 and 6.

The appellant was owner of a tenement with dwelling house and other buildings, containing about 19 acres, which he had leased to a person occupying the same, excepting plantations and all timber, and all mines, &c., "and also excepting all manner of game, hares,

rabbite, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises at all times during the said term."

Held, upon a case stated by quarter sessions, that this lease reserved to the appellant a right of sporting which was severed from the occupation of the land, and therefore rateable within the Rating Act 1874 (37 & 38 Vict., c. 54), ss. 2 and 6.

At the Michaelmas Quarter Sessions for the county of Cornwall, held at Bodmin, on the 19th Oct. 1875, an appeal by the appellant against a certain poor rate or assessment made or appearing to be made by the assessment committee of the St. Germans Union and the churchwardens and overseers of the poor of the parish of St. Stevens, by Saltash, in the county of Cornwall, bearing date the 12th June 1875, in and by which the game and sporting rights on certain hereditaments at Moditon Mill Tenement, in the said parish of St. Stephens by Saltash, in the occupation of Wm. Walters, and of which the said Henry Rogers is owner, were rated and assessed, was heard, and judgment thereon was given for the appellant, subject to the opinion of this court upon the following case:

■ The said Henry Rogers, the appellant, is the owner of a certain tenement, called the Moditon, otherwise Mutton Mill, in the parish of St. Stephen, by Saltash, within the said union, which tenement is occupied by one Wm. Walters as lessee thereof, under an indenture of lease, under seal granted to him by the appellant, and duly executed by both the lessor and lessee, and dated 15th Aug. 1864, a copy of the lease accompanies and forms part of this case.

So much of the said lease as is material to this case is here set forth:

He, the said Henry Rogers, doth grant, demise, and lease unto the said Wm. Walters all that tenement, together with the dwelling house and other buildings thereon, commonly called or known by the name of Mutton Mill, containing in the whole about 19a. 1r. 36p., situate in the parishes of St. Stephens by Saltash and Botusfleming, in the said county of Cornwall, and now in the occupation of the said Wm. Walters, excepting unto the said Henry Rogers, his heirs and assigns, the plantation recently made by the said Henry Rogers on part of the said tenement, and all timber and other trees growing or to grow on the said premises, with liberty to fell, root, work up, or bark the same respectively at will. And all mines, minerals, and quarries, clay, slate, stone, and marble, on or upon the said premises, with liberty to search for, open, and work the same respectively; and also liberty to plant young trees in the waste places, in the roads, or any of the hedges of the said premises, and to fence out and preserve the same without making any satisfaction or compensation for the same. And also liberty of destroying and altering any roads and paths, or making any new ones, or carrying or altering streams of water on, over, or through the said premises, without making any compensation for the same; and also excepting all manner of game, hares, rabbite, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises at all times during the said term.

The entry in the rate book and valuation list of the parish relating to the said tenement stands as follows:

No. 156. Occupier, Wm. Walters; owner, Hy. Rogers; description, land, game and sporting rights; name of property, Mutton Tenement; estimated extent, 15a. 1r. 17p.; gross rental, 27l.; rateable value, 25l.

No. 157. Occupier, Wm. Walters; owner, Hy. Rogers; description, land, game and sporting right; name of property, Mutton Tenement; gross rental, 7s. 6d.; rateable value, 7s. 6d.

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The following were the grounds of appeal available to the said appellant:

Because there is no game on the said farm or tenement called Moditon Mill, and the sporting rights thereon, if any, are of no value. Because of their being no game on the said farm or tenement, no injury is done to the crops thereon, and the said farm is let at its full value. Because of there being no value in the said sporting rights, there cannot in justice be any rate levied on what has no value.

At the hearing of the appeal the court ordered that the appeal be allowed, the court being of opinion that the said game and sporting rights were not severed from the occupation of the land, and that the said game and sporting rights had not been exclusively reserved by the said Henry Rogers in the lease granted by him of the said tenement to William Walters, the occupier thereof. And the court further ordered, on the application of the respondents, that they be at liberty to state a special case for the opinion of the court above as to the validity of the said rate, so far as relates to the aforesaid rating, on the point that the game and sporting rights are not severed from the occupation of the land, and that the said game and sporting rights have not been exclusively reserved by the appellant in the said lease granted by him.

The questions for the court are whether upon the true construction of the said lease, and the clause of the same set forth, the said game and sporting rights are severed from the occupation of the land, and whether the said game and sporting rights have been exclusively reserved by the said Henry Rogers in the lease granted by him of the said tenement to the said William Walters.

If the court should be of opinion that the said game and sporting rights are severed from the occupation of the land, and exclusively reserved by the appellant, the order of the court of quarter sessions is to be quashed, and the valuation list and rate are to stand, but if the court should be of opinion that the said game and sporting rights are not severed from the occupation of the land or exclusively reserved by the said lease, the order of the court is to be confirmed, and the valuation list and rate to be amended by striking out the said rate or assessment so appealed against.

Cole, Q.C. and *Charles* showed cause for the appellant against the rule *nisi* to quash the decision of the quarter sessions.—Amongst the exemptions from rating abolished by the Rating Act 1874 (37 & 38 Vict. c. 54) sect. 3, appear (sub-sect. 2) "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." By sect. 6 "(1) where any right of fowling or of shooting or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase, and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise the

fact and amount of such increase. (2) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. (3) Subject to the foregoing provisions of this section the owner of any right of sporting when severed from the occupation of the land, may be rated as the occupier thereof. (4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right." Even if this right of sporting be severed from the occupation, the appellant, who is the owner, ought not to be separately rated. [MELLOR, J.—That question is not reserved for our consideration, indeed no question under the Rating Act 1874 seems to be raised at all.] But in no case can the appellant, under the circumstances stated, be rated as occupier of the sporting rights. This appears on the face of the special case, and an amendment of the rate would not cure its invalidity. [MELLOR, J.—They seem to have confused sub-sections 1 and 3, but the appellant may have had some technical difficulty in raising a question on that point, at all events it is not reserved for us.] But the case should be sent back to be re-stated, as to whether these rights are severed from the occupation of the land. It has been held in *Wickham v. Hawker* (7 M. & W. 63) that such words as those of the lease in this case do not create a reservation properly so called, but a new grant by the lessee of rights of sporting to the lessor. That is consistent with a joint right continuing in the lessee, and unless the appellant have the exclusive right it cannot be said to be severed from the occupation of the land, within the meaning of the 3rd section of the Rating Act. Parke, B. in delivering the judgment of the court at page 76, cites *Doe and Douglas v. Lock* (2 A. & E. 705), in which Lord Denman says at p. 743 "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law: it is only a privilege or right granted to the lessor, though words of reservation and exception are used." In this manner sporting rights are distinguished from all other exceptions or reservations in a grant. To be severed from the occupation under the Rating Act, the word "exclusive" should be applied in the lease to the right reserved. [QUAIN, J.—That word was not considered necessary for the reservation of exclusive rights in *Graham v. Ewart* (11 Ex. 326.) The two deeds in that case reserve and grant respectively the liberty and privilege of sporting in very wide terms; Martin, B., in his judgment at p. 347, says "in the conveyance of it (the Woodside allotment) by the father of the plaintiff, the right of shooting, &c., not a right of shooting, &c., is reserved to him and his heirs, and in the conveyance by John Ewart the same right is expressly granted to them in the largest and most express terms, and considering the covenant in regard to trespassers we think it was the intention of the parties, as shown by these deeds, to rest in the plaintiff and his father, and their heirs the exclusive right of shooting," &c. No such intention is to be gleaned from the words of this lease, "and also excepting all manner of game, hares, rabbits, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises during

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the said term;" they merely reserve for the lessor the right to kill all manner of game in any part of the premises jointly with the lessee.

Lopes, Q.C. and Francis, for the respondents.—The justices at quarter sessions have stated the grounds of appeal upon which only their decision is to be discussed, and have clearly manifested their intention to raise no other point than that mentioned in the question reserved. No doubt the form of the rate is not accurate, and in future the 1st sub-section of section 6 will be more strictly adhered to, but that does not affect the question for the court. The quarter sessions considered that, to be rated under this Act, the sporting rights must belong exclusively to some person other than the occupier of the land; and they also considered that the appellant's sporting rights were not exclusively reserved by this lease. On both points they were wrong.

MELLOB, J.—I do not think any good or useful result would be obtained by our sending this case back for the quarter sessions to consider whether they desire to alter the question reserved for us. They seem to have intentionally excluded from their reservation every point except the severance of these sporting rights; and upon that we can only say that by this lease the rights of sporting are severed from the occupation of the land, within the meaning of sections 2 and 6 of the Rating Act 1874. These rights are no doubt reserved only by way of regrant from the lessee, and we must construe them as if granted in a separate deed by the lessee to the lessor. This was so held in the case of *Graham v. Ewart*, but at the same time words thus reserving the rights were held to deprive the lessee of any joint enjoyment of those rights. I think the words here used are sufficient to show a similar intention in the parties, and we must hold that the appellant enjoyed the exclusive right of sporting over this land. He ought clearly to have been dealt with in the rate under sub-sect. 1 of the 6th section, and not under sub-sect. 3; but whether that matter was discussed or not before the quarter sessions, we have nothing to do with it; and the rule to quash the decision of the quarter sessions must be absolute.

QUAIN, J.—I am entirely of the same opinion. I think there can be no doubt that this lease severed the sporting rights from the occupation of this farm; and as I understand its effect it gives the appellant the exclusive right to kill all manner of game upon the premises occupied by his lessee. When we consider the small extent of the farm, and the form of words used in the lease, we can only conclude that it was the intention of both landlord and tenant that the landlord alone should have the right to shoot. In *Graham v. Ewart* the words of the reservation are stronger in favour of the exclusive rights of the lessor, but it is a very strong authority as to the present case.

Judgment for respondents,

Solicitors for appellant, *Gregory, Rowcliffes and Co.*, for *G. A. Jenkins*, Penryn.

Solicitors for respondents, *N. B. nnett*, for *F. W. P. Cleverton*, Saltash.

May 20 and 23.

LEGGOTT v. GREAT NORTHERN RAILWAY COMPANY. (a)

Action by executor or administrator—Damage to estate during life of deceased—Issues determined in action for personal injury—Estoppel.

Plaintiff as administratrix to the estate of her deceased husband sued for damage to the estate which occurred during her husband's life, in consequence of his personal injuries caused by the defendants' negligence. Defendants denied the personal injuries and the negligence, and also pleaded that plaintiff had recovered, in an action under 9 & 10 Vict. c. 93, a verdict against the defendants. The plaintiff replied that the defendants were estopped from denying the injuries and negligence, as they were issues determined in the said action.

Held, upon cross demurrers to the defence and reply, that the previous action was no answer to this action, and that the plaintiff sued in different rights in the two actions, and therefore no estoppel by record arose between the parties.

Bradshaw v. Lancashire and Yorkshire Railway Company (L. Rep. 10 Q. P. 189) questioned.

THE following was the statement of claim:

1. The plaintiff is the administratrix of the personal estate and effects of Richard Thomas Leggott, her husband, who died intestate on the 3rd Aug. 1874.

2. The defendants are carriers of passengers between certain stations called King's Cross and Finchley. King's Cross station is occupied and managed by the defendants.

3. At the time of the circumstances hereinafter mentioned the deceased was carrying on the business of a potatoe salesman at the Great Northern Railway potatoe market, and he had taken a season ticket from the defendants, entitling him to travel as a passenger on their line between the above mentioned stations.

4. On the 20th March 1874, between four and five o'clock in the afternoon, the deceased was received by the defendants at their said station, at King's Cross, as a passenger, to be safely and securely conveyed by them from thence to Finchley, in a train that was shortly expected to start.

5. While lawfully waiting on the platform intended for passengers who wished to travel by that train, a certain barrow or trolley loaded with newspapers was by the negligence of the defendants violently pushed against him. He was knocked down and seriously injured in the head and leg and otherwise.

6. In consequence of these injuries he was entirely unable to attend to his business from that day till the day of his death; he incurred great expense in providing other persons to manage his business; he lost a large portion of the profits that he would otherwise have made, and the goodwill of the business, owing to his having been unable to attend to it, was rendered much less valuable. He also incurred large expenses in obtaining the necessary medical attendance, and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

The plaintiff claims 1000*l.* damages for injury

(a) Reported by *M. W. McKELLAN, Esq., Barrister-at-Law.*

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to the personal estate and effects of the said Richard Thomas Leggott.

The following was the statement of defence :

1. The defendants deny that the deceased was received by them as a passenger upon the terms and for the purposes alleged by the plaintiff in the 4th paragraph of the statement of claim.

2. The defendants deny that a barrow or trolley was by their negligence violently or otherwise pushed against the deceased, or that by any negligence or default on their part the deceased was knocked down and injured as in the 5th paragraph alleged.

3. The defendants deny that by injuries so occasioned as alleged in the said 5th paragraph, the deceased was prevented from attending to his business until the day of his death, and that in consequence thereof he incurred expenses and lost profits, and that the goodwill of his business was thereby rendered less valuable, and that his personal estate and effects were diminished as in the 6th paragraph alleged.

4. The defendants say that before the said 20th March 1874, and to the day of his death the deceased was suffering from disease of the ear, and that his detention from business, and loss of profits, expenses, and damages, if any, were occasioned by such disease, and not otherwise, and that for such disease and illness and alleged loss and damage the defendants are in no way responsible.

5. The defendants further say with respect to the several matters alleged and contained in the plaintiff's statement of complaint that heretofore and after the death of the said Richard Thomas Leggott, the plaintiff as administratrix of his personal estate and effects for the benefit of herself, as the wife, and of Annie Leggott, Alice Leggott and Ada Leggott, the children of the said Richard Thomas Leggott, sued the defendants in the Queen's Bench Division of the High Court of Justice at Westminster under the statute in such case made and provided for that the defendants were in possession of a certain railway station called King's Cross, and were carriers of passengers from thence to Finchley, and the said Richard Thomas Leggott in his lifetime became, and was received by the defendants as a passenger to be by them as such carriers safely and securely carried upon such railway from the said King's Cross station to Finchley for reward then paid by him to the defendants. Yet the defendants did not securely carry the said Richard Thomas Leggott upon the said railway on the said journey, but so negligently and unskillfully conducted themselves in and about managing the said station at King's Cross, and the platform thereof, that after the said Richard Thomas Leggott had been so received by them as a passenger, and while he was lawfully waiting upon the said platform to be carried upon the said journey, a certain barrow or trolley was by the negligence of the defendants violently pushed against him, and he was knocked down and injured in his head and leg and otherwise; and by reason of the injuries thereby occasioned to him, the said Richard Thomas Leggott, afterwards, and within twelve calendar months next before the commencement of such action, died; and such proceedings were had upon such action that a verdict was taken by consent, and afterwards to wit, upon the 25th Nov. 1875 judgment of the said court was signed

against the defendants for the said cause of action for 500*l.* and the plaintiff's costs of action in that behalf; and the defendants paid to the plaintiff as administratrix as aforesaid the said sum of 500*l.*, together with the amount of her costs in such action; and the plaintiff as such administratrix received the same in full satisfaction and discharge of the judgment and causes of action.

6. The defendants say also that heretofore and before bringing this action the plaintiff as administratrix as aforesaid sued the defendants in respect of the several matters, claims, and causes of action alleged in the statement of claim herein, and the defendants paid to the plaintiff as such administratrix 500*l.* and the costs of such action, and the plaintiff as such administratrix accepted the same in full satisfaction and discharge of all such claims and causes of action.

The plaintiff replied as follows:—First, the plaintiff joins issue upon the whole of the defendants' statement of defence except the 5th paragraph; secondly, the plaintiff further says that the defendants ought not to be admitted to deny the facts in the 1st and 2nd paragraphs denied, because it appears by the record in the action in the 5th paragraph mentioned, that the defendants pleaded in answer to the declaration set out in the said paragraph, first, that they were not guilty, and, secondly, that the said Richard Thos. Leggott did not become nor was he received by them to be carried as a passenger, as alleged in the declaration, and that issue was joined on such pleas, and that at the trial such issues were found by the jury in the plaintiff's favour, and that judgment was signed thereon accordingly, and such judgment still stands, and the plaintiff says that such issues are the same issues as those raised by the denials in the said 1st and 2nd paragraphs; and, thirdly, the plaintiff demurs to so much of the defendants' statement of defence as is contained in the 5th paragraph, and says that the same is bad in law, on the ground that an action under Lord Campbell's Act is no bar to an action for damages for injury to the personal estate of the deceased during the lifetime of the deceased, and on other grounds sufficient in law to sustain this demurrer.

The defendants rejoined:—The defendants join issue upon all the allegations contained in the 2nd paragraph of the plaintiff's reply. The defendants also demur to so much of the plaintiff's reply as is contained in the second paragraph thereof, and say that the same is bad in law, on the ground that it appears from the said 5th paragraph of the defendants' statement of defence that the action therein referred to was an action under Lord Campbell's Act, and was brought by the plaintiff in another capacity, and was not an action between the same parties in the same rights, and was not an action for or in respect of the same subject-matter of complaint or ground or causes of action as the present action, and for and on other grounds sufficient in law to support this demurrer.

The following were the plaintiff's points of argument:—First, that the issue being the same, the estoppel is good if the parties are the same, and are suing or being sued in the same capacity; secondly, that the plaintiff is the same and is suing in the same capacity; and, thirdly, that the persons to be benefited, if damages are awarded in this action, are the same, viz., the widow and the children.

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The following are the defendants' points:—First, that the action referred to in paragraph 2 of the plaintiff's reply was not an action between the same parties in the same capacity and right, and was not an action for and in respect of the same subject-matter of complaint, or ground or causes of action on the present action; secondly, that, therefore, the defendants are not estopped from raising in this action the circumstances referred to in the said paragraph; thirdly, that if such action were between the same parties in the same rights and capacities and for and in respect of the same subject-matter of complaint or ground or causes of action as the present action, then that this action does not lie; and, fourthly, that the issues objected to as raised in this action are not the subject of estoppel.

Mellor, Q.C. (with him *Harmesworth*), argued for defendants.—The matter in dispute, which is raised by the 5th paragraph of the statement of defence and the plaintiff's demurrer thereto, is concluded I presume so far as this court of co-ordinate jurisdiction is concerned, by the case of *Bradshaw v. Lancashire and Yorkshire Railway Company* (L. Rep. 10 C. P. 189). It was there held that where a passenger on a railway was injured by an accident, and after an interval died in consequence, his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. It was, however, admitted that no such action had previously been heard of, and Grove, J., in his judgment, expressly distinguishes the different characters in which the plaintiff sued in the two actions. Although an authority against the defendants on the demurrer to the defence, it is an authority in their favour so far as it goes upon the demurrer to the estoppel pleaded by way of reply. Grove, J., said at p. 192, "The intention of the Act (Lord Campbell's Act), was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act." The plaintiff here may almost be said to be estopped upon her pleadings from pleading estoppel, for if she sues in the same character in this action so as to prevent the defendants from raising the same issues as were decided in the previous action, her claim must by that action have been decided altogether, and this action is not maintainable. The words of Lord Campbell's Act (9 & 10 Vict., c. 93) show the peculiar and limited nature of the plaintiff's claim in the action which has been determined. By sect. 1, it is enacted "that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in

every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By sect. 2, "every such action shall lie for the benefit of the wife, husband, parent and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively from whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." This 2nd section is sufficient to show the limited right in which the executor or administrator must sue under the Act, and that limitation is further confirmed by the amending Act (27 & 28 Vict. c. 95), which enables the beneficiaries to sue under certain circumstances in their own names instead of that of the executor. The cases concerning estoppel by record are collected in the notes to the *Duchess of Kingston's case* (2 Sm. L. C. 760). "It must be observed," says the editor at p. 792, "that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and in fact, as a different person in law." Com. Dig. Estoppel C., there cited, says, "But generally a stranger shall not be bound by nor take advantage of an estoppel;" and in the note the word stranger is defined as "One not suing or sued in the same quality or character." *Mellers v. Brown* (1 H. & C. 686), also there cited, was ejectment brought by the administrator of his mother, in which it appeared that she had been in possession of the land sought to be recovered from the year 1818 until her death in 1847, and in order to rebut the presumption of a seisin in fee, the plaintiff, after evidence of the loss of the original, gave secondary evidence of an assignment to his mother of the premises in question for the remainder of a term of 99 years subject to two lives; but there was no evidence of the creation of the term. It also appeared that the plaintiff had, in his mother's life time, mortgaged the premises to a person whose interest vested in the defendant; it was held that the plaintiff was not estopped by his mortgage in his mother's lifetime from setting up the term. [QUAIN, J.—That was not by record at all, and even if it were, it would only show that the plaintiff is not bound in this action by a verdict in one where she sued for her own benefit.] It appears upon this statement of defence that the plaintiff before sued for her own benefit as well as for that of her children. [QUAIN, J.—But she sued then as she does now, as administratrix. The beneficiaries were not parties to the action.] But they might have been. She then sued as trustee for persons named; she could not have applied the amount obtained by verdict to the estate of her intestate, as she must do in this action. It was held in *Doe d. Hornby v. Glenn* (1 A. & E. 49), that an agreement by an executor *de son tort* did not afterwards conclude him as rightful administrator. So in *Middleton's case* (5 Co. Reps. 55). [QUAIN,

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J.—Neither of those have any authority upon an estoppel by record.] *Robinson's case* (5 Co. Reps. 32 b), was an action upon a bond by executors, one of whom had before sued the defendant in an action of debt upon the same bond as administrator. "It was unanimously agreed that by the former judgment the plaintiff was barred as to the action of the writ, *scilicet*, to have any action as administrator; but although he then in truth was executor, yet the mistake of his action is no bar nor estoppel to bring his true action.

Bray, for the plaintiff.—The only authority for this action besides *Bradshaw v. Lancashire and Yorkshire Railway Company* seems to be *Potter v. Metropolitan Railway Company* (30 L. T. Rep. 765, in Ex. Ch. 32 L. T. Rep. 36). [MELLOR, J.—We must follow the case in the Common Pleas, which is exactly in point as regards the plaintiff's demurrer to the defence.] As to the estoppel, the rule is laid down in Buller's N. P. 228, "If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands." And further on, "but then this verdict ought to be between the same parties, because otherwise a man would be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that any one should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert. But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." If the limit to an estoppel by record be rightly stated, the defendants are clearly estopped in this case from disputing the issues previously decided. [QUAIN, J.—The question is whether the plaintiff is suing in the same right in both actions.] She represents her intestate husband, and would have been barred in either action by any release given by him before his death. There is no authority at all near this point with respect to estoppel by record, unless it be *Robinson's case*; but it seems that the previous action was there determined upon demurrer, and the decision was that the determination merely precluded the plaintiff in the first action from suing again as administrator.

Mellor, Q.C., was not heard in reply.

MELLOR, J.—The case has been well put on behalf of the plaintiff, but we think no estoppel can arise against the defendants. The previous action, in which the same issues had been decided, was an action expressly created by statute, and subject to the limit imposed thereby. Lord Campbell's Act, for the first time, made a person liable for damages occasioned by his act, neglect, or default, even although the person injured met with his death in consequence. The 2nd section expressly enacted that the action is to be brought in the name of the executor or administrator, not for the benefit of the estate, but only as trustee for certain persons particularised in the section. By a later statute the machinery is somewhat altered, but not to change the interest or capacity in which the executor or administrator must sue. Under these provisions the executor or administrator is made a mere machine for bringing the action, and he cannot act in any way for the advantage or otherwise of the general estate which he has to administer. Here, on the contrary,

the administratrix sues as representative of the intestate's estate, and her first duty will be to settle his debts and other claims against it. It may be that the beneficiaries of the first action will take something under the present, but that is not certain, and the plaintiff does not sue now for them alone as she did before. I think that, for the purpose of an estoppel by record, the plaintiff is now in a position of a stranger with respect to that which she filled in the previous action. With the single exception of *Bradshaw v. Lancashire and Yorkshire Railway Company*, it seems that such an action as this has never before been brought; we yield however to that authority, although we consider that its effect is not to create an estoppel here. That authority can only be questioned on appeal, and whether the action is maintainable or not, we are prepared to say that the defendants cannot be prevented from disputing again the issues which were determined before. Our judgment must be for the plaintiff on the defence, and for the defendants on the reply.

QUAIN, J.—I am of the same opinion. I think the defendants are entitled to our judgment on their demurrer to the estoppel pleaded by way of reply. Parties to an action must be suing and sued in the same right as in a previous action, in order that the verdict shall be an estoppel. Although in the action mentioned in the 5th paragraph of the defence the plaintiff was suing nominally as administratrix, she was merely a trustee for the persons named in the declaration, and was not as in this action suing for the benefit of the deceased's estate. The two actions are brought in entirely different rights, and on that account no estoppel can exist. The exact question was not raised in *Bradshaw v. Lancashire and Yorkshire Railway Company*, but the distinction between the rights in which the plaintiff sued was clearly drawn by the Court, and indeed the judgment was based to a great extent upon that distinction. I yield without assenting to the authority of that case in respect to the maintenance of this action, but whatever might be the conclusion of the Appeal Court on the subject, I think there was clearly no estoppel by record to bind the parties in this second action.

Judgment for plaintiff on demurrer to defence; for defendant on demurrer to reply.

Solicitors for plaintiff, May, Sykes, and Batten.

Solicitors for defendants, Johnston, Farquhar, and Leech.

COMMON PLEAS DIVISION.

Wednesday, April 26.

ROBINSON v. ROBINSON. (a)

Rules of Court under the Judicature Acts—Order XXXVI., rule 30—Trial by referee.

Order XXXVI. rule 30, of the Rules of Court under the Judicature Acts, relating to trials by referees, is directory only. Therefore, where a special referee did not sit de die in diem, as prescribed by that rule, the court refused to set aside the award.

This cause had been referred to a special referee by an order which declared that the reference was to be subject to the provisions of the Common Law Procedure Act 1854 (17 & 18 Vict. c.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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125), and the Supreme Court of Judicature Acts 1873 and 1875 (36 & 37 Vict. c. 66 and 38 & 39 Vict. c. 77). The special referee had not proceeded with the reference *de die in diem*, as prescribed by Order XXXVI., rule 30 (a), of the Rules of Court, in the schedule to the Supreme Court of Judicature Act 1875, but the plaintiff had continued to attend the reference, and had not objected to the irregular adjournment.

The referee made the following award:—"I find all the issues in favour of the defendant, and as to the costs in my discretion I direct them to be paid by the plaintiff to the defendant."

Gully, for the plaintiff, moved to set aside the award. The action having been referred, under the Supreme Court of Judicature Acts, the referee was bound to proceed according to Order XXXVI., rule 30, which directs that the referee shall proceed with the trial *de die in diem* in a similar manner as in actions tried by a jury. The provision in sect. 57 of the Judicature Act 1873, that trials before referees shall be conducted in such manner as may be prescribed by the Rules of Court, is imperative.

LORD COLERIDGE, C.J.—This is the first time that Order XXXVI., rule 30, of the Rules of Court, in the schedule to the Supreme Court of Judicature Act 1875, has been brought to the attention of the court. The Order in question is a most salutary Order, its object being to do away with the inconvenience and injustice which, before the Judicature Acts came into operation, were caused by delays connected with references to arbitration. Now in the present case it seems, on the *ex parte* statement which we have heard, that, assuming that statement to be correct, there has been misconduct on the part of the arbitrator. If the other side were heard, or if the arbitrator had an opportunity for explanation, it might be shown that this was not so; but the statement in the affidavit on which this motion is made charges misconduct in not com-

(a) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 57:—"In any case or matter (other than a criminal proceeding by the Crown) before the said High Court, in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury or conducted by the court through its other ordinary officers, the court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before an official referee to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties, and any special referee so agreed on shall have the same powers and duties, and proceed in the same manner, as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the court or judge ordering the same shall direct."

By the Rules of Court in the schedule to the Supreme Court of Judicature Act 1875, Order XXXVI., rule 30:—"Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at, or adjourn it to, any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem* in a similar manner as in actions tried by a jury."

plying with Order XXXVI., rule 30, which directs that where cases are referred the trial shall, unless it is otherwise ordered, proceed *de die in diem*, as in actions tried by a jury. But Mr. Gully's client attended the reference after the adjournment which he now complains of, and took the chance of an award in his favour. If an application had been made at the time, the course of proceeding which is stated to have been adopted might have afforded a good reason for removing the arbitrator; but I think that it cannot now afford any reason for setting aside the award, for the provisions of Order XXXVI., rule 30, are directory only; and, therefore, as far as this ground of complaint goes, the award will not be set aside.

BRETT and LINDLEY, JJ., concurred.

Rule refused.

Solicitors for the plaintiff, Venn and Son.

Wednesday, April 26.

BLACKLOCK v. DOBIE AND ANOTHER. (a)

Fraud on creditors—Illegal agreement—Assignment of estate—Promise to repay part of proceeds.

Plaintiff agreed to assign his estate to defendants, two of his creditors, in trust for the benefit of all his creditors, defendants promising to repay to plaintiff 50l. out of the estate when realised.

Held, on motion in arrest of judgment in an action to recover the 50l., that the agreement was a fraud on plaintiff's creditors, and illegal.

THE declaration set out an agreement by which, in consideration that the plaintiff would execute an assignment of all his estate and effects to the defendants, who were two of the creditors of the plaintiff, on trust for the equal benefit of all the creditors of the plaintiff, and would make full disclosure of all his estate, the defendants promised the plaintiff that when the said estate and effects had been realised they would return to and pay the plaintiff 50l. from the proceeds thereof.

The declaration then alleged that the plaintiff had executed an assignment in accordance with the agreement, and that the estate and effects of the plaintiff had been realised by the defendants, but the defendants had not paid the said sum of 50l. to the plaintiff.

The case was tried at the Liverpool Summer Assizes 1875, before Mr. Herschell, Q.C., sitting as Commissioner, without a jury, when a verdict was found for the plaintiff.

In Michaelmas sittings, *Gully* obtained a rule nisi to arrest the judgment, on the ground that the agreement set out in the declaration was illegal and immoral, as being a fraud on the creditors of the plaintiff, and contrary to the policy of the bankruptcy law.

Shortt showed cause.—There was no fraud in fact, for if there had been it would have been pleaded, and unless the agreement set out in the declaration is in itself illegal the plaintiff is entitled to retain the verdict which has been found for him. But there is nothing illegal in the agreement; there is nothing about the plaintiff obtaining a release from his creditors. It merely amounts to an agreement by the plaintiff to give up all his property for the benefit of his creditors with the exception of 50l., and the expenses of proceedings in bankruptcy are saved. The trans-

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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action must, in the first instance, be assumed to be valid, and the proof of fraud lies on the person by whom it is imputed. See *Shaw v. Beck* (8 Ex. at page 400, per Parker, B.) Here there is nothing on the face of the declaration to show that any fraud was intended. There is nothing on the face of the pleadings to show that the other creditors did not assent to the arrangement, nor is there anything to show that the estate was not sufficient to pay all the creditors in full. It is perfectly consistent with all that appears here on the record that the assets of the plaintiff may have been £50 more than his debts.

Gully in support of the rule was not called on.

LORD COLERIDGE, C.J.—It is almost too clear for argument that the declaration in this case is bad in arrest of judgment. The declaration states an agreement that, in consideration that the plaintiff would assign all his estate and effects to the defendants on trust for the equal benefit of all the plaintiff's creditors, and would make full disclosure of all his estate, the defendants, as soon as the said estate and effects had been realised, would pay back to the plaintiff 50*l.* out of the proceeds. The breach is non-payment of the 50*l.* so agreed to be paid to the plaintiff. That is the declaration, and that is the agreement on which it is based, an agreement on the face of it stating that the whole estate was to be realised for the benefit of the plaintiff's creditors, and it must be taken that the amount of the whole estate would have been necessary to defray the plaintiff's debts; but this being so, 50*l.* out of the estate was to be paid back to the plaintiff. Therefore, the declaration states on the face of it an agreement which is in itself a fraud on the plaintiff's creditors, and is distinctly against the policy of the bankruptcy laws. Mr. Shortt says that this agreement might be made valid by the assent of all the plaintiff's creditors; that is possibly true, but there is nothing here to show that there was any such assent. I am therefore of opinion that the declaration is bad, and that the rule ought to be made absolute.

BRETT, J.—It seems to me that this is an agreement which sets out with the most shameless candour a fraud which was intended to be perpetrated on the creditors of the plaintiff. By this agreement the plaintiff assigns his estate for the benefit of his creditors generally, but makes an arrangement with two friendly creditors, by which he is to keep back part of the property. We must construe the agreement as it would have been construed at the time when it was made, and therefore the declaration is as bad after verdict as before, for it sets forth an arrangement which no court of justice ought to assist in giving effect to.

LINDLEY, J.—I am of the same opinion. The effect of the agreement set out in the declaration is that the plaintiff was to execute a deed purporting to assign the whole of his property for the benefit of his creditors, which deed alone was to come to the knowledge of the general body of the creditors; but there was a secret agreement by which the two creditors to whom he assigned for the benefit of the whole body of creditors were to give back part of the property which was assigned by the deed. To justify a transaction of this nature one of two things is necessary—either all the creditors must know of and consent to the agreement, or the assets must be enough to satisfy the whole amount of the debts without in-

cluding the sum agreed to be given back. It does not appear that either of these circumstances existed in the present case.

Rule absolute.

Solicitors for the plaintiff, *Milward and Whitehead*, for *Joseph Carruthers*, Liverpool.

Solicitors for the defendants, *Venn and Son*.

May 3 and 10.

GREEN v. WRIGHT.(a)

Shipowner and master—Reasonable notice of dismissal.

The master of a ship in the absence of express stipulation in the contract of hiring, is entitled to reasonable notice of dismissal from the shipowner.

THIS was an action for wrongful dismissal, brought by the plaintiff, who had been in the defendant's employment as captain of a ship, against the defendant, who was a shipowner. The plaintiff had entered into an agreement with the defendant to act in his service as captain of the ship *City Camp*, at a salary after the rate of 180*l.* a year; the wages were to begin when the plaintiff joined the ship. The question on which the decision turned was whether either party could determine the agreement without notice, and the clause in the agreement relating to this question was as follows: "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners to have the option of paying or not paying his expenses travelling home." The defendant dismissed the plaintiff without notice after the ship was partly loaded for an outward voyage, and it was for this dismissal that the present action was brought. The case was tried before Lush, J., at the Liverpool Winter Assizes 1875, and the verdict was directed to be entered for the defendant. A rule nisi was afterwards obtained for a new trial on the ground of misdirection by the learned judge, in ruling that the plaintiff, having agreed to the terms of the engagement, could be dismissed without notice.

T. H. James showed cause.—The agreement does not entitle the plaintiff to notice if he is discharged abroad, for if he is entitled to notice under such circumstances the provision that wages are to cease from the day when the captain is required to give up the command would have no meaning, and there is nothing in the agreement to show that he is entitled to notice if discharged in this country. Where there is no specific agreement as to notice, the question must be determined by custom: Manley Smith on Master and Servant, page 77, 3rd edition; but where there is no stipulation and no custom there is no right to notice. In the cases where it has been held that notice was necessary, there has always been evidence of custom, as in *Hiscox v. Batchellor* (15 L. T. Rep. N. S. 543). In *Foxall v. The International Land Credit Company* (16 L. T. Rep. N. S. 637), the jury found that the custom was proved. Here notice is excluded by the contract.

Herschell, Q.C. (McConnell with him) in support of the rule. The ruling of the learned judge at the trial cannot be supported. It must be admitted that there is no inflexible rule, but

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an indefinite hiring is *prima facie* a yearly hiring. If the plaintiff can be dismissed at any time without notice, he can leave the service at any time without notice, and this cannot have been the intention of the parties. The plaintiff was at least entitled to such notice as was reasonable under the circumstances. This view is consistent with the law as laid down by Pollock, C.B., in *Fairman v. Oakford* (5 H. & N. 635; 29 L. J. 459, Ex.), where he says, "there is no inflexible rule that a general hiring is a hiring for a year; each particular case must depend on its own circumstances. From much experience of juries I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year absolutely, but rather one determinable by three months' notice."

Our. adv. vult.

May 10.—The judgment of the court (Lord Coleridge C.J., and Archibald and Lindley JJ.), was delivered by

LORD COLERIDGE C.J.—This was an action tried before my brother Lush, at Liverpool, in Dec. 1875, in which he directed a verdict to be entered for the defendant, and we have to determine whether that direction was correct. The plaintiff had been the master of the ship *City Camp*, under a written contract dated the 28th of March 1875, from that day until the 10th of Aug. 1875, when he was dismissed, not for misconduct, but without notice, the defendant contending that by the terms of the contract between the plaintiff and himself, the plaintiff was not entitled to any notice before dismissal. Other points arose in the case, but were not discussed before us. The action was brought for a dismissal, wrongful in being without notice, and the sole question argued was whether, under the contract, the plaintiff was entitled to notice before dismissal, and on this single point my brother Lush directed the verdict for the defendant. The contract, so far as it is material to set it out, was as follows: "I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of 180*l.* sterling per annum." Then followed certain other terms not material, and then "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. Wages to begin when captain joins the ship. Francis Green, master *City Camp*." It was contended for the plaintiff that under this contract he was entitled to a reasonable notice before dismissal, at any rate if dismissed in this country; and my brother Lush held that he was not; but upon consideration we are of opinion that he was. The relation of the master of a ship to his employer, the shipowner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year, or for any other definite time, nor the notice by which the service is to be determined certain. As to the hiring we adopt the language of Pollock, C.B. in delivering the judgment of the court in *Fairman v. Oakford* (5 H. & N. 635; 29 L. J. 459, Ex.): "There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances." As to the notice we think the sound construction of the contract before us is that, except in the single

case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the shipowner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be, inflicted on the shipowner, without any remedy by such a construction of the contract, if acted on by the master, lead us to believe that such is not and could not be the meaning of the contract, nor the intention of the parties to it. The loss and inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed; and this consideration points to the same conclusion. The provision that the master's wages shall cease instantly upon dismissal abroad may well have been intended to prevent any question as to the shipowner being liable to the whole expense of bringing the master back to the United Kingdom; and does not appear to us to permit an argument for construing the contract so as to enable either party to put an end to it at any time without notice of any kind. Indeed, upon the construction of the contract contended for by the plaintiff, and if no notice before putting an end to it was required at any time on the part of either master or shipowner, it is not easy to assign a reason for the insertion of this particular provision into the contract. Nor was any satisfactory reason offered to us why the rule, *Expressio unius est exclusio alterius*, should not apply to it. We think, therefore, that under his contract, as the master could not, except under very unusual circumstances, be dismissed during the continuance of a voyage, and while the vessel was at sea, so he was entitled to some notice, and that is to reasonable notice, before dismissal in this country. There is some authority for saying that as a proposition of general law reasonable notice is to be implied as a term of such a contract of hiring as this. Sir John Byles so laid down the law at Nisi Prius, in the case of *Hiscox v. Batchellor* (15 L. T. Rep. N. S. 543), and the case of *Fairman v. Oakford* (5 H. & N. 635; 29 L. J. 459, Ex.), already referred to, seems, if the facts of it be carefully considered, to be an authority to the same effect. For in the absence of stipulation for any notice, a month's notice was held reasonable to determine an indefinite hiring of a clerk, on the ground that the same clerk had accepted such a notice as sufficient to determine a former indefinite hiring, also without stipulation for notice of any kind. It is nowhere suggested that the absence of stipulation made no notice necessary in either of the hirings, which would have been a short and simple ground, if a sound one, for upholding the verdict in that case. But without intending to throw any doubt whatever upon these cases, we decide the one before us upon its own circumstances, and upon considerations especially applicable to the contract on which the dispute arose. And we think that the order must be absolute for a new trial.

Order absolute.

Solicitors for plaintiff, *Evans and Lockett*, Liverpool.

Solicitors for the defendant, *Gregory, Rowcliffes, and Co.*, for *Hull, Stone, and Fletcher*, Liverpool.

EX. DIV.]

PIKE v. FRANK KEENE AND BYNE—PRESTON v. LAMONT.

[EX. DIV.]

EXCHEQUER DIVISION.

Thursday, Jan. 20.

(Before BRANWELL, AMPHLETT, and HUDDLESTON, BB.)

PIKE v. FRANK KEENE AND BYNE. (a)

Judicature Act 1875—Rules of court under—Judge's order for statement of names of defendants' co-partners—Order XVI., rule 10—Judge's order for a verified account under—Order XV., rules 1, 2—Disobedience to such orders—Attachment under Order XXXI., rule 20.

A judge's order for a statement of the names of a defendant's co-partners, under Order XVI., rule 10 of the Rules of Court, 1875, or for a verified account under Order XV., rules 1 and 2, are neither of them an order for "discovery or inspection" within Order XXXI., rule 20, and consequently the provisions in the said last named order for attachment in case of disobedience do not apply to disobedience of such judge's orders.

THIS was an application on the plaintiff's part for an attachment under Order XXXI., rule 20, of the Rules of Court 1875, against the defendant Frank Keene, for disobedience of the judge's order under the following circumstances: On the 11th Dec. 1875, an order was made by Huddleston, B., on the application of the plaintiff at chambers, under Order XVI., rule 10 of the Rules of Court 1875, directing that the defendant Frank Keene, who was the only person who had appeared to the writ in the action, should deliver to the plaintiff within one week, a statement in writing verified by affidavit, of the names, &c., of the persons who were, in the previous month of September, partners with him, the defendant F. E. Keene, in the firm of Frank Keene and Byne.

A summons was subsequently taken out under Order XV., rules 1, 2, and a judge's order was thereupon made on the 23rd Dec. 1875, by consent, that the defendant should within ten days file a detailed account verified by affidavit, of all the moneys received by him for the sale of certain goods entrusted to him by the plaintiff for sale. It was alleged by the plaintiff in the affidavit now made in support of the present motion, that the above-mentioned judge's orders of the 15th and 23rd Dec. had been duly served on the solicitor of the defendant Frank Keene, and that neither of such orders had been complied with. (b)

Morton for the plaintiff, now moved under Order

(a) Reported by H. LUSH, Esq., Barrister-at-Law.

(b) The following are the material Orders and Rules of Court under the Judicature Act 1875, on which the question turned:

Order XV., rule 1. In default of appearance to a summons indorsed under Order III., rule 8, and after appearance, unless the debtor, by affidavit or otherwise satisfies the court, or a judge, that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

Rule 2. An application for such order, as mentioned in the last preceding rule, shall be made by summons, and be supported by affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering appearance has expired.

Order XVI., rule 10. Any two or more persons claiming or being liable as copartners, may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are copartners in any such firm, to be furnished in such manner and verified on oath or otherwise, as the judge may direct.

XXXI., rule 20, for an attachment against the defendant Frank Keene for disobedience to the judge's orders above mentioned. By Order XXXI., rule 20, it was provided that "If any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall be liable to attachment," &c. &c., and he submitted that the defendant by his disobedience to the orders in question had brought himself within the penalties of Order XXXI., rule 20, for disobedience to orders for discovery or inspection; but

The COURT were of opinion that neither of the two orders of the 15th and 23rd Dec. was an order for "discovery" or "inspection" within the meaning or terms of Order XXXI. rule, 20, and they accordingly refused to grant the plaintiff's application for an attachment.

Application refused.

Solicitors for the plaintiff, Shaw, Boscoe, and Massey.

Monday, June 26.

(Before BRANWELL and AMPHLETT, BB.)

PRESTON AND OTHERS v. LAMONT AND ANOTHER. (a)

Practice—Jurisdiction—Service of writ out of—Statement of defence raising question of propriety of service—Plea to jurisdiction—Judicature Act 1875—Rules of Court under—Order II., rules 4 and 5—Order XI., rules 1, 3.

Whether the subject matter of the action is such that service of the writ out of the jurisdiction ought to be allowed under Order XI., rule 1, of the Rules of Court 1875, is a question which a defendant cannot raise upon his statement of defence; such question being one exclusively for the discretion and decision of the court or a judge, subject to appeal; and when once the question has been so decided the service cannot be set aside, but must stand, and the defendant must defend the action on its merits.

THIS was an application on the part of the plaintiffs, who had brought an action against the defendants to recover the price of goods sold and delivered, to strike out the statement of defence filed by the defendants as wholly bad.

The statement of defence so objected to contained allegations to the following effect: That the action was commenced on the 18th Jan. 1876, by a writ in the form given in the Rules of Court 1875, Appendix A, Part I, Form 2, under colour of Order II., rules 4, 5, and was served on the defendants at Glasgow, in Scotland; that the action was brought for the breach of a contract made at Glasgow, and out of the jurisdiction of this court; that there never was any breach of it within the jurisdiction, and that none of the circumstances mentioned in Order XI., rule 1, existed; that the defendants were born in Scotland Scottish subjects of the Queen, and of parents who were also such subjects, and were long before and at the time of and ever since the issuing of the writ, resident and domiciled in Scotland alone, and had not been during the same period resident or domiciled in England, or within the jurisdiction, and were entitled to all the privileges and immunities secured to the Scottish subjects of the Queen; that, even if any of the circumstances mentioned in Order XI., rule 1, existed, the subject matter of the action was alleged debts

(a) Reported by H. LUSH, Esq., Barrister-at-Law.

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or breaches of contract by non-payment of money, over which, when the Judicature Act 1873 was passed, no court of equity had jurisdiction, but which were wholly within the exclusive jurisdiction of the common law courts; that no court, the jurisdiction whereof is transferred to or vested in this or any court by the Judicature Act 1873 or 1875, nor any other court save the courts established in Scotland, had up to the passing of the Judicature Act 1873, any jurisdiction or cognisance over such subject matters as those in this action exercisable by process in Scotland, or had any validity in Scotland, or as regards persons living in Scotland; that no jurisdiction capable of being exercised was transferred to or vested in this court by sect. 22 of the Judicature Act 1873; that several of the Scotch courts, and particularly the Court of Session at Edinburgh, have complete jurisdiction over all the subject-matters of this action and the defendants, and can do complete justice herein.

The plaintiffs carried on business at Deptford, in Kent, under the style of John Stone and Company, and the defendant lived, as before mentioned, at Glasgow. The goods, which were the subject-matter of the action, were ordered by the defendants in Glasgow of the plaintiffs' agent or traveller there, who, in usual and ordinary course, transmitted the order by post to the plaintiffs, who thereupon forwarded the goods by carrier to the defendants at Glasgow. The invoice sent with the goods was headed as follows: "Payment to be made direct to J. Stone and Co., London. Cheques crossed London and Westminster Bank."

The plaintiffs had on the 18th Jan., under the Rules of Court 1875, Order II., rules 4, 5, and Order XI., rules 1, 3, obtained leave of Lindley, J., at chambers, to issue the writ out of the jurisdiction, and which writ was served on the defendants in Glasgow. The defendants appeared on the 19th Feb., and asked for a statement of claim. On the 28th Feb. the plaintiff applied for leave to sign judgment. The defendants obtained an extension of time on several occasions, and on the 13th March leave was given to them to defend on an affidavit setting out the fact that there was no jurisdiction. Time orders were subsequently obtained, until the 15th May when the defendants took out a summons at chambers to set aside the order of Lindley, J. for service of the writ and all subsequent proceedings on the ground that the case did not come within Order XI. rule 1, and that the English courts had no jurisdiction, and that no part of the cause of action arose in this country. The learned judge (Archibald, J.) at chambers, on the 17th May, refused to make any order, on the ground that the defendants had appeared, and that the application was too late; and that decision of the learned judge was afterwards on the 29th May affirmed on appeal by the Exchequer Division of the High Court of Justice, consisting of Kelly, C.B. and Cleasby, B., on the same ground, and also on the ground that there was a breach of contract within the jurisdiction, so as to bring the case within Order XI., rule 1. (a)

(a) The following Orders and Rules of Court under the Judicature Act 1875, are material to the case:

Order II., rule 4. No writ of summons for service out of the jurisdiction, or of which notice is to be given out

The plaintiffs then applied to the court to strike out the statement of defence, and

C. Dodd, on their behalf, now supported the application, and submitted that the statement of defence was bad, as amounting to a plea in abatement, which was abolished by the Rules of Court 1875, Order XIX., rule 13, which provides that "no plea or defence shall be pleaded in abatement." The point had been decided at chambers by the judge, who had the facts and evidence before him, and it cannot be raised by plea. Any irregularity, if there was such in the service of the writ, has been waived by the defendants appearing and asking for a statement of the plaintiff's claim. But if this were not so, the issuing of the writ concludes the question of jurisdiction. He referred to the Stat. 4 Anne, c. 16, sect. 11, respecting dilatory pleas, and cited

Ex parte Robertson, Re Moreton; 32 L. T. Rep. N. S. 697; L. Rep. 20 Eq. 733;

Drummond v. Drummond, 18 L. T. Rep. N. S. 896; 14 L. T. Rep. N. S. 823; 35 L. J. 790, Ch.; 12 Jur. N. S. 581; L. Rep. 2 Ch. 32, Order X., rule 1.

C. Crompton, for the defendants, *contra*.—This is a plea to the jurisdiction, and that is a question of fact for a jury, and not for the summary decision of a judge at chambers. If it were an action with respect to land upon the Scotch border, and the defendants wished to raise the question whether it was on the English or Scotch side, they would have the right to try that question before a jury; and so, in the present case, the defendants have a right to prove facts, showing that there was no contract in England. The Rules of Court 1875 could not have intended that such questions should be summarily disposed of at chambers.

C. Dodd was not called on to reply.

BRAMWELL, B.—Were this statement of defence a plausibly good one it ought not to be struck out, but I am of opinion that in this case we are dealing with one that is manifestly a very bad one, and which therefore ought not to be allowed to stand. It is really not a plea to the jurisdiction at all, but rather one to the propriety of the service of the

of the jurisdiction, shall be issued without the leave of a court or judge.

Rule 5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in the Form No. 2, in Part I. of Appendix A hereto, with such variations as circumstances may require. Such notice shall be in Form No. 3 in the same part, with such variations as circumstances may require.

Order XI., rule 1. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge, whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract, wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

Rule 3. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction, shall be supported by evidence, by affidavit or otherwise, showing in what place or county such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

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writ on the defendants which has taken place. The statement of defence is not equivalent to a plea that, if the defendants had been found within the jurisdiction of the court, the action could not have been maintained. In my opinion, the court has jurisdiction in the matter. The effect of the rules relative to this question is, that a plaintiff has not a right of his own choice to issue a writ for service on a defendant out of the jurisdiction, but he must, first of all, before he can serve the writ, obtain the leave of the court or a judge, and the court or the judge, upon being satisfied by the evidence adduced before them, pursuant to rule 3, of Order XI., and being guided by and acting upon the principles laid down in rule 1 of that order, will give such leave. The judge, of course, may be wrong in granting the leave, and if so the defendant is at liberty and entitled to apply to set it aside on the ground of mistake or some other ground sufficient for the purpose. But if the order giving leave is not set aside, then the order for service must stand, and the action must go on. There is no way of raising the point by plea or statement of defence. In other words, under the orders and rules an application is made to the court or a judge for leave to issue a writ and serve it out of the jurisdiction, and the issue and service may be allowed. The question whether the action is within order XI., rule 1, is a question for the court or judge, acting upon proper affidavits, supplemented by other evidence, and their decision upon the question is, subject to review on appeal—the only decision on the question of service; and, when once that question has been so decided the service cannot be set aside, but must stand, and the defendant must defend the action on its merits. Of course the defendant may, in his defence, allege that he never made the contract, or never broke it, but he is not at liberty to say what the defendant has said here. I am of opinion, therefore, that the plaintiff's application to set aside this statement of defence must be granted.

AMPHLETT, B.—I am of the same opinion, and am quite clear that this is not a plea to the jurisdiction, but to the manner of the service of the writ. The court, or the judge at chambers, has a discretionary power, and ought not to make any order at all for the service of a writ out of the jurisdiction, unless upon being satisfied that the cause of action arose in this country, and that it comes within the instances given in Order XI., rule 1, they decide on the propriety of the service of the writ, and such decision may be reversed and questioned on appeal to the Court of Appeal, and if needful even to the House of Lords. This mode of proceeding is, it seems to me, both convenient and useful, as it enables the question of jurisdiction to be raised and settled in a cheap and speedy manner, before expense is incurred in relation to the defence of the action on the merits; whereas, if the question could be raised by plea, and it should in the end be determined that the case is not one within Order XI., rule 1, then all the expenses of pleading and defending the action would be utterly wasted and thrown away. In my judgment, both convenience and justice concur in requiring that such a question should not be allowed to be the subject of a plea, or of a statement of defence. This statement of defence, therefore, must not be allowed to

stand, and the plaintiff's application to strike it out must be granted. *Application granted.*

Solicitor for the plaintiffs, *Albert West.*

Solicitor for the defendants, *C. Butcher, agent for Gavin Hamilton, Glasgow.*

Nov. 4, 1875, and May 22, 1876.

(Before KELLY, C.B., and BRAMWELL and CLEASBY, BB.)

PICKARD v. MARRIAGE AND ANOTHER. (a)

Bill of sale—Affidavit filed on registration—Description in of "every attesting witness"—Two witnesses and description of one only—Validity of bill of sale—Grantor retaining use of goods as part of salary as servant—Possession—Apparent and actual.

The goods of an execution debtor which were assigned by him to the plaintiff by a bill of sale, were left in the house of which the grantor was in the sole occupation, under an arrangement between him and the grantee that he should reside there and manage a business as servant of the grantee (the plaintiff), at a weekly salary with the use and enjoyment of the said goods. The bill of sale was insufficiently registered, by reason of the omission in the affidavits of the description of one of the two attesting witnesses. The goods having been seized by the defendants under an execution issued against the grantor, it was

Held, making absolute a rule to enter the verdict for the defendants: first, that the bill of sale being attested by two witnesses, the registration of it was invalid by reason of the affidavit filed with the copy of the bill of sale containing the description of only one of such witnesses; and, secondly, that the goods were in the apparent possession of the grantor, the execution debtor, and that as the bill of sale was invalid by reason of its insufficient registration, the grantee (the plaintiff) could not claim the goods under it, as against the defendants, the execution creditors.

THIS was an interpleader issue for the purpose of trying the right whether certain goods which had been seized by the sheriff under a writ of *fi. fa.* on a judgment recovered by the defendants against one Henry Pickard, the brother of the plaintiff, were at the time of such seizure the property of the plaintiff as against the defendants.

Upon the trial of the case at Kingston, at the spring assizes for Surrey, in 1875, before Mr. Joyce, Q.C., sitting as commissioner, the following were the facts as proved:

The plaintiff Edwin Pickard was a dairyman, carrying on business at Brixton. His brother, Henry Pickard, the execution debtor, who had been a farmer at Balcombe, becoming involved in pecuniary difficulties, disposed of his property at Balcombe by sale, and requested his brother, the plaintiff, to purchase the house and dairy business at Stockwell, which the plaintiff accordingly did, and paid the deposit; and subsequently, upon the purchase money not being forthcoming from Henry Pickard, the plaintiff himself paid the purchase money out of his own funds, and completed the purchase in his own name, and as a security for the moneys so advanced by the plaintiff to and for his brother,

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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the latter executed a bill of sale, whereby he granted to the plaintiff the furniture and goods belonging to him which had been brought to the dairy premises at Stockwell, one article of the furniture being formally handed over to the plaintiff in order to give him possession of the goods, but it remained, with all the rest of the goods, upon the premises. The brother Henry Pickard, the execution debtor, was put by the plaintiff into the dairy premises at Stockwell to manage the business for him, at a salary of 25s. a week with the use of the house and of the furniture, which was afterwards seized under the execution as hereinbefore and hereinafter mentioned. There was a provision in the bill of sale that the grantor (the execution debtor) was to have the possession and use of the goods as long as the grantee should think fit, for which use the grantor paid a nominal rent. The bill of sale was dated the 3rd Dec. 1874, and was attested by two witnesses, and was registered, but the affidavit which was filed in the registry, with the copy of the bill of sale, under the Bills of Sale Act, contained the description and residence of only one of such witnesses. The judgment on which the *fi. fa.* was issued having been recovered by the defendants against Henry Pickard, the execution was issued, and the seizure of the goods and furniture in question was made thereunder by the sheriff on the 10th Feb. 1875. On the 12th Feb. the plaintiff gave the sheriff notice of his claim to the goods under the bill of sale, and the sheriff thereupon interpleaded.

The jury found that the bill of sale by the execution debtor, and the advances of money to him by the plaintiff, were *bonâ fide* transactions, and that it was intended that the property comprised in the bill of sale should pass to the plaintiff. Thereupon a verdict was entered for the plaintiff, with leave to the defendants to move to set it aside, and to enter a verdict for themselves, on the ground that the affidavit filed by the plaintiff in pursuance of the Bills of Sale Act (17 & 18 Vict. c. 36) was defective in not containing a description of the residence and occupation of both the attesting witnesses to the bill of sale under which the plaintiff claimed.

Willis having obtained a rule according to that effect on the part of the defendants,

Edmund Thomas showed cause against it on behalf of the plaintiff, and contended, in the first place, that inasmuch as the plaintiff was in possession of the goods by his servant, the execution debtor, at the time of the seizure, a bill of sale was not necessary to the plaintiff's title to the goods. Or, it might be, that the execution debtor was a *bonâ fide* bailee of the goods for hire, paying for their use a sum which must be taken to have been deducted from the larger amount of salary which, but for having the use of the goods, he would doubtless have been paid by the plaintiff. In either case his possession was the possession of the plaintiff. Moreover, it is contended, in the second place, that one witness is as many as is required to a bill of sale; and, therefore, more than one witness being unnecessary, it is immaterial, where there happens to be two attesting witnesses, that the residence and description of one only are given in the affidavit. The description of "every attesting witness" would seem to be required only when the security is given "under or in execution of any pro-

cess." (17 & 18 Vict. c. 36, s. 1.) [*BRAMWELL, B.*—The requirement of the description of "every attesting witness" applies, I think, to the whole of the section and to a bill of sale, whether given under process or otherwise.] If more than one witness had been intended by the Act, the section would have required the description of "the witness or witnesses," or "of each and every witness." [*CLEASBY, B.*—Might it not be that the description of "every attesting witness" was intended to apply to the execution of a bill of sale by several grantors, and a separate attestation of the execution of each of them?] That certainly might be so. The copy of the bill of sale on the register, read together with the affidavit, will give all the requisite information, and the one will supply any deficiency or insufficiency of description in the other:

Routh v. Roublot, 28 L. J. 240, Q. B.; 1 E. & E. 850; *Jones v. Harris*, 25 L. T. Rep. N. S. 702; 41 L. J. 6, Q. B.; L. Rep. 7 Q. B. 157.

Willis, for the defendants, in support of his rule, *contra*.—If the bill of sale was not properly registered the plaintiff must fail. Here the execution debtor held and used this furniture as his own, precisely as he did before the bill of sale was executed. It was, indeed, expressly provided by the instrument itself, that he should remain in possession of it, and the delivery of one piece of furniture to the plaintiff, the grantee, was a mere formal proceeding, and was not sufficient to put him in the real and actual possession of the goods, and was at once nullified and destroyed by the re-delivery of the goods to the grantor, who was clearly in the apparent possession of them, and had been so continuously from the time when the goods were brought from Balcombe to the dairy at Stockwell. These goods were not the stock-in-trade of the dairy business, and the debtor had the use and possession of them, without interruption, until the seizure, and so was clearly within the statute, and the title of the defendants as execution creditors was valid. Then, as regards the insufficient description of the attesting witnesses, it is submitted that, where there is more than one attesting witness to a bill of sale, it is clearly necessary that the affidavit should contain a description of the residence and occupation of each and all of them: (See *Nicholson and another v. Cooper*, 3 H. & N. 384; 27 L. J. 393, Ex.) [*CLEASBY, B.* referred to *Chitty's Archbold's Practice*, 12th edit., p. 670, note b, where *Tuton v. Sanoner* (27 L. J. 293, Ex.; 3 H. & N. 280) is cited.]

KELLY, C.B.—With regard to the description of the attesting witnesses in the affidavit, we think that the affidavit should contain a description of both of them, as well also as a verification of the copy of the bill of sale. With regard to the other point, that of the possession of the goods, we will take time to consider.

Cur. adv. vult.

May 22, 1876.—*BRAMWELL, B.*—We are of opinion that the rule in this case should be made absolute. At the close of the argument on the rule in November last, the court expressed its opinion that on the point respecting the registration of the bill of sale, its judgment would be in favour of the defendants, and we are now still of that opinion. In the affidavit that was filed with the copy of the bill of sale there was not contained a description of both the witnesses who attested the execution of the instrument, and on

that point we are of opinion that the authority of the decided cases and the very clear words of the statute are against the plaintiff and the contention that has been put forward on his behalf. The bill of sale is, we think, by reason of that omission insufficiently registered, and, therefore invalid. But the other and chief point that was argued before us on the part of the plaintiff was that, assuming the bill of sale to be invalid for want of proper registration, yet nevertheless the goods were not in the execution debtor's possession at the time of the seizure but in the possession of the plaintiff—that they were only, if at all, in the possession of the debtor, and used and engaged by him as servant to the plaintiff, or as a bailee paying rent for the use of them, a sum or equivalent for such use being taken to be deducted from the weekly salary, which he, the debtor, would otherwise have received from the plaintiff for managing the dairy; and it was argued that that was not the possession contemplated by the Bills of Sale Act. We are of opinion, however, that it was. The debtor was, *bonâ fide*, in possession of these goods, which were the household furniture of the house which he occupied as the plaintiff's servant, and of which furniture he had the use and enjoyment as a part of his wages or salary, and that was a *de facto* possession. It was just the kind of case and the sort of mischief which this Act of Parliament was intended to meet, and the possession of the grantor, the debtor, in this case, was a real and actual one, and comes clearly within the Act. If this were not so, the obvious consequence would be that the grantor of a bill of sale might continue in possession of his goods, paying a rent for them to the grantee, and the necessity for registering the bill of sale might be altogether done away with. We think, however, that the Act of Parliament was especially intended to meet such a case as the present one, and that the defendants' rule to enter a verdict for them must be made absolute, the bill of sale not being duly registered by reason of the omission with respect to the description of one of the attesting witnesses.

Rule absolute.

Solicitor for the plaintiff, *Cornford*.

Solicitor for the defendants, *O. March*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

May 19 and 20.

(Before *CLEASBY, B.*, and *GROVE, J.*)

COLLIER v. NORTH. (a)

Statute 3 Geo. 4, c. 58, s. 42—Meaning of the word "town."

By 3 Geo. 4, c. 58, s. 42, any person who sells fish within the town of Rochdale, except in the market place (unless such sale takes place from a shop or dwelling house), is liable to a penalty not exceeding 5l.

The respondent sold four herrings in an open-street, not in the market place. The street was a main thoroughfare with houses on both sides, in a populous part of the ancient municipal borough of Rochdale, and there was a continuous line of buildings from the market place to the

street where the sale took place. When the Act was passed the street in question was not made, and the site of it was in fact green fields. There was no definition in the Act of the meaning of the expression "town of Rochdale." The justices refused to convict, being of opinion that the words "town of Rochdale" were limited to the town as it then existed, but stated a case for the opinion of the court.

Held, that the justices were wrong in refusing to convict, inasmuch as the section was intended to apply to all parts of what might be fairly termed the town of Rochdale, whether in existence at the time of the passing of the Act or not.

This was a case stated under the statute 20 & 21 Vict., c. 43.

At a petty session of the justices holden on the 22nd March 1876, at the Town Hall in Rochdale, Charles Collier, hereinafter called "the appellant," appeared before us in support of a summons issued on an information preferred by him against Bridget North, hereinafter called "the respondent," charging: "That she, on the 4th March 1876, at Molesworth-street, in the said borough, not then and there being in the old or new market place in the said borough, but within the town of Rochdale aforesaid, unlawfully did sell certain fish, to wit four herrings, contrary to the statute in such case made and provided."

And the said information was heard and determined by us at the said petty sessions, and upon such hearing we dismissed the said information.

And whereas the appellant, being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf, now we do hereby accordingly state and sign the following case:—

Upon the hearing of the information the following facts were either proved before us or admitted by both parties:

1. The appellant is the inspector and superintendent of the Rochdale New Market Place, established by the Act 3 Geo. 4, c. 58, intituled "An Act for providing an additional market place in and for the town of Rochdale, in the County Palatine of Lancaster."

2. In sect. 42 of the said Act 3 Geo. 4, c. 58, it is enacted "that it shall not be lawful for any person or persons to kill, slaughter, or dress, or cause to be killed, slaughtered, or dressed, any beast, swine, calf, sheep, or any other cattle, in any shop, standing, or other place in the said new market, except in such buildings or places as may be erected or set apart for that purpose, nor shall any person or persons, from and after the space of eighteen calendar months from the passing of this Act, put, place, or set up, or cause to be put, placed, or set up, in any shop, stall, show, or standing, or any basket, or stool, table, or board, for the purpose of showing or selling or exposing to sale, any corn, grain, butchers' meat, fish, poultry, butter, eggs, cheese, vegetables, fruit, or other marketable commodities, matters, or things, on any of the public footpaths or highways in the said town of Rochdale, other

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than within the limits of the said Old Market Place and the said New Market Place, nor shall any person or persons hereafter, on any market day or days or on any other day, sell or expose to sale within the said New Market Place, any meat, butter, poultry, eggs, garden stuff, potatoes, roots, or vegetables, or any fish, at any time within the said town, except as hereinafter mentioned; and if any person or persons shall offend in any of the cases aforesaid, such person or persons so offending shall forfeit and pay for every such offence, on conviction before one or more justices of the peace for the county, any sum not exceeding 5*l.*, to be recovered and applied as hereinafter directed. Provided, nevertheless, that nothing herein contained shall extend or be construed to extend, to prevent or hinder any person from selling or exposing to sale any marketable commodities, matters, or things whatsoever, in his or her own private dwelling house, or in his or her own shop, in any part of the said town of Rochdale."

3. The respondent did on the 4th March 1876, expose for sale, and actually sell, to one Elizabeth Holt, in a certain street in Rochdale, called Molesworth-street, in the present municipal and parliamentary borough of Rochdale, four herrings at the price of 2*d.*

4. Such sale was made in the open street, from a basket carried by the respondent from door to door, and was not sold in the private dwelling house or shop of the respondent.

5. Molesworth-street aforesaid is not in the said Old Market Place or the said New Market Place of Rochdale.

6. There is no definition in the said Act 3 Geo. 4, c. 58, of the limits of "the town of Rochdale," nor has any subsequent Act local to Rochdale defined what shall be the meaning of the expression "of the town of Rochdale," as used in the said Act 3 Geo. 4, c. 58, for the purpose of the said Act.

7. At the time of the passing of the Act (3 Geo. 4, c. 58), the said street, called Molesworth-street, was not then made, and the site of it was in fact green fields. The said street is now a main thoroughfare, with houses on both sides thereof, in a populous part of the present municipal borough of Rochdale, and there is a continuous line of building from the Rochdale Market Place to Molesworth-street aforesaid, and such line of building extends beyond the said street to points much further distant from the said Rochdale Market Place.

It is contended, on the part of the appellant, that the expression, "the town of Rochdale," used in the Act 3 Geo. 4, c. 58, must be taken to mean the aggregation of buildings erected at the time of the passing of the said Act 3 Geo. 4, c. 58, and of those erected since that time.

It is contended in reply, on the part of the respondent, that the expression, "the town of Rochdale," as used in the Act 3 Geo. 4, c. 58, has reference only to the aggregation of continuous buildings forming the town of Rochdale at the time of the passing of the said Act.

We were of opinion that the meaning of the said expression, "the town of Rochdale," as used in the said Act 3 Geo. 4, c. 58, was the aggregation of buildings erected and in existence at the passing of the said Act 3 Geo. 4, c. 58, and that Molesworth-street aforesaid, being then fields unbuilt upon, was not within the town of Rochdale,

as intended to be defined by that Act. We, accordingly, dismissed the information against the respondent.

The question of law arising on the above statement for the opinion of the said court, therefore, is, what is the present meaning of the expression, "the town of Rochdale," as used in the Act 3 Geo. 4, c. 58. The court is to make such order in relation to the matters aforesaid as to the court may seem fit.

Manisty, Q.C. and *E. A. Owen*, for the appellant.—The justices were clearly wrong in refusing to convict. The place where this sale took place was within the town of Rochdale within the meaning of 3 Geo. 4, c. 58, s. 42. The spot where this sale took place is within the present limits of the town, and the Act was intended to apply to all parts of the said town then and thereafter to be laid out in streets. This case is concluded by authority. In *Elliot v. The South Devon Railway* (2 Ex. 725; 17 L. J. 262, Ex.), the question was raised as to the meaning of the word "town" in the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 11), and it was held that it meant a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and that the term will include a space of open ground surrounded by continuous houses. The case of *Reg. v. Cottle* (16 Q. B. 412; 10 B. & S. 548; 20 L. J. 162, M. C.) is a strong authority in favour of the appellant's contention. That was an indictment against certain trustees appointed under a local and personal Act, which was to be in operation for thirty-one years. The trustees were not to continue or erect any turnpike or tollgate across roads in the towns of Taunton or Wellington, or in any other town through or into which the roads might pass or be made, and the indictment charged the trustees with erecting and continuing a turnpike-gate within the town of Taunton. It was admitted that the gate was not, when first erected, within the town of Taunton, as the town then stood. Two questions therefore arose, first, as to the meaning of the word "town;" secondly, whether the operation of the Act was intended to apply merely to the town as existing at the time of passing the Act, or to whatever should become the town from time to time during the thirty-one years for which the Act was to be in force. At the trial, the learned judge told the jury that the word "town" in the Act was to be used in a popular sense as a congregation of houses, and they were to consider whether the spot where the gate stood was surrounded by houses so reasonably near that the inhabitants might fairly be said to dwell together. As regards the second point, leave was reserved to move to enter a verdict for the defendants. A rule *nisi* was afterwards obtained to enter a verdict for the defendants on the point reserved, or for a new trial on the ground of misdirection. Lord Campbell, C.J., in delivering the judgment of the court, expressed his approbation of the direction to the jury respecting what ought to be considered the limits of a town, and that the enactment was not confined to the town as constituted at the time when the Act passed. The case of *The Commissioners for Paving, &c., the Town of Milton v. The Faversham District Highway Board* (10 B. & S. 548), is to the same effect, and Cockburn, C.J., approve of the decision in *Reg. v. Cottle* (*ubi sup.*).

No counsel appeared to argue on behalf of the respondent.

CLEASBY, B.—The question reserved to us is as to the meaning of the expression “the town of Rochdale” in the Act 3 Geo. 4, c. 58. I confess it appeared to me at first that the Act had reference to an existing state of things, and in some sense that is correct. But the town of Rochdale manifestly does not remain the same, but is of a varying nature from generation to generation. At the time of the passing of the Act the town was a growing one, and the Legislature intended that the Act should have reference to a thing not always remaining the same. The Act itself commences by saying, “Whereas the town or parish of Rochdale hath of late years greatly increased in population and building,” &c., showing that the town was an increasing one so far as regards its population. It appears to me, on consideration, therefore, that it would be unreasonable to hold that the words “town of Rochdale” only referred to the town as it existed when the Act was passed. If there had been two separate towns which by continual extension had become joined together, different considerations would have arisen. But when it is manifest that a growth was contemplated, the word “town” should be applied to the old town, together with its natural growth. Therefore I come to the conclusion that this sale took place within “the town of Rochdale,” and that the justices ought to have convicted the respondent; the case must, therefore, be remitted to them for that purpose.

GAOZE, J.—I am of the same opinion. When we look at the object of the Act, and the state of things intended to be remedied, it is clear that the word “town” did not mean town as limited at any particular time, but was intended to include what was commonly called the town of Rochdale. The preamble is as follows: “Whereas the town or parish of Rochdale, in the County Palatine of Lancaster, hath of late years greatly increased in population and buildings, and the present market place, &c., has become so inadequate, that the passages along the public streets within the said town are greatly obstructed, and rendered dangerous to the inhabitants of the said town, and also to travellers by reason of the number of stalls and standings placed therein; and whereas it would be a great convenience to the inhabitants of the said town, and the persons frequenting the said town on market and other days, and would tend to remove nuisances and obstructions if a new or additional market place was provided and established,” &c., which clearly shows that the very object of the Act is, as the town of Rochdale was increasing, to confine parties to selling in the market place, and that as the then existing market was inadequate, to provide a new market place for the town. It is worth while observing, however, that sect. 33 provides for the widening of the streets, and for certain buildings being taken down if necessary. Therefore we find direct provisions in the Act having reference to the increasing town of Rochdale, beyond what it was in 1822, when this Act came into operation. If we were to hold that the operation of the Act was confined to the then existing town, then any portions of a street which had been widened would not be within the Act, while the remaining portion which originally formed the street would be within the Act.

So that in such a case a sale of fish would be permitted in one portion of a street and not in another portion of the same street. This certainly would be a great absurdity, but, as it seems to me, it would be the necessary consequence of holding that the “town of Rochdale” in the Act intended to include only the then existing town. For if you so limited the word “town,” if some of the streets were elongated, on the part so elongated a sale could be legally effected, while on the other part a sale would render the seller liable to a penalty. Therefore the definition of the “said town of Rochdale” ought not to be so limited; and the word “said” merely has reference to the town to which the Act applies, and the expression was intended to include what might fairly be called the town. A row of cottages might be a mere suburb of the town, and not within the town; but that would depend on circumstances. The only other argument that could be raised for the respondent is, that the town may become so extended as to make the market place quite insufficient to meet the requirements of some of its inhabitants. The answer is, that if such a state of things should arise, another application must be made to Parliament for still further accommodation. For the reasons I have given, I think the justices were wrong in refusing to convict the respondent.

Case remitted to Justices.

Solicitors for the appellant, *Norris, Allen, and Carter.*

Thursday, May 11.

COOPER (app.) v. OSBORNE (resp.)(a)

Licensed premises—Private friends—Gaming—35 & 36 Vict. c. 94, ss. 17 and 25—37 & 38 Vict. c. 49, s. 80.

The appellant, a private friend of a licensed person, bona fide entertained by him after the hours of closing at his own expense within the Licensing Act 1874, s. 30, was playing cards for money on the licensed premises, and was convicted under the Licensing Act 1872, s. 25, of being on the said premises during the period they were required to be closed.

Held, upon a case stated that the appellant was not on the premises in contravention of the provisions of the Licensing Acts with respect to the closing of licensed premises, and that the conviction must be quashed.

This was a case stated by two justices of the peace acting for the Newark Division of the county of Nottingham under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at Newark-on-Trent, in the said county of Nottingham, on the 5th Jan. inst., Charles Cooper, of Spalford, in the county of Nottingham, farmer (called the appellant), was charged before the said justices on the information of John Osborne, of Newark-on-Trent, police superintendent (called the respondent), for that he, on the 29th Dec. 1875, at the parish of South Clifton, in the said county of Nottingham, was on certain licensed premises (to wit), the Red Lion Inn, there situate, during the period during which the said premises were required under the provisions of the Licensing Act 1872 to be closed

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law

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COOPER (app.) v. OSBORNE (resp.).

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contrary to the statute in such case made and provided.

Henry Derbyshire, a police constable, stationed at Clifton, proved that on the 29th Dec. last he was passing the Red Lion Inn at South Clifton about eleven o'clock at night, when he heard voices within and distinguished that persons were playing cards for money. He subsequently obtained admission to the premises, and then found several persons present, including the appellant in the present case. The landlord stated that they were his private friends, and he considered that he had a right to entertain them as such.

The said justices' attention was drawn to the case of *Patten v. Rhymer* (29 L. J., 189 M. C.). The appellant's advocate admitted the persons in the inn were playing at cards for money, but contended that the Legislature, when inserting clause 30 in the Licensing Amendment Act of 1874, whereby a licensed persons was authorised to entertain and supply liquors after the hours of closing to his private friends at his own expense, intended that the licensed person should have the same rights as any private person to entertain his friends in any manner he pleases, and that, therefore, neither the landlord nor his friends were liable to any penalties under the Licensing Acts.

The said justices were of opinion that notwithstanding the persons on the licensed premises were, as they had no reason to doubt, and found as a fact that they were, private friends to whom the landlord might after hours give at his own expense intoxicating liquors under sect. 30 of the Licensing Act 1874; yet he was not thereby justified in allowing them to play for money; the said justices, therefore considered they were there in contravention of the Licensing Act, as to the closing of licensed premises (sect. 25 of the Licensing Act 1872), and they therefore convicted the appellant.

The appellant being dissatisfied with their decision, as being erroneous in point of law, requested a case to be stated for the opinion of the court.

Should the court be of opinion that the appellant, being a private friend of the licensed person, was upon the premises in contravention of the Licensing Acts, then the conviction is to stand; otherwise it is to be quashed.

The court having remitted this case to the said justices, who stated and signed the same to be restated by pointing out how the defendant had contravened the Licensing Acts, they hereby stated as follows:—

"The reasons for our decision were: By sect. 3 of the Licensing Act 1874, it is provided that all premises in which intoxicating liquors are sold by retail, shall be closed at the hours in such sect. named, unless extended by the licensing justices, which had not been done. The appellant was found upon the licensed premises after closing time. He gave no evidence that he was an inmate, servant, or lodger, or *bond fide* traveller, and only contended that his presence on the premises was not in contravention of the Licensing Acts, but that he was a private friend of the landlord. As he was not there for the purpose only of being entertained by the landlord as a private friend with intoxicating liquors, as allowed by sect. 30 of the Act. of 1874, but (though still a private friend of the landlord) it appearing to us that he was there for an unlawful purpose (to wit), gaming for money, we considered he was aiding and abetting

the landlord (as the licensed person named in sect. 17 of the Act of 1872), in suffering unlawful games to be carried on on the premises; and therefore that he was on such premises in contravention of the Licensing Acts, and in consequence liable to the penalty in which we convicted him."

The case came on to be argued first at the same time with *Hare*, appellant, v. *Osborne*, respondent, on the 17th Feb. 1876, reported 34 L. T. Rep. N. S. 294; that was a case stated at the request of the landlord, who was convicted for suffering gaming on the occasion when the appellant was charged in this case. The court affirmed that conviction, but remitted the case of the charge against the appellant as stated by the justices.

Rolland now argued for the appellant on the amended case.—The charge against the appellant, as it appears by the information, is not one of aiding and abetting the landlord in suffering gaming, as suggested by the justices in the reasons for their conviction, but for being on licensed premises after closing time, which is provided for by sect. 25 of the Licensing Act 1872 (35 & 36 Vict. c. 94); by that section, "If, during any period during which any premises are required under the provisions of this Act to be closed any person is found on such premises, he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bond fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding 40s." Although under that Act, taken by itself, the appellant might have been liable to conviction, he is by implication now clearly exempt, in consequence of sect. 30 of the Licensing Act 1874 (37 & 38 Vict. c. 49), by which "No person keeping a house licensed under this or the principal Act shall be liable to any penalty for supplying intoxicating liquors after the hours of closing, to private friends *bond fide* entertained by him at his own expense. Sect. 17 of the Act of 1872 imposes a penalty upon the licensed persons only, and not upon his guests, if the former suffers gaming or any unlawful game to be carried on on his premises; there is, therefore, no such offence as that suggested by the justices, even if the appellant were charged with it.

The respondent did not appear.

CLEASBY, B.—I believe we are all agreed. My opinion is that the conviction cannot stand, because the appellant was not guilty of the offence charged against him. The 25th section of the Licensing Act 1872, which imposes a penalty upon any person found upon licensed premises during the period the premises are required to be closed, must now be read with the 30th section of the Licensing Act 1874, which exempts licensed persons who supply intoxicating liquors after the hours of closing to private friends *bond fide* entertained by him at his own expense. That section of the later Act must also exempt such private friends so entertained, for their presence on such premises is no longer, to use the limiting words of sect. 25 of the first Act, in contravention of the provisions of the licensing Acts, with respect to the closing of the licensed premises. There is no provision for the conviction of a guest in a licensed house, whether during the hours of closing or not, for gaming or any unlawful game but the magistrates have somehow introduced

section 17 of the Act of 1872, which imposes a penalty on a licensed person for such an offence, into the subsequent sect. 25, so as to make the guest liable for his presence at the time of the landlord's contravention of the Act, although exempted by the second Act. The reasons given by the justices are in this case certainly erroneous, and it cannot be said that the appellant's presence on the premises was under the circumstances in contravention of the provisions of the Act. The appeal, therefore, must be allowed.

DEYMAN, J.—I am of the same opinion. The magistrates find as a fact that the appellant was, within the words of sect. 30 of the Act of 1874, a private friend of the landlord, and being entertained by him at his own expense. The landlord, therefore, was justified in allowing the appellant to be on the premises after the time of closing, and the appellant has not thereby contravened the Act. There was nothing illegal in what the appellant did, at all events until the playing at cards for money commenced. Although the landlord may be convicted for suffering such a proceeding, it seems that there is no penalty upon the persons playing cards either during the open or close hours. More might, perhaps, be said in support of a conviction if the appellant had been charged with aiding and abetting the landlord in a breach of the 17th section, but there seems to be no summary remedy for such an offence. At all events, there is nothing here to support the charge under the 25th section, which is made against the appellant, and the conviction must be quashed.

FIELD, J.—I am of the same opinion.

Judgment for appellant.

Solicitor for appellant, R. W. Mareland.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

July 10, 11, and 18.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

ADIE v. CLARK. (a)

Patent—Infringement—Account—Evidence.

Plaintiff having taken out a patent for improvements in the machinery for clipping horses, defendant offered, if the plaintiff would give him a licence for the manufacture, to pay the sum of 1s. 2d. on all horse clippers sold by him (the defendant) after a certain date, and plaintiff accepted the offer. A bill was filed for specific performance of this contract, and a decree was made, declaring that the agreement ought to be specifically performed, ordering a licence to be granted, and directing an account.

On a summons on behalf of the plaintiff to surcharge the defendant on account of certain clippers asserted to have been made according to the plaintiff's invention, the defendant denied that his clippers came within the limits of the patent, and produced the specification of an American patent as evidence of the construction to be put on the specification of the English patent.

Reported by H. STEWART ROOPE, Esq., Barrister-at-Law.
XXXV., N. S., 887.

Held (reversing the decision of Bacon, V.C.) that, on the principle that a licensee could not in any way dispute the validity of the patent, the evidence was inadmissible, and, further, that the clippers made by the defendants were within the plaintiff's patent.

This was an appeal by the plaintiff from a decision of Vice-Chancellor Bacon, under the following circumstances: The plaintiff was the patentee of a horse-clipping machine, and the defendant was a maker of horse-clipping machines, to whom the patentee had agreed to grant a licence to manufacture machines under his patent; the defendant agreeing to pay a certain royalty upon each machine sold by him. Disputes, however, arose between the parties, and eventually a bill was filed for specific performance by the defendant of the agreement in question. On the hearing, in Feb. 1874, a decree was made in favour of the plaintiff, and an account was directed. A licence was settled and executed under the decree; but on taking the accounts the defendant denied that he had ever made any machines under the plaintiff's licence, and insisted that all those he had made and was making were, according to the true construction of the specification of the plaintiff's patent, without the limits of that patent, and, consequently, did not come within the terms of the decree. The plaintiff took out a summons to surcharge the defendant on account of the horse clippers, which he alleged were made according to his invention. The defendant, in opposition to the claim, produced in evidence certain documents which had been deposited at the Patent Office, consisting of descriptions of American patents, and also some prior specifications of English patents. At the hearing of the summons the plaintiff objected to this part of the evidence as inadmissible; but Vice-Chancellor Bacon overruled the objection, and dismissed the summons. On the appeal the only important point for the purposes of a report, which was decided, was as to the admissibility of the above-mentioned evidence.

The Attorney-General (Sir John Holker, Q.C.), Sir H. Jackson Q.C., and Lawson, for the plaintiff.

Kay, Q.C., Fry, Q.C., and Aston, Q.C., for the defendant, submitted that the evidence in question was admissible. The following cases were cited:

Trotman v. Wood, 16 Q. B., N. S., 479;

Curtis v. Platt, 11 L. T. Rep. N. S. 245.

JAMES, L.J., in giving the judgment of the court, went fully into the facts, and proceeded as follows: Of course it is said that as licensee it is not competent for the defendant to dispute the validity of the patent, and it is admitted, therefore, that the documents cannot be used directly to show want of novelty. But they are available, and used in this way. A licensee is entitled to show the limits of the patent, and that he is outside those limits. And, in construing a patent, this is always to be observed, that you should so construe it that it shall be a valid and not a void patent. If you construe this patent one way, then the documents produced show that the patent is bad for want of novelty, and you ought, therefore, to construe it so as to protect it from that conclusion. The counsel for the plaintiff objected to the admissibility of this evidence; but, as it had been admitted and acted on by the Vice-Chancellor, we admitted it *de bene esse*. We think, however, we ought to give our decision on the

[Ct. of App.] POLAK v. EVERETT—BEGGIE v. PHOSPHATE SEWAGE COMPANY (LIMITED). [Ct. of App.]

objection, and we are of opinion that the evidence is clearly inadmissible for the purpose of construing the specification of the particular patent before us. The admissibility of it was put on some expressions in the judgments of the learned judges in the case of *Trotman v. Wood*, relating to Trotman's anchors. They are only *dicta*, because no such evidence was acted on in that case. It was never meant by the learned judges, and it cannot be effectually contended, that there is any principle to be applied to the construction of specifications which differs from that applicable to the construction of every written instrument whatever. Of course, in ascertaining the meaning of the words used, you endeavour to put yourself as much as possible in the position of the person using them. What a testator knew is commonly resorted to. Facts within the knowledge of both the parties to a written contract may be very material in understanding the precise meaning of the expressions used by them. So in a specification, which is addressed by a man having knowledge of the subject to people having also knowledge of the subject—to that portion of the public who have, or may have, an interest in it—that which is clearly matter notorious to the world at large, that which is matter within the common knowledge of the trade or of persons conversant with the article, may be resorted to for the purpose of limiting the construction of a specification, or of a claim in it, to this extent, and to this extent only: You assume that a patentee would not be so absurd as to claim that which he knew, and that which he knew everybody else knew, to be old, and you would, if possible, avoid that absurdity if by any legitimate construction of the words used you could do so. But this is a very different thing from construing a man's language by the production of a document which, so far as it appears, the man never saw or heard of—from construing a specification and claim which is intended for the information of the public by the production of a document which, so far as it appears, no one of the public ever saw or heard of. As used in this case, it was not used really for the purpose of assisting in the construction of, or ascertaining what was meant by, the patentee in the language he used, but as a device to escape from the clear rule which prevents a licensee from disputing the validity of the patent. What was really attempted was this: A great part of what is covered by the patent is old, and therefore bad; some little part is new, and therefore good; the court will confine the patent to what is new and good. That device will not succeed. A licensee cannot bring his licensor into litigation as to the novelty of any part of his patent, under any pretence whatever. His Lordship then dwelt upon the merits of the case, and said the court was clearly of opinion that the appellant was entitled to surcharge the defendant in respect of the instruments manufactured by him, and that the appellant must have his costs both of the appeal and of the proceedings in the court below.

Solicitors, *H. Jarman; J. H. Johnson.*

SITTINGS AT WESTMINSTER.

Tuesday, May 2.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and DENMAN, J.)

POLAK v. EVERETT (a).

Principal and surety—Discharge of surety by alteration in original contract—Divisibility of the security—Knowledge of the surety.

If the principal creditor deprives the surety of any right he would have had against the original debtor, even though the surety is benefited thereby, the surety is discharged.

Although the surety is aware that an alteration is being made in the original contract, he is not bound to express his dissent to the transaction.

APPEAL from the Queen's Bench Division (reported 34 L. T. Rep. N. S. 128, where the facts of the case and judgment of the court will be found fully reported). The argument in the Court of Appeal went entirely on the facts, and it would therefore be useless to repeat them.

Philbrick, Q.C. and R. E. Webster, for the defendants (the appellants).

McIntyre, Q.C. and J. C. Mathew, for the plaintiffs, were not called upon.

JESSEL, M.R.—It is not necessary for us to say more than that the judgment of the Court of Queen's Bench must be affirmed.

KELLY, C.B., MELLISH, L.J., and DENMAN, J., concurred.

Judgment affirmed.

Solicitors for plaintiffs, *Lumley and Lumley.*
Solicitors for defendant, *Parker and Clarke.*

Tuesday, May 2.

BEGGIE v. PHOSPHATE SEWAGE COMPANY (LIMITED) (a).

Money received—Failure of consideration—Fraud. Defendants, a limited company, had patented in England a process for utilising sewage. Plaintiff, acting ostensibly on his own account, but really on account of the company, bought from defendants for 15,000l., a grant of the exclusive right to use their process in Berlin. Plaintiff then conveyed his interest to L. for 30,000l., and L. conveyed it for 30,000l. to H.'s clerk, in trust for the intended Berlin company. The Berlin company was formed and issued a prospectus, stating that they had the exclusive right to use defendants' process in Berlin. The 30,000l. was paid to H., who kept 15,000l. and paid 15,000l. to defendants in satisfaction of plaintiff's obligations. The object of the scheme was to float the Berlin company, in which H. was interested. No exclusive right had been or could be obtained in Berlin, and plaintiff and H. knew this, but defendants' directors did not.

In an action to recover the 15,000l. paid to defendants,

Held (affirming the judgment of the Queen's Bench Division), that plaintiff was not entitled to recover, because, knowing that there was no Berlin patent, he had only bargained for an ostensible grant, which he had got, and because his claim was founded on fraud, and a rule to enter the verdict for defendants was made absolute.

DECLARATION for money received by the defendants for the use of the plaintiff, and for money found to be due on accounts stated.

(a) Reported by R. H. ARNOLD, Esq., Barrister-at-Law.

Plea, never indebted.

There were other counts in the agreement between the plaintiff and defendants, but these are not material, as the case rested entirely on the money counts.

At the trial in London, before Cockburn, C.J., on the facts found by the jury, the verdict was directed to be entered for the plaintiff for 15,000*l.*, leave being reserved to the defendants to move to enter a verdict for them.

The Queen's Bench Division (Cockburn, C.J., and Quain and Field, JJ.) made the rule absolute to enter the verdict for the defendants.

The report of the case will be found in 33 L. T. Rep. N. S. 470.

The plaintiff appealed.

Butt, Q.C. and Trevelyan, for the appellants.

Sir Henry James, Q.C., Cohen, Q.C., and Lanyon, for the respondents, were not called upon.

The judgment of JESSEL, M.R. (in which the rest of the court concurred) went entirely on the facts, and the judgment of the Queen's Bench was affirmed.

Judgment affirmed.

Solicitors for plaintiff, Combe and Wainwright.
Solicitor for defendants, John Holmes.

Wednesday, May 10.

(Before JESSEL, M.R., MELLISH, L.J., and
POLLOCK, B.)

RICHARDSON v. GREAT EASTERN RAILWAY COMPANY. (a)

Negligence—Railway company—Through traffic—Defect in foreign truck—Minute examination unnecessary.

A railway company is not bound to make a minute investigation into the soundness of every truck that comes on to its lines from other companies; an ordinary examination is sufficient.

Nor, when one defect has been discovered in a truck and has been properly remedied, will it under those circumstances be necessary for the company to make a further minute examination of the truck before forwarding it to its destination.

THIS was an appeal from a judgment of the Common Pleas Division, whereby the plaintiff had obtained a rule absolute upon the findings of the jury to enter the verdict for himself (23 L. T. Rep. N. S. 248; L. Rep. 486, C. P.), and it now came before the court on a special case stated.

At the original trial, which took place before Kelly, C.B. at Kingston, at the spring assizes, 1874, the following three questions were left to the jury, and the following answers given:

First question.—Would the defect in this axle, which was the cause of the accident, have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? Answer.—Yes.

Second question.—Was it the duty of the defendants to examine this axle by scraping off the dirt and minutely looking at it, so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? Answer.—No.

Third question.—If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect, they ordered it to be repaired, and it

remained for four or five days upon their premises for that purpose? Answer.—It was their duty to require from the waggon company some distinct assurance that it had been thoroughly examined and repaired.

Hawkins, Q.C., Parry, Serjt., and Marriott, for the company, argued the case upon the same grounds as in the court below.

Biron (*Lush* with him) for the respondents.

JESSEL, M.R.—This is an appeal from the Common Pleas Division directing a verdict to be entered for the plaintiff for 250*l.* damages. The action was brought for damages against the Great Eastern Railway Company for that, owing to their negligence, an accident had occurred upon their line by which the plaintiff was injured. The question for us to decide is, as to the liability of the company. The facts of the case appear to have been shortly as follows: There was a coal truck belonging to the Birmingham Waggon Company which had been let by them to some colliery proprietors, and that truck came from the Great Northern line on to the defendants' line at Peterborough. The Great Eastern, like all other railway companies, is compelled by statute to forward and to give due facility for forwarding the traffic of other companies. The company was not a volunteer in the matter, but was performing a statutable duty. Of course, the company are bound to see that the trucks coming on to their line are in a state to travel safely, and it is impossible for them to be excused unless they have used reasonable diligence in examining the trucks forwarded to them by other companies. The substantial question is, whether that duty has been discharged by the defendants. From the evidence it appears that at Peterborough there are every week a vast number of trucks sent along the defendants' line from other lines. An examination is made of such trucks by servants of the company appointed for the purpose. It has been called a "cursory" examination; that would be practically impossible; but certain precautions are taken by the workmen employed on that duty, which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient. All these usual precautions were adopted here, and two defects were discovered—one being that a spring had lost its camber, which had disabled the truck from travelling safely, and the other a crack in the woodwork, which does not appear to have been so material as to have interfered with the travelling of the truck. Notice of the first defect was given to the Birmingham Waggon Company, which had a workshop at Peterborough, so that they might get it remedied; and with regard to the other defect, it being inconvenient to unload the truck, without which the defect could not be remedied, and it being unnecessary to remedy it immediately, as it did not interfere with the safety of the truck, that defect was left to be remedied subsequently. The truck was accordingly shunted that the spring might be repaired, and on its return to the defendants their servants ascertained that the repairs had been done and examined the truck in the usual way to see that there was no other defect. It was then sent on, and the accident occurred through a defect in no way connected with the two defects previously mentioned—namely, a defect in the axle. The real question is, whether the company were guilty of negligence in not

(a) Reported by R. H. ANFELTY, Esq., Barrister-at-Law.

[CT. OF APP.]

RICHARDSON v. GREAT EASTERN RAILWAY COMPANY.

[CT. OF APP.]

making a more minute examination, for there is no doubt that the crack, having reached the surface, might have been discovered by a sufficiently complete examination. We must look to what is reasonable in reference to the exigencies of mankind. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat foreign trucks as to defeat the very object for which they were sent on to the line, namely, for the purposes of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was, whether the mode of examination adopted by the company was reasonably satisfactory. It appears to me that the jury did answer that question substantially in the defendants' favour. Three questions were put to the jury. The first was whether the defect in the axle would have been discovered upon any fit and careful examination of it to which it might have been subjected? The jury answered yes. The second question was whether it was the duty of the defendants to examine the axle by scraping off the dirt and minutely looking at it—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? The jury answered no. The third question was whether, if that was not their duty upon the first view of the truck, it became their duty so to do when, upon having discovered the defects in the spring and in the side of the truck, they ordered it to be repaired, and it remained for four or five days upon their premises for that purpose. The jury answered, "It was their duty to require from the Birmingham Waggon Company some distinct assurance that it had been thoroughly examined and repaired." The meaning of the last question appears to be this: Assuming that it is not incumbent in general on the company to do more in cases of foreign trucks than they did here, still, a defect having been discovered, did that throw upon them a duty to do more? I think there can be only one answer to that question. If the defect was such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further; but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now, I read the answer of the jury to the third question as meaning that there was no such duty as suggested by the question, but that the defendants ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed, or that it had been neglected. It is not for the jury to lay down an absolute duty such as this, irrespective of the case and of the evidence before them. It is impossible to make that answer the foundation for a verdict against the defendants. If it was the defendants' duty to inquire, it could only be because they were bound to satisfy themselves of the fitness of the truck, and if so bound they could not exonerate themselves by mere inquiry of the waggon company. If it had been proved that they relied upon mere

inquiry, I am not sure that that might not, *per se*, be evidence of negligence. I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff, therefore, fails. The judgment must, therefore, be reversed.

MELLISH, L.J.—I am of the same opinion. The question depends on the nature of the defendants' obligation with regard to what are called foreign trucks, i.e., trucks sent on to their lines by other companies. They are bound in point of law to carry on these trucks to their destination, unless they can show some good reason for refusing. The plaintiff has, in order to maintain the action, to make out two things; first, that the defect in the axle of the foreign truck, through which the accident happened, was discoverable, for, if the defect was undiscoverable, clearly the defendants could not be liable; secondly, that the defendants were in fault in not discovering it. It was shown by the evidence on the part of the railway company, which was substantially uncontradicted, that a very great number of trucks come through Peterborough every week, and that it is impossible that they should be examined minutely; but a mode of examination is adopted which in practice is generally found sufficient to disclose defects, if any exist. It was practically undisputed by the plaintiff's counsel, that if the usual examination had been made, and no defects had been discovered, there would have been no case against the defendants, but it was said that upon a defect being discovered by the usual examination, the truck ought then to have been thoroughly overhauled. The Chief Baron put two questions with regard to this part of the case, namely, the second and third questions. The second question the jury answered in the negative. The third question seems to me to ask whether, assuming that there might not be in general, or in the first instance, a duty to examine the axle minutely, there was such a duty under the particular circumstances; that is, whether the discovery of the defect on the cursory examination, made it the duty of the company to examine more minutely. It seems to me, having regard to the finding on the second question, that the jury by their answer to the third question, meant to negative the existence of the duty to examine more minutely as they had done in their answer to the second question; but they add a finding that it was the duty of the defendants to have inquired of the waggon company as to the repairs. What effect are we to give to that finding? It was never alleged by the plaintiff that it was the duty of the defendants to inquire of the waggon company. There was not a single witness who said that it was in the usual course of business or a proper thing to make such an inquiry. We cannot, I think, give any effect to a mere suggestion of the jury respecting a matter as to which they were not asked, and as to which there was no evidence before them. If it had been put to the jury that there was such a duty, an answer would very easily have suggested itself. It would be urged that it would be a very foolish thing to place any confidence in such an inquiry. The people who send the waggons will always say that they are in good repair. I think, therefore, that this finding must be disregarded, and that we can only consider the substantial effect of the finding as an answer to the question put and as I have already said

I think it negatives the existence of the duty. I cannot help thinking that the decision in the court below proceeded upon some misapprehension of the facts, and there are expressions in the Lord Chief Justice's judgment which would seem to show that he was under the impression that the repairs for which the truck was stopped at Peterborough were general repairs, whereas it seems clear that there was no question of repair at Peterborough other than with respect to the spring and the crack in the side of the truck. The spring was in fact repaired, and the crack in the side, though it remained unrepaired, had no connection whatever with the failure of the axle, through which the accident did occur. For these reasons I think there was no evidence of negligence on the defendants' part, and the decision of the court below must be reversed.

POLLOCK, B.—I agree that the verdict should be entered for the defendants. My only doubt has been whether it would be necessary to have a new trial; for if there were any evidence of negligence fit to be submitted to a jury, we could not properly enter a verdict for the defendants. I am now satisfied, however, there was no sufficient evidence of negligence on the defendants' part. The only sensible construction of the answer to the third question appears to me to be that the jury intended to negative the duty as to which the question was asked, but they added to that negative a finding that the defendants ought to have inquired of the company. It seems obvious that that must have been their meaning; for the two duties—the duty to examine for themselves and the duty to inquire—could hardly co-exist. It seems to me that the third question was unnecessary. If, on the whole of the evidence it had appeared that there was any connection or probability of connection between the defects discovered, *i.e.*, the defects in the spring and the side and the defects in the axle, the case would have been different, and the question might have been material. It appears to me impossible to impose on the defendants the duty of making a minute examination of the whole truck because defects have been discovered in some part of the truck which have no connection with the probable existence of defects in any other part of the truck. For these reasons I also think the judgment should be reversed.

Judgment reversed.

Solicitors for plaintiff, *Freeman and Bothomley for Kelsey and Son.*

Solicitor for defendants, *W. H. Shaw.*

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and DENMAN, J.)

MARCUS v. GENERAL STEAM NAVIGATION COMPANY (LIMITED). (a)

New trial—Verdict against evidence—Costs of first trial—Stat. 17 & 18 Vict. c. 125, s. 44.

The plaintiff brought an action for three parcels carried by three ships belonging to the defendants, and which were lost during transit. As regards two of these parcels, a verdict was found for the plaintiff; as to the other, the defendants succeeded. The defendants subsequently applied for

and obtained a new trial, the result of which was that they got an entire verdict.

Held (reversing the judgment of the Queen's Bench Division), that as there had been no default on the part of the defendants, and the plaintiffs had not exercised the power which they possessed of entering a nolle prosequi, or of intimating that they did not intend to pursue further the particular issue found against them on the first trial, the defendants were entitled, under the circumstances, to recover the costs of the first trial, relating to the issue found in their favour.

On taxation of costs, the master declined to allow the costs incurred by the defendants at the second trial for shorthand writer's notes.

Held (affirming the judgment of the Queen's Bench Division), that it was entirely within the discretion of the Master to allow or disallow these items, and that it was not the practice of the court to interfere with that discretion, except in cases of gross abuse.

THIS was an action brought by the plaintiffs against the General Steam Navigation Company for the non-delivery of certain furs. The case came on for trial before Cockburn, C.J., and a special jury, in 1874, when it appeared that three different parcels of furs had been delivered to the care of the defendants, to go by three different ships, all of which were alleged to have been lost on board. As to two of these packages, the verdict went for the plaintiff; as to the third, which was alleged to have been lost on the ship *Germania*, a verdict was found for the defendants. A rule nisi for a new trial was afterwards applied for by the defendants on the ground that the verdict was against the weight of evidence, and eventually made absolute, the court intimating that the defendants must take the risk of losing on all the issues on the further trial.

The second trial was heard before Kelly, C.B., when a verdict was found for the defendants on all the issues. When the costs came to be taxed the master allowed the costs of the second trial and none of the first. He also declined to allow the costs of some shorthand writer's notes, taken at the defendants' instance on the second trial. The defendants appealed to Denman, J., at chambers, who referred the matter to the Queen's Bench Division. The court declined to interfere with the master's taxation. The defendants accordingly appealed, and the question raised was as to the right of the defendants to recover the expenses of the first trial so far as they related to the issue found in their favour. On the case coming on for hearing,

Anderson, on behalf of the plaintiff, contended that there was no appeal given to this court, and quoted the Judicature Act 1873 (36 & 37 Vict. c. 66), sect. 49, by which it is enacted that no order made by the High Court of Justice, or any judge thereof, "as to costs only which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order." [JESSEL, M.R.—That applies only to a case where the judge has a discretion, and has exercised it in giving or refusing costs.]

Charles Hall then argued on behalf of the appellant, and contended that the master had exceeded his power in refusing the costs of the first trial, so far as they related to the issue found in favour of the defendants. He further con-

(a) Reported by R. H. AMPLETT, Esq., Barrister-at-Law.

[Ct. of App.] VESTRY OF MILE END OLD TOWN v. GUARDIANS OF WHITECHAPEL UNION. [Ct. of App.]

tended that the expense of the shorthand writer's notes ought not to have been disallowed.

Anderson, for the plaintiff, was told to confine himself to the first point, and contended that these costs were not recoverable. He relied on the Common Law Procedure Act 1854, sect. 44, by which it is enacted that "when a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order."

JESSEL, M.R.—I am of opinion the appellant is entitled to succeed on the first point. It appears that the plaintiff brought three actions for three parcels, carried by three ships belonging to the defendants, and alleged to have been lost on board. The defendants denied their liability, and the three different causes of action were tried together. As to one of those, the defendants succeeded in the first trial, viz., as to the claim in respect of the loss on the *Germania*. The defendants subsequently applied for a new trial of the whole matter; for it appears the new trial could not have been limited merely to the two issues on which the verdict went against them, without the consent of both sides; and this consent was not given by the plaintiff. Accordingly a new trial was granted generally. Now the plaintiff had the option as regards the issue which had been found against him on the first trial, of entering a *nolle prosequi*, or of intimating that he did not further intend to insist on this particular claim. But he took neither of those courses which were open to him, but preferred to take his chance of succeeding on each of the issues. The result of the second trial was that the defendants got an entire verdict. The question now raised before us is whether the plaintiffs ought, under the circumstances, to pay the costs of the first trial, so far as it relates to the *Germania*. Now sect. 44 of the Common Law Procedure Act 1854 enacts that "when a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event," the effect of which is that if a party is successful as regards both trials, he gets costs paid in both trials. It is said, however, that the defendants are not entitled to get their costs, because there is some technicality in the way: and I regret that the objection has been given effect to, in the court below. I can see no principle at all in such a contention. The defendants are not in default, and the plaintiffs have no right whatever to object to these costs being recovered. If, as has been said, there is no precedent for this cause, I think it is quite time we made one. As regards the costs incurred for shorthand writer's notes, I think it is entirely discretionary with the master whether he will allow them or not, and it has not been the practice of this court to interfere with that discretion, except in cases of gross abuse. The decision of the master on this point has been given, and the matter has also been before a judge at chambers and a Divisional Court of the Queen's Bench. As to this, therefore, the appellant fails, and there will consequently be no costs given on either side.

KELLY, C.B.—I am of the same opinion.

MELLISH, L.J.—I concur. I can see no reason why a defendant, having been successful, is not, under the circumstances, entitled to recover the costs of the first trial relating to the *Germania*.

DENMAN, J.—I am of the same opinion. I think that as regards the disallowance of the costs relating to the *Germania*, the master was wrong. As regards the shorthand notes, it was discretionary with the master whether he would grant them or not, and in my judgment we ought not to interfere. (a)

Solicitor for plaintiff, A. G. Ditton.

Solicitor for defendant, Batham.

May 2 and 3.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and DENMAN, J.)

VESTRY OF THE HAXLET OF MILE END OLD TOWN v. GUARDIANS OF THE WHITECHAPEL UNION. (b)

Metropolis Management Acts—Apportionment of expenses—One side of a street—18 & 19 Vict. c. 120, s. 105—25 & 26 Vict. c. 102, s. 77.

The plaintiffs, acting under the Metropolis Management Acts, resolved that a portion (to wit, the eastern side) of a new street should be paved throughout the whole length for a uniform breadth of 12 ft., measured from the eastern boundary; and that the owners of the houses forming the eastern side should pay the estimated expenses. In an action against the defendants for contribution to these expenses, their workhouse being part of the eastern side of the street, it was stated in defence that there were houses and land on the western side liable to contribute; and it was replied that these houses and land did not bound or abut on any part of the street to be paved.

Held, upon demurrer to the reply (affirming the decision of the Queen's Bench Division), that the plaintiffs had no power to charge the owners of one side of the street only, and that the action could not be maintained.

APPEAL from a judgment of the Queen's Bench Division in favour of the defendants on a demurrer to reply. The case is reported in 34 L. T. Rep. N. S. 178, where the pleadings are set out at length.

The vestry of Mile End New Town resolved to pave the whole length of a new street on one side only. The estimated expenses of the work were apportioned amongst the owners of the houses and land bounding or abutting on the side of the street so paved, and not among the owners on both sides of the street. The real question raised by the demurrer was whether the vestry had power by law to throw the entire expense on owners of houses and land adjoining the particular side which has been paved, or whether the cost of paving must be apportioned among the owners of land and houses adjoining the street on both sides?

The Queen's Bench Division (Blackburn, J., Lush, J., and Field, J.) held that the owners on both sides were liable for the cost incurred in the paving. The vestry appealed.

Philbrick, Q.C. and Bazalgette for the appellants

(a) It should be observed that the new trial was granted in this case prior to the Judicature Acts and Rules of Court coming into operation, under which it is apprehended the court would have had power to limit the new trial to the issues found against the defendant under Order XXXIX., rule 3.

(b) Reported by E. H. ANSELL, Esq., Barrister-at-Law.

CT. OF APP.]

FARQUHARSON v. FLOYER.

[CHAN. DIV.]

(the plaintiffs in the court below).—The appellants are empowered under 18 & 19 Vict. c. 120, s. 105(a) to pave part of the breadth of a street, and the question to be decided is, whether the owners of land and houses abutting on the part so paved can be charged with the estimated expenses. We submit they can under the Metropolis Local Management Acts Amendment Act (25 & 26 Vict. c. 102), s. 77. *Whitchurch v. The Fulham Board of Works* (L. Rep. 233, Q. B.; 35 L. J. 145, M. C.; 13 L. T. Rep. N. S. 631) is distinguishable. There the expenses of paving were apportioned among separate sections of a street, varying in character and value throughout its entire length, instead of the whole of it.

Finlay (Day, Q.C. with him), for the respondents, were not called upon.

JESSEL, M.R.—I think the decision arrived at by the Court of Queen's Bench in this case is clearly right. There is no doubt that the term "street," according to the interpretation clause, includes "part of a street." And the 105th section (18 & 19 Vict. c. 120) says that "if a vestry deem it expedient or necessary to pave a street, such vestry shall well and sufficiently pave the same, either throughout the whole breadth of the carriage way and footpaths thereof, or any part of such breadth;" and that the owners of the houses "forming such street" shall on demand, pay to such vestry the amount of the estimated expenses of providing and laying such pavement, each amount to be determined by the surveyor of the time being for the vestry. And by a later statute (25 & 26 Vict. c. 102) the owners of land are also made liable to contribute. Now the question raised before us is a very simple one, and it is this: if a vestry decide on paving the whole or part of a street, that is to say, cutting the street transversely, and do not choose to pave it throughout the whole breadth, is such vestry not bound to divide the expense between the owners of land and houses on both sides? I think they are. Houses "forming such street" must mean the houses on both sides. The intention of the Legislature was that whether the whole or part of a street is paved, the owners of land or houses on both sides should be liable to pay for the costs incurred in such paving.

(a) By 18 & 19 Vict. c. 120, s. 105, in case the owners of the houses forming part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry, or district board of the parish, or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth and carriage way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board.

By 25 & 26 Vict. c. 102 s. 77, where any vestry or district board shall, under the powers given by 18 & 19 Vict. c. 120, s. 105, have paved or be about to pave any new street, the owners of the land bounding and abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of the houses therein.

By 25 & 26 Vict. c. 102, s. 112, the expression "new street" shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street.

KELLY, C.B., MELLISH, L.J., and DENMAN, J., concurred.

Judgment affirmed.

Solicitor for plaintiff, *Milner Juisam*.

Solicitors for defendants, *Turner and Sons*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor HALL.)

Tuesday, April 25.

FARQUHARSON v. FLOYER (a).

Payment of testator's debts—Marshalling of assets—Pecuniary legatees—Residuary devisees.

The rule laid down by Lord Chelmsford in Hensman v. Fryer (17 L. T. Rep. N. S. 394; L. Rep. 3 Ch. 420), that when the residuary personal estate of a testator is insufficient for the payment of debts, the residuary devisees must contribute rateably with the pecuniary legatees, is at variance with the settled rule of the court. The pecuniary legacies must be exhausted before the residuary devise is charged. That case not followed.

Mirehouse v. Scaife (2 My. & Cr. 695), Collins v. Lewis (L. Rep. 8 Eq. 708), Dugdale v. Dugdale (27 L. T. Rep. N. S. 705; L. Rep. 14 Eq. 284), and Tomkins v. Colthurst (1 L. Rep. Ch. D. 626) followed.

THE testator in this case, after bequeathing certain pecuniary legacies, devised real estate to trustees, upon trust to sell and apply the proceeds in aid of his personal estate in payment of his debts; and after specifically devising certain other real estate to his sons in strict settlement, he devised his residuary real estate to another son, and his issue in strict settlement. The personal estate and the real estate devised for the payment of debts were insufficient for that purpose.

The plaintiffs were the pecuniary legatees, and prayed that the debts might not be paid entirely out of the legacies bequeathed by the will, but should fall rateably on those legacies and the residuary real estate.

Hastings, Q.C. and Marnaghten, for the plaintiffs.—*Hensman v. Fryer* (17 L. T. Rep. N. S. 394; L. Rep. 3 Ch. 420) is still good law upon both the points decided, viz., not only that a residuary devise is still specific, but also that where the general personal estate is insufficient for the payment of debts, the deficiency must be borne by the residuary devisees rateably with the pecuniary legatees. It is true, that *Stuart, V.C.*, in *Collins v. Lewis* (L. Rep. 8 Eq. 708), declined to follow Lord Chelmsford's decision in *Hensman v. Fryer*, on the ground that it was "clearly a mistaken decision," and that *Malins, V.C.*, in *Dugdale v. Dugdale* (27 L. T. Rep. N. S. 705; L. Rep. 14 Eq. 234) said that it was decided "under a misapprehension as to the effect of the decision in *Tomby v. Roche* (2 Coll. 490)." But since these cases there have been the decisions of *Bacon, V.C.*, and the Court of Appeal in Chancery in *Lancefield v. Iggulden* (30 L. T. Rep. N. S. 156, and vol. 31, 813; L. Rep. 17 Eq. 556, and 10 Ch. 136). The Vice-Chancellor decided that in a deficiency of personal estate, specifically devised estates are not liable to contribute towards payment of debts until the residuary real estate has been exhausted.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

CHAN. DIV.]

PERKINS v. SLATER.

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But that decision was reversed in the full Court of Appeal, in which unqualified approval was expressed of *Hensman v. Fryer*, and no distinction made between the two questions then decided. Lord Cairns says: "I feel bound to say that I look upon *Hensman v. Fryer*, decided by Lord Chelmsford, as a direct decision upon this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the judge who was then at the head of this court, that the Wills Act had made no alteration in the law in this respect. Therefore, both on principle and authority, I feel bound to come to a different conclusion, from the Vice-Chancellor in this case, and his decree must be varied accordingly." And James, L. J., says, "I well recollect the decision of Lord Chelmsford in *Hensman v. Fryer*, and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment. . . . I think that the decision of Lord Chelmsford is binding upon the other branches of the court, and I think it ought to have been treated as settling the question." But since the decisions in *Lancefield v. Iggulden*, the case of *Tomkins v. Colthurst* (L. Rep. 1 Ch. Div. 626) has been before Malins, V.C. The question was the respective liabilities as to the payment of debts of pecuniary legatees, specific legatees, and specific devisees, and the Vice-Chancellor said, referring to the question of marshalling assets and distributing the liabilities between pecuniary legatees and residuary devisees: "The other point decided in *Hensman v. Fryer* was a reversal of the settled rule of the court. I do not think that point attracted as much attention as the other. But as early as the year 1869 in *Collins v. Lewis* (L. Rep. 8 Eq. 708), the same point came before Sir John Stuart, who, as Vice-Chancellor, had greater experience of the mode of administering estates in Chancery than Lord Chelmsford. The Chancery Bar, as well as the judges and other persons familiar with the practice of that court, know this perfectly well, and if Lord Chelmsford had been as firmly impressed with that view, he would not, I think, have come to the conclusion to which he did come." And after referring to *Lancefield v. Iggulden* the learned judge continued: "I cannot think that the learned judges by expressions in that case which directly refers only to points which did arise, intended to adopt a rule which would reverse the old and well-settled practice of the Court of Chancery on an entirely distinct point. I must, therefore, continue to follow the old rule as to the marshalling of assets." We submit, however, that he was bound by that decision on both points, especially as in the case of *Jackson v. Pease* (L. Rep. 19 Eq. 96) on an insufficiency of personal assets to pay the costs of an administration suit, the decision in *Hensman v. Fryer* was to all intents and purposes followed by this branch of the court.

Hinde Palmer Q.C. and *Cecil Russell*, for the defendants, were not called upon.

The VICE-CHANCELLOR was of opinion that as regards pecuniary legacies the law was settled, and that those legacies ought to be resorted to in order to make up any deficiencies of assets for the payment of the testator's debts; and that the three decisions above mentioned, that of Stuart, V.C., in *Collins v. Lewis*, and those of Malins V.C.,

in *Dugdale v. Dugdale* and *Tomkins v. Colthurst*, were in accordance with the decision of *Mirehouse v. Seaisfe* (2 My. & Cr. 695), and that he should follow those decisions.

Solicitors: *Lawford and Waterhouse, E. M. Hore.*

May 8, 9, and 15.

PERKINS v. SLATER.(a)

Mandatory injunction—Light and air—Damages.

Mandatory injunction refused, and nominal damages, without costs on either side, granted in a case where the plaintiff had only a life interest, subject to an existing lease, and where, though there was a substantial interference with present comfort in respect of light, there was no prospective injury or diminution in the saleable value of the property. There being no case as to air, the plaintiff's case as to light was made less strong by its being addressed conjointly to air and light. As proceedings were taken under the old practice, the plaintiff should have sought his remedy by action at law.

THE plaintiff was entitled for life, subject to a tenancy, to a certain freehold plot of ground and premises, 104, St. George's-road, Brighton. The defendant was the copyholder of inheritances (subject to a mortgage) of the plot of ground abutting to the west of the plaintiff's premises. The plaintiff's premises consisted of a messuage with a courtyard in front thereof running down to St. George's-road aforesaid. The said messuage, which faced northward, consisted of a ground floor used as a coachhouse and stables, and of a first floor used as a dwelling house. The courtyard was 38ft. 3in. long, and for the last twenty years and upwards has been bounded on the west, north, and east, by a wall 8ft. 10in. high. At the distance of 4ft. or thereabouts from the said messuage on the west side, the said boundary wall rises to a height of 11ft. 3in., at which height it joins the house.

On the first floor of the plaintiff's premises were four windows facing the north and overlooking the said courtyard, which were all ancient lights. They were the only windows giving light to the sitting and bedrooms of the said messuage. The said coachhouse and stables had been used as such for twenty years and upwards. There were three ancient doorways thereto. The centre door by which access was gained to the first floor was lighted by a fanlight, which was an ancient light, inserted over the lintel.

The defendant's premises were conterminous with that part of the plaintiff's premises which consisted of the before mentioned tenement, and were divided therefrom by a boundary wall, which belonged to the plaintiff. The only building existing on the defendant's property at the date of the matters in complaint was an old cottage and dilapidated outbuildings abutting on the said boundary wall, and standing on the defendant's plot of ground laterally and transversely to the plaintiff's said wall at a distance at the nearest corner of 11 feet or thereabouts from the plaintiff's said tenement. The said old cottage and outbuildings stood on a level above the aforesaid boundary wall, which was of the average height

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

of 10 feet, to a height of about 3ft. 6in., measured to the lower or parapet line of the said old buildings, and of about 9ft. 6in. to the roof ridge of the same buildings; the roof of the cottage lay at a slope of about 45deg.

About April 1875, the defendant, being desirous of pulling down the cottage and building two shops, applied to the plaintiff's solicitor for permission to use the plaintiff's western boundary wall, and he offered to pull down the existing wall, and build another, of which plaintiff and defendant were to have the joint use. Negotiations went on without any agreement being arrived at, and on July 8th the plaintiff's solicitors were informed that workmen were beginning to pull down the said cottage and outbuildings, and on the same day wrote to threaten proceedings if the plaintiff's rights were interfered with. On the 14th July 1875, the plaintiff's surveyor inspected the defendant's plans, from which it appeared that the defendant intended to build two shops and premises facing St. George's-road, and extending along the entire length of the plaintiff's said boundary wall to the west. The height of the said shops from the ground to the parapet line was to be 33ft. 6in., and the south-east corner of the shops was to be 11ft. from the north-west corner of the plaintiff's messuage, and 1ft. 6in. above the tops of the windows of the living rooms over the plaintiff's coach house. The intended out-buildings to the said shops were to be 22ft. high to the parapet line.

The plaintiff's solicitors, on receiving the surveyor's report, expressed to the defendant's solicitor their objection to the buildings proposed, and stated that they would seriously interfere with the light and ventilation of the plaintiff's property.

The defendant had begun to build the retaining wall of the outbuildings, which stood at a height on a level or nearly on a level with the parapet of the plaintiff's tenement immediately adjoining it, at right angles thereto. The defendant alleged that it would not seriously impede the access of light and air to the plaintiff's premises from the west, and affect the said ancient lights, because the two rooms in the plaintiff's tenement were only used as living rooms for a servant, and required no more than the ordinary supply of light, and he was advised by his architect that they would have abundance of light for all ordinary purposes. Moreover, his buildings were lateral to the plaintiff's windows on the west side and were intended to occupy the site of ancient buildings, as old or older than the plaintiff's light, which were 9ft. 6in. above the plaintiff's boundary wall on the west side of his stable-yard, and which must have prejudiced equally with the intended buildings, the plaintiff's light and air. The plaintiff's property, moreover, was bounded on two sides out of three by wide thoroughfares. The plaintiff alleged that his messuage was let on lease to Mr. G. W. Currie, the London banker, who, prior to the acts of the defendant in the bill complained of, was in negotiation with the plaintiff for a further lease for twenty-one years, and was prepared to lay out a considerable sum of money in improving the property; but that owing to the defendant's proceedings, the negotiations were suspended. The plaintiff had, therefore, sustained damage, and prayed in the usual form for an injunction and damages.

J. R. Griffith, for the plaintiff, cited

Kelk v. Pearson, 24 L. T. Rep. N. S. 890; L. Rep. 6 Ch. 11;

Aynsley v. Glover, 31 L. T. Rep. N. S. 219; L. Rep. 18 Eq. 544; affirmed 32 L. T. Rep. N. S. 345; L. Rep. 10 Ch. 263;

Cottrell, for the defendant, cited.

Lady Stanley of Alderley v. Lord Shrewsbury, 32 L. T. Rep. N. S. 248; L. Rep. 19 Eq. 616;

Clarke v. Clarke, 14 L. T. Rep. N. S. 98; L. Rep. 1 Ch. 17;

Durell v. Pritchard, 13 L. T. Rep. N. S. 545; L. Rep. 1 Ch. 244;

Robson v. Whittingham, 13 L. T. Rep. N. S. 730; L. Rep. 1 Ch. 442;

City of London Brewery Company v. Tennant, 29 L. T. Rep. N. S. 755; L. Rep. 9 Ch. 212.

Griffith, in reply, referred to

Yates v. Jack, 14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. 295;

Smith v. Smith, 32 L. T. Rep. N. S. 787; L. Rep. 20 Eq. 500.

The VICE-CHANCELLOR.—The plaintiff asks the court to grant him a mandatory injunction in respect of a wall erected by defendant, which the plaintiff says intercepts, or materially impedes the access of light and air to his buildings, and also in respect of buildings intended to be built by the defendant, which the plaintiff says will destroy, or seriously diminish, the value of the plaintiff's property. The property in respect of which the plaintiff seeks relief, consists of coachhouses in a court-yard, with two sleeping rooms over them, in which rooms there are four windows, and of a passage over the door of which there is a fanlight. The plaintiff's case is to a great extent a complaint that the defendant's wall has injured his buildings, and will still further injure his premises, and especially his court-yard, by depriving them of ventilation. In the *City of London Brewery Company v. Tennant* (29 L. T. Rep. N. S. 755; L. Rep. 10 Ch. 221), Lord Selborne said, "It is only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air. Therefore, when witnesses say that there is a material diminution of light and air, and say no more, they are in truth reducing the value of the evidence as to light to the standard which must be applied to the evidence as to air, as to which such evidence is of no value whatever." It appears to me that no case is made out for the court's interference in respect of deprivation of air, and that the value of nearly all the plaintiff's evidence is greatly reduced by its being addressed conjointly to air and light. As regards light, I am of opinion that the plaintiff has not made out a case for the court's interference in respect of prospective injury. As regards present injury, I think the plaintiff's premises have been rendered substantially less comfortable, and that there has been such a substantial diminution of light to which the plaintiff was entitled, as to cause inconvenience in the use of the plaintiff's premises. But I am of opinion that the plaintiff's case is not one for an injunction, considering that it would be a mandatory injunction. The saleable value of the plaintiff's property is not I think diminished, nor do I think the property will let for less than formerly; and considering that the plaintiff is only a reversioner, and that his estate is only a life estate, he is not entitled to substantial damages. As to the plaintiff's interest, it is indeed observable that neither the length of the

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BOLTON v. BOLTON—REG. v. JUSTICES OF WEST RIDING OF YORKSHIRE.

[Q.B. DIV.]

existing tenancy nor the plaintiff's age has been shown. The plaintiff as reversioner was, however, entitled to take legal proceedings in respect to his title to the light. But such proceedings should have been by action, seeing that he had not a case for an injunction. I will not, however, dismiss the bill on that ground, although the proceedings are under the old practice. I give the plaintiff 40s. damages, but I do not mean that he shall have costs, he having made a case in respect of air and a case for a mandatory injunction, both of which have failed. There will not be any costs given to either party.

Solicitors: *Emmet and Son for Hill, Fitz Hugh Woolley, and Griffith*, Brighton; *Thomas for Onions*, Brighton.

Monday, May 15.

BOLTON v. BOLTON (a).

Orders 1875: Orders XXIII., XLII., rules 2 and 9—Form of writ App. F., No. 1—Discontinuance of action.

Where a plaintiff has given notice to the defendant to discontinue the action, and the costs have been taxed, no further order of the court is required to enable the Chief Clerk to issue a writ to enforce payment, and the writ may be varied to suit the circumstances of the case. Order XXIII. has the force of an order of the judge or court.

ORDER XXIII. provides that a plaintiff before or after the receipt of the statement of defence, before taking any other proceeding, may give notice of discontinuance of the action to the defendant, and shall thereupon, after taxation, pay the defendant's costs. The plaintiff in this case had given notice of discontinuance after receiving the statement of defence and the costs had been taxed, but the plaintiff made default in payment. The defendant made application to the chief clerk for a writ of *fi. fa.* But the chief clerk refused to issue the writ, on the ground that there was no judgment or order of the court produced, as required by Order XLII., rules 2 and 9. The form of writ given in Appendix F. to the orders of 1875 has regard to a judgment or order made in the case.

Oswald applied for an order that the chief clerk should issue the writ, on the ground that Order XXIII., which provided for the discontinuance of the action without leave of the court or judge, and for the payment of the defendant's costs, had the effect of a judgment or order of the court. And, though the form of writ given in Appendix F., No. 1, was inapplicable, there was power given to vary it, as circumstances might require, by Order XLII. rule 10. He therefore asked that the writ might be varied by the omission of all reference to a judgment or order of the court, and the insertion of the words "Pursuant to Order XXIII. of the Supreme Court of Judicature Act 1875, upon a notice in writing, dated, &c., whereby the said A. B. gave notice to the said C. D. of discontinuance of the said action, and upon the certificate of one of the taxing masters of our said court filed and adjudged to be paid for the costs of the said action by the said A. B. to the said C. D., together with interest thereon, from, &c." (the date of the taxing master's certificate).

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

The VICE-CHANCELLOR gave leave to issue the writ in the form suggested, without further or other order.

Solicitor, *G. Dixon*, for *W. M. Skinner*, Sunderland.

QUEEN'S BENCH DIVISION.

Tuesday, Jan. 18.

R. v. JUSTICES OF THE WEST RIDING OF YORKSHIRE. (a)

Public Health Act 1875 (38 & 39 Vict. c. 55), s. 343.—Rate made by local board under repealed Act.

A local board of health gave notice of their intention to make a district rate under the Public Health Act 1848 (11 & 12 Vict. c. 63) and amending Acts. At the time the rate was made the Acts in question were repealed (though the local board were unaware of the fact) by the Public Health Act 1875 (38 & 39 Vict. c. 55), which, however, provided that the repeal should not affect anything "duly done" under any enactment thereby repealed. The new Act authorised the levying of a rate for substantially the same purposes as the repealed Acts upon giving similar notices.

Held, that the rate was good as a rate under the new Act, and that the notice given was a thing "duly done" under the saving clause.

RULE calling upon the justices of the West Riding of Yorkshire to show cause why a *mandamus* should not issue commanding them to enter continuances and hear an appeal, in which the Elland-cum-Greeland Gas company were the appellants, and the Elland Local Board of Health were the respondents.

The rate (the subject matter of the appeal) was a general district rate, made under the Public Health Act 1848 (11 & 12 Vict. c. 63). On the 2nd August 1875, notice was duly given under sect. 99 by the respondents of their intention to make a general district rate on 11th Aug., and an estimate deposited for inspection, showing the sums of money which were required for the various purposes of the rate as required by sect. 98, and also the rateable value of the property assessed, and the amount of the rate. On 11th Aug. the Public Health Act 1875, came into operation. This Act, by Sect. 343, repealed the Public Health Act 1848 (11 & 12 Vict. c. 63) and amending Acts, but contained the following saving clause:

Provided always that this repeal shall not effect (a) Anything duly done or suffered under any enactment hereby repealed; or

(b) Any right or liability acquired, accrued, or incurred under any enactment hereby repealed; or

(c) Any security given under any enactment hereby repealed; or

(d) Any penalty or forfeiture or punishment incurred in respect of any offence committed against any enactment hereby repealed; or

(e) Any investigation, legal proceeding, or remedy in respect of any such right, liability, security, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not been passed.

On the same day (*viz.*, Aug. 11), the respondents, in conformity with the notices given on the 2nd Aug., proceeded to make the district rate "for defraying such expenses as are, by the Local

(a) Reported by R. H. ANFELTY, Esq., Barrister-at-Law.

Government Act 1858, charged upon the rate, and such other expenses of carrying into execution the said Acts in the said district as are not provided for by any other rate or chargeable upon the district fund." Notice of the making of the rate was published on the 12th Aug. The rate was made and published by the board, in ignorance of the Public Health Act 1875, having come into operation. On 24th Aug. payment of the rate was demanded of the appellants, who refused to pay. On the case coming on for hearing at the sessions at Leeds, the justices were of opinion that the rate was invalid in consequence of the Public Health Act 1848, and amending Acts having been repealed, when the rate was made, and accordingly declined to hear the appeal.

Subsequently a rule for *mandamus* was granted, against which

Maule, Q.C. and *Tennant* showed cause on behalf of the respondents, and contended that the rate was a nullity, having been made without proper authority, and cited

Millward v. Coffin, 2 W. Black, 1390;
R. v. Wavell, 1 Doug. 115.

M. W. Whitaker and *Forbes*, for the appellants, supported the rule, and contended that notwithstanding that the Act of 1875 came into operation before the rate was made, the rate which was for the usual purpose was good by virtue of the saving clause (sect. 343), which expressly excepted from the repeal anything "duly done."

Cockburn, C.J.—The question here is whether the quarter sessions should entertain an appeal against a general district rate, made by the Local Board of Elland. The circumstances under which the rate was made are certainly very peculiar. The Local Board of Health, it appears, intended to make the rate under the Public Health Act 1848. That Act requires certain notices to be given; and the Local Board accordingly, in conformity with the Act, issued the necessary notices, while the Act of 1848 was still in force. But it so happened that, before the time for which the notices were given had expired, the Act of 1848 was repealed, and the Act of 1875 came into operation. Ignorant of this fact, and of the repeal, the Local Board proceeded to make the rate under the Act of 1848; and hence the question arises which we are now called upon to decide. Now it is clear that by the Act of 1875 they had power to make this rate, and the purposes of the rate are substantially the same under both Acts, as well as the notices which are required to be given. It has also not been disputed, and is indeed indisputable, that had the notices been given under the later Act they would have been binding. Can these notices, given under the Act of 1848, enure so as to make this a good rate? That is undoubtedly a question of some nicety, and I own my mind has fluctuated considerably during the argument. Still, on the whole, I have come to the conclusion that the rate in question was well made, and that the court of quarter sessions ought not to have refused to hear this appeal. If the Act of 1848 had been simply repealed, and there had been no saving clause, the case would then have been different, and I rather think my opinion would have been that the notices to be good must have been given under the second Act. But I find it expressly enacted that things "duly done" are

excepted from the repeal by the saving clause. What was done here was done in exercise of the powers conferred on the Local Board by the Act of 1848, and in due form. I think it would, therefore, be unjust and mischievous if that which was properly done under the Act of 1848 were allowed to be treated as a nullity, and fresh notices had to be given. The Legislature intended to give effect to anything duly done. The case must, therefore, go back to the court of quarter sessions.

Mellor, J.—I am glad to be able to come to the same conclusion, and on much the same grounds, as the Lord Chief Justice. It would be a strange construction of the Act if we were compelled to hold this rate invalid. The rate was made by the same persons who had authority to make it under the provisions of the Act of 1875, and the rate itself is valid unless it was precluded by the want of the requisite notices. Now sect. 210 of the Act of 1875 enacts that "public notice of intention to make any such rate, and of the time when it is intended to make the same, and of the place where a statement of the proposed rate is deposited for inspection, shall be given by the urban authority in the week immediately before the day on which the rate is intended to be made, and at least seven days previously thereto." Though I, too, have not been free from doubt during the argument, I have come to the conclusion that this rate is good. There is no doubt the purposes are the same, and there is nothing at all misleading. I think, therefore, we should act in contravention of the intention of the Legislature were we to hold this rate to be invalid.

Field, J.—I, too, have come to the same conclusion. The rate is made for purposes in accordance with the provisions of the 210th section of the Act of 1875, and admittedly made by persons who, on 11th Aug., had power to make it under that Act. The question is whether the rate is a nullity for any other reason? It is said to be so, because it was made under the Act of 1848. Now, if the object and purposes of the rate under those two Acts had been different, there would have been some force in the objection; but as the objects are identical, I confess I cannot see how the ratepayers can suffer inconvenience or injustice. I think the estimate was a thing "duly done" under the saving clause, and the same observation applies also to the notices. Is there anything in the rate then which shows it to be a nullity? I think not, and it would be very inconsistent to hold that this rate was bad. No doubt it is important that the object of the rate should be stated in the rate; and if, as in *Reg. v. Wavell* (*ubi sup.*), any of the objects were illegal, there would be a difficulty in supporting it. In the present case, however, all the objects are warranted by law, and the fact that *per incuriam* a mistake was made which could not mislead, ought not, I think, to be held a sufficient ground for upsetting this rate.

Rule absolute.

Solicitors: *Torr, Janeway, Tagart, and Co.*, for *Leicester and Wright, Bradford*, for appellants.

Williamson, Hill, and Co., for *Norris, Foster, and England, Halifax*, for respondents.

Q.B. Div.]

FINCH v. THE GUARDIANS OF THE YORK UNION.

[Q.B. Div.]

Thursday, April 20.

FINCH v. THE GUARDIANS OF THE YORK UNION (a).

*Pauper lunatic—Order for maintenance—Action—Striking out defence—Statutes 16 & 17 Vict. c. 97; 30 & 31 Vict. c. 12; 38 & 39 Vict. c. 77.**An action was brought on an order made by justices under 16 & 17 Vict. c. 97, s. 96, directing the guardians of a union to pay certain costs for the maintenance of a lunatic pauper in an asylum. The guardians defended the action. An application was then made to have the statement of defence struck out under Order XXVII., rule 1.**Held (by Blackburn, J. and Lush, J.) that though the order itself could not be appealed against, yet where such order formed the subject-matter of an action a defendant was entitled to plead to such action, and if such plea affords no answer to the statement of claim the proper mode of objection is by demurrer.**This was a motion to strike out a defence under Order XXVII., rule 1.**The following was the plaintiffs' particulars of claim indorsed on the writ of summons:**"The plaintiffs' claim is for 102l. 14s., due to the plaintiffs under an order of two justices of the county of Wilts, dated the 23rd Oct. 1875, by virtue of powers conferred upon them by the Criminal Law Lunatics Act 1867, and the Lunatic Asylum Act 1853, and ordered to be paid by the defendants to the plaintiffs for the lodging, medicine, maintenance, clothing, and care of a certain lunatic, named James Powell, and a further sum of 11l. 18s., being the sum due to the plaintiffs at the rate of 17s. per week, from the 23rd Oct. 1875 to the 29th Jan. 1876, and ordered by the aforesaid order to be paid by the defendants to the plaintiffs."**The following was the statement of defence complained of:**"The defendants deny that the said sums of money set out in the plaintiffs' particulars of claim are due from them to the plaintiffs.**"The defendants say that the said order of the two justices of the county of Wilts, dated the 23rd Oct. 1875, mentioned in the writ, and referred to in the particulars of claim, is invalid, and is not conclusive upon them.**"It is contended by the defendants that the said justices had no such powers to make the said order conferred upon them by the Criminal Lunatic Act 1867, and the Lunatic Asylum Act 1853, or by any other Acts.**"It is further contended by the defendants that as the said order is for the payment of 102l. 14s. part of the money claimed in respect of the lodging, maintenance, clothing, medicine, and care of the said lunatic James Powell, for a period of four years and eight months prior to the date of the said order, the said order is bad and of no force whatever, because in the first place the justices had no power to make a retrospective order at all, and in the second place, that if they had such power, they were only entitled to make a retrospective order for the expenses incurred with reference to the said lunatic during the last preceding twelve months.**"Before the making of the said order no settlement of the said lunatic has been adjudged, and up to the present time there has been no adjudica-**tion whatever as to the settlement of the said lunatic. The plaintiffs have waited an unreasonable time before the obtaining of the said order, and up to that time no claim whatever was made by the plaintiffs upon the defendants for the maintenance, &c., of the said lunatic, nor did they in any way communicate to the defendants the fact of their having the said lunatic under their control.**"The books of the defendants were, according to the order of the Poor Law Board, closed on the 28th March 1875, and no proceeding was taken for the recovery of the said sums mentioned, or any part thereof, nor was any claim made on the defendants whatsoever within the half year ending the 25th March 1875, or within three months thereafter, so that the defendants, if they are compelled to pay the said sums of money, are precluded from reimbursing themselves for the payment thereof by levying a rate upon the ratepayers of the said union, as they would have been entitled to do if the proceedings or claim had been instituted and made earlier. The defendants have no other means of obtaining the money which will be required to satisfy the plaintiffs' demand, and will, therefore, if the verdict of the action is against them, have to pay the money and costs out of their own pocket.**"The defendants say that, assuming the plaintiffs are entitled to be paid anything in respect of the said lunatic, the amounts inserted in the said order are unreasonable and excessive."**It appeared that J. Powell was a criminal who was convicted at the York Assizes in 1869, and that he became a lunatic whilst undergoing his term of imprisonment. He was sent to Salisbury Asylum and was detained there beyond the term of his sentence, as he continued insane. During such imprisonment, and for a considerable time afterwards, the Guardians of the York Union paid a considerable sum for his maintenance, when they refused to continue it. An order was then obtained against the guardians under 16 & 17 Vict. c. 97, s. 96, which enacts that "it shall be lawful for the justice by whom any pauper lunatic is sent to an asylum under the powers of this Act, or for any two justices of the county or borough in which the asylum in which any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or for any two justices, being visitors of such asylum, to make an order upon the guardians of the union or parish, or the overseers of the parish (if not in a union or under a Board of Guardians), from which, at the instance of any officer or officiating clergyman, such lunatic is or has been sent for confinement, for payment to the treasurer, officer, or proprietor of the asylum, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of such lunatic in such asylum, and such order may be retrospective or prospective, or partly retrospective and partly prospective; and the guardians or overseers, on whom such order shall be made, shall from time to time pay to the said treasurer, officer, or proprietor, the charges aforesaid."**Section 121 of the same statute enacts—**If any overseer, or any treasurer of any county, upon whom any order of justices for the payment of money under the provisions of this Act, or any Act hereby repealed, as such, shall refuse or neglect for the space of twenty days next after due notice of such order to pay the money so ordered to be paid, the said money, to-*

gether with the expenses of making the same, shall be recovered by distress and sale of the goods of the overseer or treasurer so refusing or neglecting, by warrant under the hands and seals of any two justices hereby authorised to make the order for payment of the money aforesaid, or by an action at law, or by any other proceeding in any court of competent jurisdiction against such overseer or treasurer; and if the guardians upon whom any such order is made refuse or neglect for such time as aforesaid to pay the money so ordered to be paid, the same, together with the expenses of recovering the same, may be recovered by an action at law or by any other proceeding in any such court; and in case of any such action or proceeding no objection shall be taken to any default or want of form in any order of admission or maintenance, or in any certificate or adjudication under this Act, if such order or adjudication shall not have been appealed against, or, if appealed against, shall have been confirmed.

By 30 & 31 Vict. c. 12, s. 6, sub-sect. 1: A criminal lunatic confined in any asylum to which lunatics may be sent under 16 & 17 Vict. c. 97, and whose sentence expires before such evidence of his sanity has been given as justified his being discharged, is to be "deemed a pauper lunatic, and shall be in the same position in all respects as if he were a lunatic who, immediately previous to the expiration of his term of punishment, has been found wandering at large within the parish or place where the offence was committed in respect of which he became a criminal lunatic."

Bromley, for the plaintiff.—The order made upon the defendants is in the nature of a judgment *in rem*, and cannot be questioned. At all events the only defence available would be to produce evidence showing that the justices have no jurisdiction to enter upon the inquiry. In *Kettering v. Northampton* (34 L. J. 198, M. C.) the majority of the court held that no appeal lay against an order made under 16 & 17 Vict. c. 97, s. 96. He referred also to *Reg. v. Seaton* (7 Durn. & East, T. R. 373.)

Grain, for defendants, was not called upon.

BLACKBURN, J.—It by no means follows that because an order made under sect. 96 is final, an action such as this cannot be defended. Whether the defence is an answer or not is another question; but the proper way of raising the point would have been by demurrer. I am clearly of opinion it is not so frivolous as to justify us in setting it aside.

LUSH, J., concurred.

Motion refused.

Solicitors for plaintiff, Bell and Co.

Solicitors for defendants, Sharp and Ullithorne, for Brearey, York.

April 27 and 28.

FAUND v. WALLACE. (a)

New trial—Evidence prematurely admitted—Witness called but not examined.

A new trial will not be granted for evidence prematurely admitted, but which becomes admissible in the course of a trial.

In an action against the defendants for non-payment of certain money for a machine, the defence was that the machine was faulty in its construction. In opening the case plaintiff's counsel, in order to show that the defence was not bonâ fide, proposed to read in evidence a letter written by W. (defendant's son), who had the management of the

machine, and alone corresponded with the plaintiff. Subsequently, W., who was in court, was called as a witness by the defendants, but asked no question; the learned judge then ruled that the letter was receivable in evidence against the defendants. A verdict was found for the plaintiffs, and the defendants having applied for a new trial,

Held (per Blackburn and Lush, JJ.), that whether or not the evidence was admissible in the first instance, it subsequently became so by W. being called as a witness, and the fact that W. was not examined by the party calling him, nor asked whether he had acted bonâ fide, made no difference.

THIS was an action on an agreement for the price of a royalty and plans of a certain machine which had been constructed at the defendant's house. It was admitted by the defendant that his son, Roger Wallace, had the chief management and care of the machine, and that he was the only person who could communicate with plaintiff, who was a foreigner. Under the agreement, which it is unnecessary to detail at length, the first instalment was to be paid fifteen days after the satisfactory working of the machine. Fifteen days after the machine was put up by the plaintiff's engineer the latter had left England. At that time Roger Wallace, the son, wrote a letter which he expressly stated at the trial was written without any knowledge or sanction on the part of his father.

The effect of this letter was that unless larger commission was given on future machines erected in England, the machine which he complained of as being of faulty construction, and which was not then working, should never work again in his father's factory; but that if the plaintiff would agree to this, the machine would be set going again the next week. The cause was tried before Pollock, B. In opening the case the Solicitor-General, who appeared for the plaintiff, proposed to read the letter referred to; the counsel for the defendant objected to its being read, but promised to call Roger Wallace as a witness. The learned judge then said that if this course were adopted the letter would, undoubtedly, become evidence in cross-examination. After the plaintiff's case was closed, Roger Wallace was put into the box, but was asked no questions. The plaintiffs then called for the production of the letter, but the defendants contended that as no question had been asked in the examination in chief on which the credit of the witness could arise, the letter was not receivable in evidence against the defendants. It was admitted, however, by the learned judge, who thought the evidence admissible on two grounds; first, as evidence from which the jury might conclude that the reason for the non-working was not owing to any fault in its construction, but that there had not been fair play; also that defendants, by putting Roger Wallace into the box had made him their evidence, and that if no opportunity were given the plaintiff of cross-examining him, the defendant would be entitled to rely on his conduct as *bonâ fide*. A verdict was eventually found for the plaintiff for the full amount claimed. A rule *nisi* was afterwards granted for a new trial, on the ground that the above letter had been improperly received in evidence. Against which

R. E. Webster and A. Cock showed cause.

Waddy Q.C., and Wallace supported the rule.

Q.B. Div.]

REG. v. ST. ALBANS SANITARY AUTHORITY.

[Q.B. Div.]

BLACKBURN, J.—I am of opinion that this evidence was admissible under the circumstances. Whether or no, it was admissible in the first instance may, perhaps, admit of some doubt; I am inclined to think it was, but it is unnecessary to decide that question now. Young Wallace, it appears, was in court, and if he had not been called the plaintiff's counsel would have been certain to make strong observations on his not going into the witness box. To prevent that the defendant's counsel said, "I will put him into the box, and call him as my witness." He is accordingly called, and the fact that he was not examined by the defendants, nor asked whether he had acted *bonâ fide*, appears to me not to affect the question; if the plaintiff's counsel had not cross-examined, the defendants might fairly have asked the jury to assume that he had acted *bonâ fide*. The other side, accordingly, seeing he was tendered as a witness, undertook to show that he had acted unfairly towards them, and with that object the letter, which is now complained of, was put into his hand and eventually read. There can be no doubt as to the cogency of such evidence to destroy the credit of young Wallace's testimony. I think the letter was clearly admissible in evidence for the purpose for which it was tendered.

LUSH, J.—I quite agree with the observations made by my brother Blackburn. Even assuming that evidence is prematurely admitted, which afterwards becomes admissible in the course of the trial, that is no ground for a new trial.

Rule discharged.

Solicitor for plaintiff, A. G. Ditton.

Solicitors for plaintiffs, Ingle, Cooper, and Holmes.

Wednesday, May 3.

REG. v. ST. ALBANS SANITARY AUTHORITY, ON THE PROSECUTION OF THE SANITARY AUTHORITY OF BARNET. (a)

Notice of appeal, time for—Whether time runs from date of order or service of order—"Cause of appeal"—Public Health Act 1875, s. 48.

The time for giving notice of appeal against an order of justices runs from the date of the making of the order appealed against, and not from the date of service of a written form of order upon the appellant.

By the Public Health Act 1875, s. 48, where any ditch lying near the boundary between the district of any local authority and any adjoining district is foul, a justice may, on the application of the local authority whose district is injuriously affected thereby, summon the local authority of the adjoining district to show cause why an order should not be made for cleansing the ditch; and the court, "after hearing the parties, or ex parte in case of the default of any of them to appear, may make such order," as to the cleansing of the ditch as may seem reasonable.

By sect. 269, a person deeming himself aggrieved by any rate, order, conviction, or thing done under the Act, may appeal, first, to the next sessions held not less than twenty-one days "after the demand of the rate or the decision of the court;" and, secondly, on giving notice to the other party

and the court within fourteen days "after the cause of appeal has arisen":

Held, that "cause of appeal" means the determination of the justices to make the order, and not the service of the order upon the appellant.

THIS was a special case stated for the opinion of the court by the Hertfordshire Quarter Sessions. It appeared from the case that an order had been made upon the appellants by two justices of Hertfordshire, to cleanse a certain ditch. The order was made under the 48th section of the Public Health Act 1845, which section is as follows:

Where any watercourse or open ditch lying near to or forming the boundary between the district of any local authority and any adjoining district is foul and offensive, so as injuriously to affect the district of such local authority, any justice having jurisdiction in such adjoining district may, on the application of such local authority, summon the local authority of such adjoining district to appear before a court of summary jurisdiction, to show cause why an order should not be made by such court for cleansing such watercourse or open ditch, and for executing such permanent or other structural works as may appear to such court to be necessary; and such court after hearing the parties, or ex parte in case of the default of any of them to appear, may make such order with reference to the execution of the works, and the persons by whom the same shall be executed, and by whom and in what proportions the costs of such works shall be paid, and also as to the amount thereof, and the time and mode of payment, as to such court may seem reasonable.

The order was made on the 6th Sept., but was not served upon the appellants till the 24th of the same month. On the 2nd Oct. the appellants served notice of appeal to quarter sessions. It was contended at the hearing that the notice was too late, within the meaning of the 269th section of the Public Health Act 1875, the material portion of which is as follows:—

Where any person deems himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, such person may appeal therefrom, subject to the conditions and regulations following:—

(1) The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made.

(2) The appellant shall within fourteen days after the cause of appeal has arisen give notice to the other party, and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal, and of the ground thereof.

The quarter sessions overruled the objection, and quashed the order of the justices below (no evidence being offered on the part of the respondents), subject to the opinion of this court whether the notice of appeal given by the appellants was within the time limited by the 269th section of the Public Health Act 1875 or not.

Clarke (Croome with him), for the appellants, argued that the notice was in time. The time limited by the 2nd sub-section of sect. 269 of the Public Health Act 1875 begins to run from the service of the order. So it has already been decided upon the meaning of "cause of complaint" in various statutes:—

R. v. Devonshire JJ., 1 M. & S. 411;

R. v. Derbyshire JJ., 7 Q. B. 198;

R. v. Lancashire JJ., 8 B. & C. 593;

Leeming and Cross's Quarter Sessions, 2nd edit. p. 284.

In *R. v. Derbyshire* (ubi sup.) the statute 4 & 5 Vict. c. 59, s. 1, empowered a party, upon whom an

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order for payment of money had been made by justices, to appeal "within six days after such order shall be made or given." It was held that the time ran from the making of the order, not from the date of service. But Lord Denman, C.J., observed: "The cause of complaint may well be taken to mean something directly affecting the party appealing, or at least brought to his knowledge; but the period fixed in the present Act is the making of the order." He also referred on this point to *Ex parte Johnson* (3 B. & S. 947; 32 L. J. Rep. M. C. 193) [*Mellor, J.—E. v. Lancashire* (8 B. & C. 593) would seem to be an exception to the general rule.] The phraseology of the two sub-sections of sect. 269 of the Public Health Act 1875 was advisedly varied in order to meet cases like the present. In sub-section 1 "the decision of the court" is spoken of; in sub-section 2 the term "cause of appeal" is used. The use of a different term implies a different object. And "appeal to next sessions" has often been held to mean "next practicable sessions."

R. v. Southampton, 6 M. & S. 394.

Michael for the respondents.—All the cases in which it has been decided that "cause of complaint" or a similar term means service of an order appealed against, were decided upon statutes empowering the justices to make an order on the appellant *ex parte*. He cited

Ex parte Simkin, 2 E. & E. 306, decided on the Nuisances Removal Act, 1858 (18 & 19 Vict. c. 121, s. 40).

He was then stopped.

BLACKBURN, J.—One could perhaps wish that the terms of the enactment which we have to construe had been otherwise expressed, but I have no doubt as to their meaning. The 269th section contemplates in its opening clause three subjects of appeal—a rate, an order or conviction, and a "thing done" by the court of summary conviction. The first subject of appeal, the rate, would first come into existence behind the back of the party affected, and it is therefore from the demand of the rate that the time of appeal begins to run. The first sub-section accordingly provides that the appeal shall be to the next sessions, held not less than twenty-one days after the demand of the rate or the decision of the court. Then comes the second sub-section, which enacts that the appellant "shall within fourteen days after the cause of appeal has arisen give notice." For the sake of grace of style, or for some other object best known to themselves, the framers of the Act have varied the language, speaking of "rate or decision of the court" in the one case, and of "cause of appeal" in the other. But in my opinion these terms have precisely the same meaning. *R. v. Lancashire* (*ubi sup.*) is distinguishable, on the ground that there the judgment was behind the back of the appellant. Where there is a conviction or order it is different, for neither of them can take place without the appellant having notice of their effect at once. The notice, therefore, was given too late, and the appeal ought not to have been entertained.

MELLOR, J.—I am of the same opinion. The appellants had had an order made upon them under sect. 48 of the Public Health Act 1875, which enacts that a justice of the peace may, on the application of a local authority, summon the local authority of an adjoining district to appear before a court of summary jurisdiction, to show cause

why an order should not be made for the purpose mentioned in the section. It appears that the order may be made *ex parte* in case of default of appearance, and this is very reasonable, for otherwise authorities which had brought themselves within the section might escape orders by merely not appearing. The hearing in default has all the incidents of a hearing in presence of the parties. As to the question in this case, where there is a party aggrieved by an order, it has been argued that the change of expression from "decision of the court" to "cause of appeal" shows that the meaning is different; but with this I cannot agree, although I fail to see the object of the change of expression. The appellants were present here. It has never been held that a formal order is necessary before the time for giving notice begins to run. The appellant knows that there is an order made against him as soon as the decision of the court is pronounced, and that is the "cause of appeal" within the meaning of the statute.

Judgment for the respondents.

Solicitor for the appellants, *Beal*.

Solicitors for the respondents, *Harris, Barnott*.

Wednesday, May 10.

REG. ON THE PROSECUTION OF JOHN JOHNSON v. THE INHABITANTS OF GREENHOW. (a)

Highway—Portion of road carried away by landslide—Liability to repair.

The inhabitants of the defendant parish were indicted for the non-repair of a highway. It appeared that a portion of the highway in question had been carried away by a landslide, and its place supplied and filled up with earth, stones, and other debris. No trace remained of the old metalled road, but the line of it was known and admitted. At the trial a verdict of guilty was entered, subject to the report of an engineer on certain points, leave being given to either party to state a special case on such report. The engineer found that the road was absolutely destroyed to an extent of 252 yards, but that it was practicable to form a permanent and passable road along the old track at a cost of 341l. A special case was afterwards stated. The court had power to draw inferences of fact.

Held (per Blackburn, and Quain, J.J.) that though the metalled portion of the road had been carried away, the line itself was still known, and that consequently there was no such total destruction of the road as would extinguish the liability which ordinarily attaches to a parish.

THIS was an indictment against the inhabitants of the township of Greenhow, in the North Riding of the county of York, for the non-repair of a highway, in the said township.

The indictment was removed by *certiorari* into this court, and came on to be tried before Amphlett, B. at the spring assize, 1875, held at York, when a verdict of guilty was found by consent, subject to the opinion of the court upon the following

CASE.

1. The prosecutors are John Johnson, Matthew Smith, and other inhabitants of Bilsdale, and the defendants are the inhabitants of the township of Greenhow, one of three townships in the parish of

(a) Reported by E. H. AMPLETT, Esq., Barrister-at-Law

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Ingleby Greenhow, which parish forms part of the highway district of Langbaugh West, in the North Riding of the county of York. And it is admitted for the purposes of this case, that the defendant township of Greenhow is liable to maintain its own highways.

2. The road is properly described in the indictment, copy of which is hereto annexed, to be a common Queen's highway, called or known by the name of Broughton Bank Top, leading from Stokesley towards and unto Bilsdale, in the North Riding of the county of York.

3. The indictment alleges that a certain part of the same road, situate, lying, and being in the said district or township called Greenhow, being in length divers, to wit 251, yards, and in breadth divers, to wit six, yards on the 1st July 1873, and from thence continually afterwards until the date of the said indictment, was very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment.

4. The highway in question is an ordinary metalled road, and that portion of it mentioned in paragraph 3, and now in dispute, runs north and south along the slope of a hill several hundred feet above the level of the valley beneath the slope, being at right angles to the direction of the road, and very precipitous.

5. Up to the time of the landslip hereinafter mentioned, the said road was a highway repairable by the parish or township of Ingleby Greenhow, and was, except as hereinafter mentioned, and now is in good and proper repair.

6. In April and June 1872, two landslips of great magnitude occurred on the said slope of the said hill, the second being a continuation of the first, the two landslips together comprising many acres of land, and extending from the top of the said slope to about 170 yards below the said highway.

7. The portion of the said highway now in dispute and out of repair was absolutely destroyed by the said landslip, that is to say was carried away into the valley below, and its place supplied and filled up with earth, stones, and other debris of landslip.

8. A large portion of the hillside was moved bodily downwards to the valley beneath, and the ground on which the old road stood was broken up and carried away as stated.

9. The depth and level of the debris along the line of the old road differs much. The debris is at one point 25ft. above and at another 2ft. below the level of the old road, and now occupies the line or tract of the old highway.

10. This debris consists of loose soil, stone, and shale, and there is water coming from springs on the hillside which percolate through and over it, and from the time of the original landslips up to the present time in dry weather both horses and some carts and conveyances still continue to pass over it nearly in but higher up the hill than the line of the old road, and of course with great danger and difficulty. In wet weather the debris is at times so full of water as to be impassable, as there are no drains.

11. At the point where the debris is 25ft. above the level of the old road it has been ascertained by boring that for a depth of 31½ft. from the surface there is nothing but soil, shale, and stones, and that there is no trace of the old metalled road, but the line of it is known and admitted.

12. The metal, consisting of broken stones of the old road, was carried away at one point 55yds. down the hill into the valley from its original position, and a wall which ran along the east or lower side thereof as a fence or boundary on that side was carried downwards along with the road, and is visible among the debris for about 50yds. of its length.

13. At the north edge of the landslip, at the point where the same meets the uninjured portion of the said highway, the side of the old road is scooped out and lowered so that there is a fall of some few feet from the uninjured metalling to the debris on the line or track of the old road.

14. By an order at Nisi Prius a verdict of guilty was entered, subject to the finding of Mr. Richard Cail, of Newcastle-on-Tyne, engineer, on the following questions, namely:

First. What had become of the old road, and whether and to what extent had it been carried away from its former position?

Secondly. Whether and to what extent it had been absolutely destroyed?

Thirdly. Whether it was practicable and at what cost to make a permanent and passable road along the old track of a similar character to the adjoining parts of the old road? And it was ordered that upon such finding a special case might be stated at the request of either party.

15. Mr. Cail having viewed and inspected the *locus in quo*, and taken such evidence and obtained such information and assistance as he thought fit made his report on the 4th Nov. 1875, and found the facts as follows:—

First. The old road had been carried away and overlaid by a landslip at a point called Broughton Bank Top to an extent of 252 yards or thereabouts.

Secondly. The road is absolutely destroyed for the extent to which it is carried away and overlaid, amounting in the whole to the said length of 252 yards.

Thirdly. It is practicable to form a permanent and passable road along the old track of a similar character to the adjoining part of the old road, and the cost of doing so would be 341l.

16. The rateable value of the whole parish is 4756l., and a rate of 5d. in the pound on this amount produces 100l. or thereabouts.

17. There is in existence a good road from Bilsdale to Stokesley, which diverges from the destroyed road at a point on the Bilsdale side of the landslip, and reaches Stokesley by way of Engleby Greenhow, but by this road, from the point of divergence, the distance to and from Stokesley is increased by one mile and two-thirds of another mile, and persons using the same have also to pass through, open and close several gates.

18. On this road the defendant township has, since the said landslip, expended a considerable sum in improving it so as to render it more convenient.

19. There is also a road from Bilsdale to Stokesley by way of Carlton. The said roads are both of them longer in distance than the destroyed road, but the gradients are somewhat better.

20. The court is to be at liberty to draw inferences of fact.

21. The question for the opinion of the court is, whether there exists a legal duty or obligation upon the defendants to make and maintain an available

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carriage road in the line or track of the old road, so as to form and continue a permanent and passable highway from Stokesley to Bilsdale at the part so destroyed, as aforesaid.

If the court shall be of opinion that such legal duty or obligation exists, then the verdict of Guilty is to stand.

If the court shall be of a contrary opinion, then the verdict is to be set aside and a verdict entered for the defendants.

Wills, Q.C. and Forbes, for the prosecution.—The question that arises here is whether, under the circumstances, the parish are relieved of their liability to repair this road which attaches to them by the common law of England. We say that the obligation to repair the road still subsists. The line or trench of the old road exists, and is known, and it is found by the arbitrator that it is practicable to make and maintain a permanent and passable road along the same at a reasonable cost. The cases which at first blush appear to lean in favour of the defendants, are all distinguishable from the present one. In *E. v. Paul* (2 Moo. & B. 307) it was held that a parish could not be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass. Maule, J., there said, "The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment, and there is no longer anything to repair. The parish cannot be liable to rebuild the wall." The facts in *E. v. Bamber* (5 Q. B. 279; 13 L. J. 13, M. C.) were very similar. There a portion of the highway was swept clean away by the sea, or, as Lord Denman, C.J., expressed it in his judgment, "All the materials of which a road could be made had been swept away by the act of God," and the parish were held not liable to make good the damage that was done. The last case on the subject is *E. v. Hornsea* (1 Dears. C. C. 291; 23 L. J. 59, M. C.), where the indictment charged that certain part of a highway was out of repair. It appeared that there, also, part of the road had at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and that the surface of the existing road was in good repair up to the time when the same had been so destroyed, at which part the road was terminated by a perpendicular cliff caused by excessive encroachments. No part of the road was then out of repair. The slope on which the road was had there been washed away by the sea, and if anybody had stood on the top of the cliff he could not possibly have seen any subsisting road to the beach. Moreover, to have restored the road in that case would have been an engineering work of considerable difficulty and expense.

Cave, Q.C. for the defendants.—The road here would have to be re-made and not repaired, and, consequently, no obligation attaches to the defendants. No harm will happen if the defendants are held not liable. This highway is under the jurisdiction of a highway board, who are authorised under 27 & 28 Vict. c. 101, s. 47, to make improvements in roads within their jurisdiction, one of which, by sect. 48, sub-sect. 3 is "the doing of any work in respect of highways beyond ordinary repairs executed to place any existing highway in a proper state of repair." [BLACKBURN, J.—Have the public any power to compel them to do these works?] No, it is a matter within their discretion.

Here the road for 252 yards is absolutely destroyed, and the case is within the authorities that have been cited by the other side.

BLACKBURN, J.—There is great difficulty in laying down a principle generally applicable, but I think from the statement contained in this case there has not been so much done as would amount to a total destruction of the road so as to relieve the parish from liability. When a piece of ground is swept clean away into the sea common sense tells you that you cannot call on the inhabitants of a parish to repair the mischief. Again, in the case of the sea wall which is washed away by the sea over which the road passed, it is plain that the conclusion arrived at by Maule, J., was correct, and that you could not compel the parish to rebuild the wall. Landslips such as this may occur from floods, or by a convulsion of nature, or by the act of God. The metalled surface was ploughed up so that no trace of it remains; a large quantity of débris has been brought down and piled on the line of the road; still, I can see here no such total destruction as would be sufficient to relieve the defendants. The facts here are not in dispute. There was a landslip, and a portion of the highway was carried away into the valley below, and its place supplied by stones and other débris; the depth and level of the débris along the line of the old road differs. At this spot there is no trace left of the metalled road, but it is stated that the line of it is known and admitted. Now the court has power to draw inferences of fact, but can we draw the inference that the road is totally destroyed? The engineer states that the old road at this point had been carried away, but that it is practicable to repair the road at a moderate cost. The metalled surface is undoubtedly gone, so that carts and conveyances cannot go along it as they should do. Bearing in mind that the expenses would not be heavy, and having a power to draw inferences of fact given us, I think there has been no such distinction here as ought to relieve the parish from further liability. Our judgment should therefore be for the Crown.

QUAIN, J.—I am of the same opinion. The difficulty in these cases is to say exactly when a road is so destroyed as to extinguish the liability which ordinarily attaches to a parish. The cases cited are all distinguishable from the present. What we have to ask ourselves is whether, as a jury, we can come to the conclusion that there has been here such a complete destruction as to bring it within the authorities? Now, the extent of the damage done here is set out in paragraphs 7 and 8 of the case which has been submitted to us. It appears the metalled part of the road has been carried away. The only destruction that I can see is that the place where the old metalled road was is filled up with stones and débris, but the line is still remaining. I confess I cannot see how this road was so destroyed as to relieve the inhabitants of the parish from all further liability with respect to it. I think, therefore, that judgment must go for the Crown.

Judgment for the prosecution.

Solicitors for the prosecution, *Bell, Brodrick, and Gray*, for *Arrowsmith and Richardson*, Thirsk.

Solicitors for the defendants, *Williamson, Hill, and Co.*, agents for *F. H. Wilcox*, Stokesley.

C.P. Div.] FISHER v. THE VAL DE TRAVERS ASPHALTE PAVING COMPANY (LIMITED). [C.P. Div.]

COMMON PLEAS DIVISION.

Tuesday, April 25.

FISHER v. THE VAL DE TRAVERS ASPHALTE PAVING COMPANY (LIMITED). (a)

Cost of defending action—Contractor and sub-contractor—Indemnity—Remoteness of damage.
The plaintiffs were contractors for the construction and maintenance of a tramway belonging to a tramway company with the company, and in order to carry out their contract they entered into a contract with the defendants by which the defendants undertook the construction and maintenance of the asphalté paving of the tramway.

When H. was lawfully driving along the public highway on which the tramway was, he was, by reason of a hole in the asphalté paving of the tramway (due to the negligence of the defendants in carrying out their contract) thrown out of his cart and injured.

*H. therefore commenced an action to recover compensation against the Tramway Company, who at once gave notice of the action to the plaintiffs, who passed on the notice to the defendants, and claimed to be indemnified by them. The defendants repudiated all responsibility or liability, and refused to have anything to do with the defence of the action. The action was eventually compromised by the plaintiffs, who paid to H. 110*l.* for damages and costs, and also incurred costs themselves in defending the action up to the compromise and in compromising, to the amount of 18*l.* 1*s.* 4*d.**

Held, by the court (Lord Coleridge, C.J., Brett, and Lindley, J.J.), that the plaintiffs could not recover the costs paid to H., or the costs incurred in defending or compromising the action, although the costs were reasonably incurred, and though the plaintiffs did in fact benefit the defendants in so incurring them by reducing the claim of H. So held, by Brett and Lindley, J.J., solely on the authority of Bazendale v. London, Chatham, and Dover Railway Company (32 L. T. Rep. N. S. 330; L. Rep. 10 Ex. 35; 44 L. J. 20 Ex.), and by Lord Coleridge, mainly on the authority of that case.

The first count of the declaration stated that the plaintiffs were the contractors for the construction and maintenance of a tramway belonging to the North Metropolitan Tramways Company, and that the plaintiffs had as such contractors agreed with the defendants to lay with asphalté in a workmanlike and efficient manner the said tramway, and to keep and maintain the same in good order and condition, that all conditions, &c., to have the said asphalté so laid and kept, and maintained as aforesaid, yet the defendants did not lay with asphalté in a workmanlike and efficient manner the said tramway, and did not keep or maintain the same in good order or condition, but suffered the said asphalté to sink and become out of repair, and by reason thereof a certain person then lawfully driving upon the said public road upon which the said tramway was laid was thrown from his cart, and much injured, &c., and the said person being entitled so to do made a claim against the North Metropolitan Tramways Company, and the said company reasonably and properly settled the same, and the plaintiffs became liable to, and have been called upon to,

indemnify, and actually have indemnified the said company against such claims so settled by the said company.

The second count alleged that the plaintiffs being responsible for the maintenance of the tramway agreed with the defendants as in the first count stated, and that the defendants made default as in the first count stated, and that by reason thereof a person lawfully driving along the public road in which the said tramway was laid was thrown from his cart, &c., and the plaintiffs thereby became liable to compensate the said person.

There was a third count for money paid by the plaintiffs for the defendants at their request.

The defendants pleaded denying the material allegations in the declaration.

The particulars of claim were as follows :

To amount paid by the plaintiffs in an action 2 s. d.	
brought by one John James Hicks, against the North Metropolitan Tramways Company, for personal injuries sustained owing to the want of proper repair of certain asphalté by the above named defendants in Mare-street, Hackney, which asphalté they had laid down and had undertaken to keep in repair, but failed in doing so.....	110 0 0
The defendants' costs in defending the said action	18 1 4

The plaintiffs, being contractors for the laying down and keeping in order of a tramway belonging to the North Metropolitan Tramways Company, entered into an agreement with the defendants by which the defendants became bound to lay down, and keep in order (for a definite time), the asphalté paving of a part of the tramway in question, which was in a public highway, called Mare-street, Hackney. The defendants broke their contract with the plaintiffs by suffering the asphalté paving at some junction points in Mare-street to be worn down so as to create a dangerous hole, into which the wheel of a cart driven by a person named Hicks got, and the cart was thereby upset, and Hicks thrown out and severely injured.

Hicks then claimed compensation from the North Metropolitan Tramways Company, who passed on the claim to the plaintiffs.

The plaintiffs then passed on the claim to the defendants, who repudiate all responsibility or liability.

Hicks then issues a writ against the North Metropolitan Tramways Company, notice of which was passed on by the company to the plaintiffs, and by the plaintiffs to the defendants.

Afterwards the plaintiffs write to the defendants as follows :

Hicks v. North Metropolitan Tramways Company.

Gentlemen,—Referring to former correspondence about this matter we have now to inform you that the case comes on for hearing in a very few days, when, as there is no possible defence to the action, we shall, as advised, let judgment go by default.

We are informed that a settlement could now be effected for 120*l.*, but the attorneys have got hold of the case and they will run up the costs rapidly, especially as it is certain the plaintiff must get damages.

We wish to give you one more opportunity of arranging this matter, but any further delay will render a settlement more difficult and costly.

As we are advised, your liability to us is clear and incontestable, and your refusal to settle now will only put us to the trouble of proceeding against you, with the certain result that the whole of the damages and largely increased costs will have to be paid by you. Pray let us hear from you.

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And then receiving no reply they write to the defendants as follows :

Gentlemen,—Referring to our letter of the 30th ult., to which we have received no reply, and in which we stated that we would let judgment go by default, we now beg to inform you that, as we are advised, and to save expense, we intend to-day offering to settle with Hicks by paying him in full discharge of all demands for compensation some sum not to exceed 60*l.*, and giving him an undertaking to pay his attorney's costs.

Please note that we shall hold you responsible to us and to the Tramways Company for any settlement we may make.

To this arrangement the defendants did not accede or consent.

In the result the plaintiffs settled the action by paying 110*l.* to Hicks for damages and costs.

The charges of their own solicitors amounted to 18*l.* 1*s.* 4*d.*, which they also paid, they taking on themselves the action to which the Tramway Company were the nominal defendants.

The present action was tried before Lord Coleridge, C. J., and a common jury on the 27th Nov. 1875.

The learned judge left to the jury the question whether the plaintiffs adopted a reasonable course in negotiating and settling the action brought by Hicks, and the jury found in the affirmative.

The verdict was accordingly entered for the plaintiffs for the whole sum claimed.

Afterwards *Philbrick*, Q.C., moved for a rule calling on the plaintiffs to show cause why a new trial should not be granted on the ground that the defendants were not liable to pay to the plaintiffs any part of the sums claimed.

The court, however, granted the rule only for a new trial on the ground that the defendants were not liable to the plaintiffs for 40*l.*, the costs of Hicks, or for 18*l.* 1*s.* 4*d.*, the plaintiffs' own costs in the action brought by Hicks.

Philbrick, Q.C. appealed to the Court of Appeal upon the refusal of this court to grant the rule as to all the grounds upon which, as above stated, he moved ; but the Court of Appeal held that this court had rightly so refused.

Murphy, Q.C. and *Lanyon*, showed cause.—The only point is whether the plaintiffs are entitled to the costs of defending the action, and bringing it by a judicious compromise or settlement to a termination. The jury have found that the whole conduct of the plaintiffs was proper and reasonable, and if it was a correct question to be left to and decided by the jury, their verdict disposes of this action. The defendants broke their contract, and in consequence of their breach of contract, Hicks was injured, and had to be compensated by the plaintiffs, why should not the costs of fixing the compensation be borne by the parties who are the ultimate parties to bear the cost of the compensation itself. The question of whether a party sued for a breach of contract or tort in respect of which he, by reason of a contract made by him with a third party, has a right to be compensated for any damages he may have to pay by the third party, can recover from such third party the costs of defending such action or of ascertaining the amount of liability, when he has not been expressly requested to defend or to incur costs, has been much discussed of late. The true rule would seem to be this, that the person sued must do whatever is reasonable, and that so doing he is entitled to be indemnified. The question of whether such

costs are recoverable depends upon the question of whether the incurring them is the ordinary consequence of the defendants' neglect or breach of contract, and by ordinary consequence is meant natural and anticipated consequence. Costs incurred by any unusual or unreasonable course of conduct would be too remote. In order to ascertain whether such costs are sufficiently proximate, the question of whether they were reasonably incurred must be answered. In the case of *Baxendale v. The London, Chatham, and Dover Railway Company* (L. Rep. 10 Ex. 85; 32 L. T. Rep. N.S. 330), if that case is to be taken to represent the law, the conduct of the plaintiff was not in fact reasonable, and it is on that ground that the judgment of Lord Coleridge is rested. The fact, however, is that unless the case of *Baxendale v. London, Chatham, and Dover Railway Company* is to stand upon this ground, it is at variance with a long series of decided cases. In *Bonneberg v. The Falkland Islands Company* (17 C. B., N.S., 1; 10 L. T. Rep. N.S. 530; 34 L. J. 84, C. P.) Willes and Williams, J.J. clearly intimate that, in their opinion, the material question in each case is, was the defence of the action reasonable? The case of *Short v. Kalloway* (11 A. & E. 29) is decided with reference to that question, and so are the cases of *Goodwin v. Francis* (L. Rep. 5 C. P. 295; 22 L. T. Rep. N. S. 338) and others similar to that. In *Baxendale v. The London, Chatham, and Dover Railway Company*, *Tindal v. Bell* (11 M. & W. 228, 232) is treated as of no authority on this point, and *Mors Le Blanche v. Wilson* (L. Rep. 8 C. P. 227; 28 L. T. Rep. N. S. 415) a case in this court, is overruled with the remark by Quain, J. that it proceeded upon a dictum of Parke B. in *Tindal v. Bell*, whereas it was the guiding principle of the decision in *Tindal v. Bell* which was followed in *Mors Le Blanche v. Wilson* (L. Rep. 8 C. P. 227; 28 L. T. Rep. N. S. 415; 42 L. J. 70, C. P.) The damages are the natural result of the defendant's breach of contract, and, therefore, they are bound by their contract to pay them. [LORD COLERIDGE.—What contract is there that the defendants should pay the costs of having their liability ascertained?] Perhaps the damages claimed are more properly claimed as the consequence of the defendant's tort. [LORD COLERIDGE.—The assessment or settlement of the amount in the action by Hicks against the Tramway Company would not be binding in the action brought by the now plaintiffs against the defendants; therefore it may be that it is no ascertaining of the defendant's liabilities that has taken place.] We only claim what is a reasonable sum, and that in this case, as it now stands, is the amount which we paid. [BRETT, J.—I fail to distinguish this case from *Baxendale's*.] The distinction is that there the court had to act as the jury, and did not find the course adopted to be reasonable, whilst here it is so found. The Court of Appeal in this very case have decided that we are entitled to the amount of the settlement, and have implicitly overruled *Baxendale's* case, if it is a decision that where a reasonable course is adopted the costs cannot be recovered.

Philbrick, Q.C. and *W. G. Harrison* were not called upon to support their rule.

BRETT, J.—We are bound by authority to say that this rule should be made absolute. The defendants were guilty of a breach of their contract to lay down and keep in order for a certain time

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the asphalt of a tramway. The question is as to what damages they are liable to pay to the plaintiffs for that breach of their contract. The first and immediate damages arising therefrom are the expenses of putting the asphalt of the tramway into proper order, and had there been no accident to Hicks through the want of repair of the asphalt, these damages, in this case, would have been all that the defendants could have been called upon to pay; but an accident did happen to Hicks through the breach of contract committed by the defendants. Hicks sued the tramway company for negligence, and to this action the company had no defence. Then arises the question of the amount of the claim for negligence. The tramway company give notice to the plaintiffs, their contractors, and the plaintiffs forward the notice to the defendants, with whom they themselves contracted. The defendants decline to have anything to do with the matter, and leave the plaintiffs to act as they may think proper with reference to the claim. The plaintiffs then take up the case and effect a proper and reasonable settlement, and in so doing incur costs, which were, and which are found to have been reasonably and properly incurred, and the person injured, Hicks, also incurred costs, and these as well as their own costs the plaintiffs pay. The plaintiffs' case then is that they are entitled to recover these costs; they say the claim made was an unliquidated one, and it was reasonable to have the proper amount ascertained. They say we gave the defendants notice, and made the best possible terms; we had no right to shut our eyes, fold our hands, and pay whatever was asked; the jury find we acted reasonably, and are entitled to be held harmless. It is answered that there was no contract to pay the damages which the defendants actually paid; and further, none to pay the costs of ascertaining these damages or arriving at a settlement. As to the damages themselves, we refused to grant a rule to the defendants to enable them to raise the question as to their liability to repay them to the plaintiffs, and the Court of Appeal have held that we were right in so refusing, and that the payment of the damages was a natural consequence of the defendants' breach of contract. Now the question is, given that the payment of the damages is a natural result of the breach of contract by the defendants, is the cost of ascertaining, and, mayhap diminishing, those damages to be allowed as a natural result? It is said the defendants never contracted to pay these costs; that argument applies equally to the damages themselves. But for the case of *Baxendale v. London, Chatham, and Dover Railway Company*, I should have seen no distinction between damages and the reasonable costs of ascertaining them. It is somewhat hard to say to the plaintiffs, you were not entitled to pay any unreasonable claim made by Hicks, and yet to say if you reasonably diminish that claim, or sift it, or inquire into it, you do it at your own expense. The question in the Exchequer Chamber in *Baxendale v. London, Chatham, and Dover Railway Company* (32 L. T. Rep. N. S. 330; L. Rep. 10 Ex. 35), I think stood thus, assuming the damages to be recoverable, are the costs of ascertaining them recoverable? And the answer there given is no. This was so held by that court for reasons which we here cannot discuss, but to which it is our duty to bow. There is no fair

distinction in principle between this case and *Baxendale's* as regarded the majority of that court. That case decides the present, both as to the plaintiffs' own costs and as to those incurred by Hicks; and therefore, although apart from that case, I should have otherwise decided, I think the rule must be made absolute.

LINDLEY, J.—I am of the same opinion; and for the same reasons I cannot distinguish this case from *Baxendale v. London, Chatham, and Dover Railway Company*.

Lord COLERIDGE, C.J.—This case is concluded by authority, but at the same time it is not quite so clear to me as it is to my learned brothers that I was not wrong, apart from authority, in leaving to the jury the question of reasonableness. It is not quite clear to me that there may not be a distinction between the damages and the costs. It would be difficult to lay down any principle; there might be, instead of three contracts as here, half a dozen, and very complicated questions as to liability might arise under such circumstances. However, it is enough to say that the case is decided for us by the case of *Baxendale v. London, Chatham, and Dover Railway Company*.

Rule absolute.

Solicitors for the plaintiffs, *Stevens, Wilkinson, and Harries*, 24, Coleman-street.

Solicitors for the defendants, *Drake and Son*, Cloak-lane, Cannon-street.

Thursday, April 27.

WEIDNER v. HOGGETT. (a)

Undertaking—Principal and agent—Contract, contractee not named.

The defendant, who was an agent of the *Bebside Colliery Company*, with whom B., W., and Co. had previously contracted for a supply of coals, gave to B., W., and Co. an undertaking as follows: "I undertake to load the ship *Der Versuch* with *Bebside* coals in ten colliery working days, &c. On account of *Bebside Colliery*, W. S. Hoggett." This undertaking was obtained by B., W., and Co. because the plaintiff, the captain of the ship *Der Versuch*, refused (without such an undertaking being procured for him) to sign a charter-party whereby B., W., and Co. chartered the ship *Der Versuch* to carry a cargo of coals to *Elsinore*, and in which no provision was made for payment of damages for detention in loading. The undertaking made no mention of the person contracted with by it, but it was communicated by B., W., and Co. to the plaintiff, who then signed the charter-party. The ship being detained beyond the ten days, the plaintiff applied to the defendant for compensation; this the defendant at first refused, but afterwards offered 20l., which was declined by the plaintiff. The plaintiff then sued on the undertaking to recover damages for such detention.

Held that there was evidence for a jury that the undertaking was a contract between the plaintiff and defendant, and that, even independently of the offer of 20l., there was such evidence, and that the defendant had rendered himself personally liable.

THIS action was tried at Durham at the summer assizes of 1875, before Huddleston, B.

(a) Reported by GRAY DODD, Esq., Barrister-at-Law.

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The learned judge at the trial directed a verdict for the plaintiff for the sum of 45*l.* (an agreed sum), giving to the defendant leave to move to enter a nonsuit if the court should be of opinion that there was no evidence which ought have been left to the jury of liability on the part of the plaintiff.

The facts were as follows: The plaintiff was the captain of a foreign ship called *Der Versuch*. In January 1873 the ship *Der Versuch* was chartered by Messrs. Bilton, Williams, and Co. for the conveyance of a cargo of coal from a dock in the Tyne to Elsinore. There was provision in the charter for demurrage in unloading, but none for damages for detention in loading. The plaintiff at first refused to sign the charter, on account of the absence of any provision to meet delay or detention in loading, and was eventually induced to do so by Messrs. Bilton, Williams, and Co. promising to get an undertaking from the owners of the colliery from which the cargo was to come, that the time occupied in loading should not exceed ten days.

A clerk of Messrs. Bilton, Williams, and Co., went accordingly to the office of the "fitter" to the Bebside Colliery Company, that company being the owners of the colliery from which the cargo was to come, and obtained from the defendant the document upon which the present action was brought, and which was in the following form:

Sailing Ships, Newcastle-on-Tyne, Jan. 17th, 1873.

I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals, in ten colliery working days (Sundays Saturdays, cavilling days, and colliery holidays not working days) after the said ship is wholly unballasted and ready in Northumberland Dock to receive her entire cargo, strikes of pitmen or workmen, frosts and storms, and delays at spot caused by stormy weather, and any accident stopping the working, loading, or shipping of the said cargo, always excepted; time to count from the day following that on which notice of readiness is received, said notice (in writing) to be handed to Mr. R. Thompson as soon as the ship is actually ready as above stipulated, and not before. The ship to move to the spot and proceed with her loading whenever required to do so during the entire continuance of her lay days. The non-fulfilment of any of the above mentioned conditions to render this guarantee null and void.—On account of Bebside Colliery, W. S. HOGGETT.

The undertaking itself was a printed form, which the defendant filled in and signed. The words "on account of Bebside Colliery" were in print, and the signature of the defendant was placed beneath those words.

The defendant at the trial stated that he acted under the orders of a Mr. Walton, who was the "fitter" for the Bebside Colliery as well as for other collieries belonging to the gentlemen who owned the Bebside Colliery and formed the Bebside Colliery Company.

The defendant's salary of 250*l.* per annum was paid by each colliery, according to the amount of coals raised by each.

A "fitter" is an agent for the sale of coals raised by a particular colliery. The same fitter frequently acts for several collieries.

It appeared that undertakings similar to the one sued on were in common use at Newcastle in the coal trade, and that since 1874, but not before, the name of the charterer was sometimes put on the undertaking, though sometimes it was not. When the defendant gave the undertaking he was not aware that he was giving it with reference

to a charter-party already fixed or about to be fixed.

The ship in question, *Der Versuch*, was detained beyond ten days in loading, and the plaintiff, the captain, claimed demurrage from the defendant for such detention. The defendant in reply to such claim said he never paid such claims, but ultimately he offered the captain 20*l.* in settlement, which was refused, and the present action brought to obtain damage for breach of the undertaking above set out.

Herschell, Q.C. having obtained an order *nisi* to enter a verdict for the defendant, on the ground that there was no evidence of a contract between the plaintiff and the defendant, or in the alternative for a new trial,

C. Russell, Q.C. and *C. Crompton* showed cause.—Upon the charter-party the plaintiff had no remedy for delay or detention in loading; he therefore refused to sign the charter-party unless the charterers would get him an undertaking from their vendors of the intended cargo to load within a certain time. The charterers, Messrs. Bilton, Williams, and Co., agree to this, and accordingly get for the plaintiff the document sued on. That document was intended to be a contract. It was intended to be a contract by the defendant; this appears from its form. The words "on account of Bebside Colliery" are words printed on the form used to identify the subject-matter of the contract, to identify the place from which the coals are to come. "Bebside Colliery" is not the firm name of the Bebside Colliery Company. The printed words are not, and are not meant to be, any qualification of the defendant's signature. The document itself is "I undertake," and there is no such principal as "Bebside Colliery." It was intended to be a contract with the plaintiff; it was for his benefit, and was obtained at his request. The offer to pay 20*l.* was itself an admission of liability sufficient to support the verdict. It must be taken that the jury have found that the contract was with the plaintiff, and the circumstances are sufficient to justify that finding. They cited

Tanner v. Christian, 4 E. & B. 591; 24 L. J. 91, Q. B.;

Lennard v. Robinson, 5 E. & B. 125; 24 L. J. 275,

Q. B.; and

Notes to Thompson v. Davenport, 2 Sm. L. C., 7th

edit., 384 *et seq.*

Gainsford Bruce (*Herschell*, Q.C. with him), in support of the order.—The contract was with the charterers, Messrs. Bilton, Williams, and Co. [*Brett*, J.—The charterer was not liable for delay; of what use could such an undertaking be to him?] At the time it was given the defendant did not know the terms of the charter-party; he did not know that the charterers were not responsible for delay. The intention was that the charterers should be protected, whatever the charter-party. The fact of the document being given to Messrs. Bilton, Williams, and Co. or their agent affords cogent evidence that the contract was with them, and therefore cogent evidence that it was not with the plaintiff. The defendant knew nothing about the plaintiff when he gave the undertaking, and had no intention of contracting with him. The undertaking was a promise to Messrs. Bilton, Williams, and Co., and, though they might tell other people that they had received such a promise, that is not enough to create a privity of contract between the defen-

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dant and such other people. As to the offer to compromise by paying 20*l.*, that was an offer made to Messrs. Bilton, Williams, and Co. in reality, and therefore does not affect the present question. There was no consideration for the personal undertaking of the defendant, and the form of the document excludes the idea of personal liability.

LORD COLERIDGE, C.J.—I am of opinion that the verdict should stand. The defence is that there is no contract between the plaintiff and the defendant. I have, however, come to the conclusion that there was evidence for the jury that the contract was between the plaintiff and defendant. What is the fair meaning of such an undertaking as the one sued on in this action? This case can be put on either of two grounds. The captain of the *Der Versuch* had declined to sign a charter in the terms in which it was offered to him, unless this undertaking was got for him by the charterers, Messrs. Bilton, Williams, and Co. It was procured, and I think there was evidence to show that it was procured for him; and when a claim was made upon the defendant under the document in question, he admitted that there was a contract, but disputed the extent of his liability, and offered 20*l.* That was an admission of liability under the contract. The other ground, as it seems to me, on which the case can rest is, that although the plaintiff is not named in the document as the person with whom the defendant contracted, neither are the charterers, and it would seem that the document was intended to be a contract by the defendant with any party concerned who might act upon it. As to the signature, Mr. Bruce could not dispute the authorities which show that it was sufficient to bind the defendant personally.

BRETT, J.—The only question upon which any argument which needs consideration was addressed to us was whether there was evidence for a jury of a contract between the plaintiff and the defendant. It was contended that the defendant contracted with Messrs. Bilton, Williams, and Co. and not with the plaintiff. I confess I regard the case as one of some difficulty, but on the whole I think there was evidence sufficient to support the verdict. The contract was with reference to a foreign ship. The captain refused to assent to a charter-party stipulating for demurrage in unloading, but making no provision for detention in loading, without receiving an undertaking which would secure him from undue detention. Messrs. Bilton, Williams, and Co., the charterers, accordingly obtain for him the undertaking declared on, to satisfy his claim if the ship should be detained. The charterers had a contract with the Bebside Colliery Company for a supply of coal, and it is said that this undertaking was an agreement between the charterers and the Bebside Colliery Company in furtherance of that contract. So treating it, it would be an idle document, made without consideration on either side. It is true the defendant had no notice of the charter-party, but, as appears from the undertaking itself, he knew the coal was to be put on board a foreign ship, and that the undertaking was with reference to that ship. The fair inference is that he knew the undertaking was being obtained for the captain, though the name of the captain was not disclosed, and not for the charterers, who

could incur no demurrage for delay, the charter being in a form which is common where the charterers are acting for a foreign merchant, and which makes no provision for detention in loading, but only for demurrage in unloading. The captain then may be treated as an undisclosed principal. Further, the jury were entitled to consider the admission made by the offer of 20*l.* when the defendant applied for compensation. Upon the facts, apart from the admission made by that offer of 20*l.*, and also upon that admission, I think there was evidence for the jury that there was a contract between the plaintiff and the defendant.

LINDLEY, J.—The difficulty is created by the use by the defendant of a printed form beginning "I undertake," and leaving in blank the name of the person with whom the contract is. We are thus compelled to look outside the document in order to discover to whom or for whom the undertaking is given. "I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals in ten colliery working days," is an undertaking from the very nature of it with some one interested in the subject-matter of it, with the owner, the charterers, or the captain. Looking to all the circumstances under which the undertaking was given, it seems to me that there is abundant evidence to show that it was given for and on behalf of the captain as an undisclosed principal. I think upon the true construction of the document the defendant was the proper person to be sued. The printed form shows the place from which the coals were to come, viz., "Bebside Colliery;" but the defendant does not profess, either by his mode of signing, or by any other indication, to be signing on behalf of any principal, or so as not to bind himself.

Order discharged.

Solicitors for the plaintiff, *Oliver and Botterell*.

Solicitors for the defendants, *Pattison, Wigg, and Co.*, agents for *Armstrong*, Newcastle-on-Tyne.

April 26 and May 9.

SAUNDERS v. STEWART. (a)

Damages, measure of—Remoteness of damage—Telegraphic message.

Where a collector of telegraphic messages who, for reward, undertook to receive messages for transmission, and to transmit them by telegraph to places abroad, received such a message written in a cypher (which he had no means of understanding or reading), and negligently transmitted it wrongly, so that the plaintiff, the sender of the message, lost a profitable contract, it was held, that only nominal damages could be recovered by the plaintiff in an action brought by him against such collector.

The plaintiff sent to the defendant, who carried on the business of collecting and receiving telegraphic messages in this country for transmission by telegraph abroad, and so transmitting them, a telegraphic message for transmission abroad.

The message was written in cypher, so that it was impossible for the plaintiff to have any knowledge of its contents or meaning, but the cypher was known to the person to whom the message was addressed.

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Its effect was to order a large quantity of goods upon which the plaintiff would, if the order had been executed, have obtained a considerable profit.

The defendant, however, transmitted the message wrongly, so that the order was not understood by the person to whom the message was sent or executed by him, whereby, as above stated, the plaintiff lost a considerable profit.

At the trial, the verdict was entered for the plaintiff for the full damages claimed by him, leave being given to the defendant to move to reduce the damages, or to enter the verdict for him.

A rule having been obtained,

Butler, on behalf of the plaintiff, showed cause.—This is a question almost destitute of authority; but, though in this country analogous questions have been but little discussed, in America there are many cases in which points closely resembling the present have arisen and been adjudicated on by the courts. The case of *Strasburger v. Western Union Telegraph Company*, reported in a note to Sedgwick on Damages, pp. 441, 442, was an action to recover damages sustained by the plaintiff from the defendant's failure to transmit a telegram from New York to St. Louis, instructing one Davison "to sell silver lepins for 10 dollars, also others for less," the despatch was not sent, and owing to the fluctuation in the price of gold, which was at a premium, there was a considerable decline in the markets before the arrival of a letter containing the same instructions as the telegram. The plaintiff contended that the rule of damages was the difference between the market price at the time when the despatch should have been delivered and that when the letter was received. The defendant contended that these damages were too remote. The judge, however, held at the trial that the defendant company were bound as common carriers to exercise due diligence and care in the conduct of their business, without being satisfied of the specific pecuniary value of any message left with them. They were bound, he says, to infer that the despatch was of importance, and might be of pecuniary value, and the damages should be measured by the decline in gold which made the difference in market value. In another case (*United States Telegraph Company v. Wenger*, 55 Penn. Stat. 262, 1867), also cited in the Notes to Sedgwick on Damages, p. 442, the message was a direction to buy stock at a limit mentioned in the telegram. The court held, that as the company, through gross negligence, did not transmit the message, and the stock was therefore not purchased till after a delay, and the message disclosed to the company's agents its nature, the measure of damages was the rise in the price of the stock between the time when it ought to have arrived and the time when the purchase was made. The case of *The New York, &c., Printing Telegraph Company v. Dryburg* (35 Penn. 298), is also an authority to show the care required from the telegraph companies. This case, no doubt, differs from these in the fact that the message here was in cypher, but that should not, upon principle, create a distinction; for the very fact of its being in cypher was ample notice of its importance. The rule, no doubt, is that laid down in *Hadley v. Baxendale* (9 Ex. 341, 354; 23 L. J. 179, 182, Ex.), a rule accepted, as is said in *Mayne on Damages*, 2nd edit., p. 213, both in England and America.

The damages must be either such as arise according to the usual course of things from such breach of contract itself, or else such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract; as the probable result of a breach of it. They also cited

Playford v. The United Kingdom Telegraph Company, 21 L. T. Rep. N. S. 21; L. Rep. 4 Q. B. 758; 10 B. & S. 759.

Herschell, Q.C., on behalf of the defendant, contended, as follows:—This case falls within the class of cases to which the rule given in *Hadley v. Baxendale* is applicable. If notice had been given of the probable consequences of the breach of contract, it may be that greater care would have been used. [Barr, J.—If this were an open message, would you say that the defendant would not be liable?] If liable, liable only for what was apparent on the face of the message. The damages recoverable in the present case are merely nominal damages. The damages are such as would be present to the mind of the defendant, and in this case no damages whatever, or no definite amount, could have been anticipated by the defendant.

Cur. adv. vult.

May 9.—Lord COLERIDGE, C.J., read the judgment of the court.—The plaintiff in this case was a tradesman in this country. The defendant was a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiff for transmission to New York a message in words, which taken by themselves are entirely unintelligible, but which would be understood by the plaintiff's correspondent in New York as giving a large order for certain goods on which the plaintiff, if the order had been executed would have earned considerable commission. The defendant, through undisputed negligence, did not transmit the message, and the plaintiff admittedly lost thereby considerable profits which he would otherwise have made by the transaction. The action was for negligence in not transmitting the message. The verdict was for the plaintiff, and the question arises as to the true measure of damages. The plaintiff seeks to retain the verdict for a sum intended to represent the loss of profit above mentioned; the defendant contends that such damages are not within the rule as laid down in *Hadley v. Baxendale* (9 Ex. 341), and ever since approved and acted on; and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in *Hadley v. Baxendale* (*ubi sup.*) applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion, how the case might be if the message, instead of being in language utterly unintelligible, had been in language with plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason the second portion of Baron Alderson's rule clearly applies. No such damage as above mentioned could be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. And for the same reason, namely, the total ignorance of the defendant as to the subject-matter of the contract—an ignorance known to and indeed intentionally procured by the plaintiff.

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BUCHELL v. CLARK AND ANOTHER.

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The first portion of the rule applies also, for there are no damages more than nominal which can be "fairly and reasonably considered as arising naturally and according to the usual course of things from the breach" of a contract such as this. No rule as to damages which is to be found in any of the cases or in the books of Mr. Sidgwick and Mr. Mayne, will avail the plaintiff in this case. And the cases cited to us from the American courts, in which the liabilities of common carriers have been imposed on telegraph companies in America, even if correct with regard to such companies, have no application to a case where the defendant is not a telegraph company but a collector of messages to be transmitted by such a company, and the negligence complained of is his negligence, and not the negligence of such a company. We think, therefore, the rule should be made absolute to reduce the damages to a nominal sum.

This was the judgment of the Lord Chief Justice and of Brett and Archibald, JJ.

Rule absolute to reduce the damages accordingly.

Solicitors for the plaintiff, *Stocken and Jupp*, agents for *Radcliffe and Layton*, Liverpool.

Solicitors for the defendant, *Biddale, Craddock, and Biddale*.

Thursday, May 25.

BUCHELL v. CLARK AND ANOTHER. (a)

Lease and counterpart—Habendum and reddendum—Lease, construction of.

Where the habendum of a lease differs from the reddendum as to the duration of the term, the statement in the habendum must prevail. So even where the counterpart of the lease confirms the reddendum and contradicts the habendum.

In the habendum of a lease granted in 1784, the term was expressed to be for ninety-four and a quarter years, whilst in the reddendum it was for ninety-one and a quarter years, and in the counterpart it was expressed, both in the reddendum and habendum, to be for ninety-one and a quarter years.

Held, that as between the assignee of the reversion and the assignee of the lease there could be no reformation of the lease, even if the circumstances under which the lease was executed showed that the intention of the parties was that it should be a lease for ninety-one and a quarter years, but that the habendum must prevail and the lease be regarded as one for ninety-four and a quarter years.

This was a special case, as follows:

1. The plaintiff sues as owner in fee of the premises contained in a lease dated the 3rd Sept. 1784.

2. By that lease the premises mentioned in the statement of claim were demised to Samuel Coney, his executors, administrators, and assigns "to have and to hold the said premises from the feast of St. John the Baptist last past before the date hereof for and during and unto the full end and term of ninety-four years and one quarter of a year from thence next ensuing, yielding and paying therefor yearly and every year during the said term of ninety-one years and one quarter of a year hereby demised unto the said Henry Penton the yearly rent of 3l."

3. The lease was executed by Henry Penton only.

4. Indorsed upon the lease was a description of its contents at follows:

Henry Penton, Esq., to Mr. Samuel Coney,	<p style="text-align: right;">Dated 3rd Sept. 1784.</p> <p>Lease of a house and premises in the new road leading from Paddington to Islington, commencing 24th June 1784, for ninety-four and a quarter years. Rent 3l. per annum, payable quarterly.</p>
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5. The 4 in 94 had originally been 1, and the + had been added at some time of which there was no evidence.

6. It was objected that this fact could not be taken into consideration; such objection is to be dealt with by the court.

7. The counterpart of the lease signed by Coney, the lessee, corresponded in all respects with the lease, except that in the habendum the term stated is ninety-one years and one quarter, instead of ninety-four years and one quarter, and the same in the indorsement, if that can be regarded.

8. The house in question is one of a row of seven houses, all of which belonged to the same lessor, and the remaining six of which were demised by indenture of lease dated the 31st July 1784; five of the said remaining six houses being demised for the term of ninety-one and a quarter years from the said feast of St. John the Baptist, and the sixth one from the 29th Sept. of that year, for the term of ninety-one years to the same lessee or to others by his direction.

9. This evidence also is objected to, and to be dealt with by the court.

10. The plaintiff claims as owner in fee on the expiration of the lease.

11. The defendant is the executor of one Ann Hill, who had purchased the residue of the term.

12. He defends as landlord, an under lease not yet expired having been granted by her.

The question for the opinion of the court is whether the lease of 1784 was one for ninety-four and a quarter or ninety-one and a quarter years. if the former, judgment for the defendants; if the latter, for plaintiff, as prayed for in statement of claim.

Finlay (G. R. Kennedy with him).—There is a mistake in the wording of the habendum, and that this is so is obvious from the circumstances under which the lease was granted, and also from the counterpart. The reddendum, which expresses correctly the term intended to be granted, should therefore be treated as controlling the habendum, or, at any rate, it can be used to assist in the correction of what is an obvious mistake in the earlier part of the instrument. In cases where the mistake in a written instrument is obvious, courts of law always construe the instrument according to the true intention of the parties. The case of *Wilson v. Wilson* (23 L. J. 697, Ch.), where a "not" was wrongly inserted, is an example of this. There the court rejected the "not," and read the instrument as it ought to have been. He also cited an anonymous case cited by Lord St. Leonards in delivering judgment in *Wilson v. Wilson*, (sup.) *Leake on Contracts*, p. 173; *Strickland v. Maxwell* (2 C. & M. 539); *Spyve v. Topham* (3 East, 115); *Morton v. Woods* (18 L. T. Rep. N.S. 791; L. Rep. 4 Q. B. 293 (Ex. Ch.); 9 B. & S. 632.)

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Graham (Benjamin, Q.C. with him, *contra*).—The habendum is the governing part of the instrument; the office thereof "is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use": (*Shep. Touch.* 75). Then, as to the suggestion that the lease is to be read with the counterpart, the answer is given in *Shep. Touch.* 53. "If there be any difference between the parts, the counterpart shall be made to agree with the principal." [BRETT, J.—Have you any cases where application has been made to a court of equity to reform a lease under any circumstances at all similar to the present?] No; the cases of reformation of instruments are between original parties to the instruments sought to be reformed, and not as here, where one party has purchased the rights given by the instrument. He also cited *Garrard v. Frankel* (30 Beav. 445; *Shep. Touch.* 88); *Doe d. Tatum v. Catmore* (16 Q. B. 745.)

Finlay, in reply, distinguished *Garrard v. Frankel* (30 Beav. 445) on the ground that the defendant in the present case could on the face of the lease itself see the discrepancy, and therefore took the estate with notice of the difficulty, whereas, the plaintiff having only the counterpart, took without such notice.

BRETT, J.—I do not say that the case is free from difficulty, but I have come to the conclusion that our judgment should be for the defendant. The evidence of the circumstances under which the lease was granted, and of the leasing of the other houses in the row, was objected to; but it was argued for the plaintiff that such evidence showed the manifest intention of the original parties to the lease in question to be to create a term of ninety-one and a quarter years, and that therefore the court should reform (or treat as reformed) the lease, and so make the whole consistent, viz., a lease for ninety-one and a quarter years. To this it was urged that a reformation is only effected as between original parties; whereas here the lease is in the hands of an assignee of the lessee. Then, in reply to this, on the part of the plaintiff, we are reminded that the plaintiff is the assignee of the lessor, and had a right to assume from the counterpart in his possession that the term was for ninety-one and a quarter years only; whilst the defendant represents one who purchased according to the description in the lease, and consequently had more notice of the difficulty as to the duration of the term than the plaintiff could have, and was bound to inquire. Now, assuming (without deciding that the court can look at all the facts of the case) that we can look at all the facts in the case and take them into our consideration, still I think no case for the reformation of this lease is made out. The defendant bought upon the faith of the lease. I cannot think that the purchaser of a lease is bound, if the construction of the lease is doubtful, to look at the counterpart. I cannot think that he is bound to look from the superior to the inferior instrument to see if they are consistent. He has the right to assume that the counterpart corresponds with the lease. Treating, then, the lease as it stands, the authorities show that if there is any discrepancy between a lease and a counterpart, the lease must prevail, and the error or difference in the counterpart be "deemed the misprision of the clerk:" *Shep. Touch.* 53. The

words in the reddendum, "the said term of ninety-one and a quarter years," must be rejected, or treated as surplusage. The ejectment, therefore, fails, and the defendant is entitled to judgment.

ARCHIBALD, J.—I am of the same opinion. The authorities cited [he then read the passages cited from *Shep. Touch.*] show that we must read the habendum as expressing the real intention of the parties, there being, as I am satisfied, no ground for reforming the instrument on the application of the present plaintiff.

Judgment for the defendant.

Solicitor for the plaintiff, *W. Hayne*.

Solicitors for the defendant, *Mackeson, Taylor, and Arnould*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Friday, May 12.

BIRNIE (app.) v. MARSHALL (resp.)(a).

Trespass in pursuit of game—Bond-fide claim of right—Identity of land—1 & 2 Will. 4, c. 32, s. 30.

The appellant was charged with trespass in pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, and was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. The appellant's defence was that he was game watcher, employed by three gentlemen who were proved to rent shooting from the lord of the manor, and that the lord claimed the shooting over part of the glebe under an Inclosure Act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that the land upon which the alleged trespass was committed was included in the lands over which his employers' shooting extended, nor in the disputed part of the glebe. The magistrate decided that the appellant had no bond fide claim of right to shoot on this particular land, and convicted him of the trespass.

Held, upon a case stated (Field, J. dissenting), that under the circumstances, the magistrate was justified in convicting.

THIS was a case stated by a justice of the peace in and for the county of Cumberland, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before him, as hereinafter stated.

At a petty sessions, holden at the public office in Workington, in and for the division of Workington, in the county of Cumberland, on the 1st Dec. 1875, and by adjournment on the 9th Feb. 1876, an information preferred by Joseph Marshall (hereinafter called the respondent), against Robert Birnie (hereinafter called the appellant), under the Act 1 & 2 Will. 4, c. 32, s. 30, charging that he, the said Robert Birnie, did, within three calendar months then last past (to wit) on the 13th Nov. 1875, at the parish of Workington, in the said county, unlawfully commit a certain trespass, by entering and being, in the daytime of the same day, upon a certain close of land, in the possession and occupation of Jacob Waugh and James Armstrong, in pursuit of game, without the license or consent of the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having any right to authorise the said Robert Birnie to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided, was heard and determined by the said justice, the said parties respectively, or their respective attorneys, being then present; and upon such hearing the appellant was duly convicted before the said justice of the said offence, and he adjudged him for his said offence to forfeit and pay the penalty or sum of 1s., to be paid and applied according to law, and also to pay to the respondent the sum of 3l. 14s. 6d. for his costs; and if the said several sums were not paid forthwith he adjudged the appellant to be imprisoned in the House of Correction at Carlisle, in the said county, for the space of seven days, unless the said several sums, and all costs and charges of the commitment and conveying of the appellant to the said house of correction should be sooner paid.

Upon the hearing of the information it was proved on the part of the respondent and found as a fact that on the 13th Nov. last (the day named in the information) the appellant was upon certain inclosed land in the parish of Workington aforesaid, in the occupation of Jacob Waugh and James Armstrong, with a gun in his possession, with which he there shot a partridge and a hare. And it was further proved on the part of the respondent and not denied by the appellant that the land where the game was shot formed part of the glebe land belonging to the rectory of Workington.

On the first day of hearing it was alleged on behalf of the respondent, and not denied, that the rector of Workington or his licensee had always exercised the privilege of sporting over the land in question; but it was contended on behalf of the appellant that he (the appellant) was the game watcher for Messrs. Peter Iredale, Thomas Harrison, and William Carruthers, three gentlemen who claimed to be the lessees of the right of sporting upon the land in question under Henry Fraser Curwen, Esq., the lord of the manor of Workington, who it was alleged by the appellant was entitled to exercise sporting privileges over the land by virtue of a certain Inclosure Act passed in 49 Geo. 3, intitled "An Act for Inclosing Lands in the Townships of Workington and Winscales and manor of Workington, in the parish of Workington, in the County of Cumberland;" but as the appellant was not then prepared with any evidence in support of his allegation, the said justice did upon the application of the appellant's attorney adjourn the hearing of the said information; and the same information next (by virtue of successive adjournments) came on for hearing on the 9th Feb. last, and it was incumbent on the appellant to prove his right to go on this land. The first witness called by the appellant's solicitor was Mr. Tom Milburn, the clerk of the magistrates, and the solicitor to Henry Fraser Curwen, Esq., who deposed that Mr. Curwen was the lord of the manor of Workington, and as such lord claimed the right of shooting over those lands in the parish of Workington which were within the manor of Workington, and also that Mr. Curwen had let all the rights of shooting within a certain defined area which was outlined blue on a plan then produced to witness. Witness also produced a draft lease which had

been prepared and agreed to between the appellant's employers and Mr. Curwen, in which the parcels were described as follows: "Secondly, all that the right and liberty of shooting, hawking, fowling, coursing, hunting, and sporting over all and singular that portion of the Curwen estates and manor of Workington, situate in the parishes of Workington, Distington, and Dean, in the county aforesaid, which are particularly specified, delineated, and described in the plan drawn upon the front skin of these presents, and therein outlined with a blue colour, now belonging to or vested in the lessors, or which they have any right or title to use or enjoy." No questions were asked this witness as to whether the land trespassed upon was within the manor or Workington. Another witness was then called by the appellant, who stated that he had lived almost all his lifetime in the neighbourhood of Winscales, and had farmed land there under the lord of the manor. That he remembered the commons before they were inclosed, and knew the land occupied by the respondent. That some of it belonged to the Rector of Workington and some of it to Mr. Henry Fraser Curwen, but that he thought that the rector would claim the common. That witness did not know where the trespass had been committed. Mr. Thos. Harrison, one of the appellant's employers was then examined, and deposed that he was one of the parties to the agreement for taking the game on Workington and Winscales Commons. That the appellant was their gamekeeper, and they authorised him to go upon that land; it was not Marshall's (the respondent's) land, but land in the occupation of Messrs. Waugh and Armstrong. The portion of land in question was in the township of Workington. The respondent's attorney objected to this evidence, as Mr. Harrison did not see the trespass committed, but he ordered the man to go on the land.

It was contended by the appellant's attorney that the said justice had no jurisdiction in the matter, as a *bonâ fide* question of title was raised by the proceedings, and that the appellant had a *bonâ fide* right to shoot over the land under the agreement with Mr. Curwen, who, it was alleged, was entitled to the game by virtue of the provisions in the above-mentioned Inclosure Act. The respondent's attorney thereupon proceeded to address the said justice in reply, and in the first place, referring to the draft lease, he contended that when persons other than the lessees sported upon the land included in the lease, such persons must be accompanied by the lessees. But the said justice stopped him, and he then contended that no evidence had been produced by the appellant to show that the land upon which the trespass was alleged to have been committed was included in the draft lease, or was within the manor of Workington; and the said justice being of opinion that no evidence had been produced by the appellant to show the connection of the land trespassed upon with that referred to in the draft lease, or that the land trespassed upon was within the manor of Workington, did intimate such opinion to the appellant's attorney, and did offer to adjourn the case again to enable the appellant to produce such evidence; but the appellant's attorney declined to accept a further adjournment of the case, insisting that he had set up a *bonâ fide* claim of title; whereupon the said justice convicted the appellant in manner before stated, being satisfied

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that no *bonâ fide* claim of title had been set up by the appellant.

The question of law arising on the above statements for the opinion of this honourable court, therefore, is, whether the said conviction was legally and properly made. If this honourable court should be of opinion that the said conviction was legally and properly made then it is to stand; but, if otherwise, it is to be quashed.

Bompas argued for the appellant.—It is to be observed that the magistrate, in referring to the adjournment until the 9th Feb., says, in the case, that "it was incumbent on the appellant to prove his right to go on this land." That statement, upon which only can this conviction be justified, is contrary to law. There was no dispute as to the *bonâ fide* nature of the appellant's claim, and that being so, the magistrate's jurisdiction was thereby ousted. The question which the magistrate further considered, and which was beyond his jurisdiction, was whether the appellant showed any *prima facie* evidence of the right which he admittedly claimed in good faith. [GROVE, J.—Was it not a question of fact for him to decide whether the place of the alleged question was within the bounds of the right he claimed?] *B. v. Cridland* (7 E. & B. 853) was decided upon another point, but the opinions expressed concerning this one have since been approved and acted upon; the general rule was there said to be that in case of summary convictions justices have jurisdiction to determine whether the claim of title to real property is set up *bonâ fide*; but if it is *bonâ fide* set up, they have no jurisdiction to proceed further in the matter; and that the proviso in statute 1 & 2 Will. 4, c. 32, s. 30, viz., "that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to an action at law for such trespass," does not give justices jurisdiction upon a charge of trespass in pursuit of game, to determine a claim of title to land against the wish of the defendants. The jurisdiction of justices under this statute has been recently considered in the Court of Common Pleas; although the conviction was affirmed, the question was admitted to be only whether a reasonable and honest claim of right was involved: *Watkins v. Major* (33 L. T. Rep. N. S. 352; L. Rep. 10 C. P. 662). That the claim of right to shoot under this Inclosure Act was a reasonable question appears from the similar question raised before the Exchequer Chamber in *Sowerby v. Smith* (31 L. T. Rep. N. S. 309; L. Rep. 9 C. P. 524).

Henry, for the respondent.—The magistrate was right in demanding some proof of a *bonâ fide* claim to the particular land over which the appellant was shooting. A man claiming to shoot over the land belonging to another ought to do more than produce a lease of the shooting over some lands therein described—he should give some evidence at least of the identity of the land described with the place in which he was alleged to be trespassing. An opinion was expressed by Williams, J. in *Morden v. Porter* (7 C. B., N. S., 641), that the party trespassing is not the less guilty of the offence under this Act because he *bonâ fide* believes that he has the licence of the occupier to shoot over the land. And this was the conclusion of the Court of Queen's Bench in *Cornwell v. Sanders* (3 B. & S. 206).

Bompas, in reply.—It sufficiently appears that a *bonâ fide* claim on the appellant's part existed, and the magistrate had no right to consider its nature or its limit: (*Reg. v. Justices of Derbyshire*, 11 W. R. 780). Justices are judges only of whether the claim is *bonâ fide* and reasonable: (*Leatt v. Vine*, 30 L. J. 207, M. C.; *Legg v. Pardoe*, 9 C. B., N. S., 289) and this was admitted by everybody.

CLEASBY, B.—The question for us is whether this conviction was legally and properly made. It appears to me that it was, for I think the facts as they are stated justify the magistrate's conclusion that his jurisdiction was not ousted by any *bonâ fide* claim of title. It is not sufficient for a person charged under this Act to say, I claim title to this land. Neither the claim is to be allowed, nor the magistrate's decision is to be supported without some substantial foundation, and I conclude from the facts stated, that the materials upon which the magistrate was justified in exercising his discretion by finding no *bonâ fide* claim, were sufficient. No doubt this gentleman, the rector, had always enjoyed the right of shooting over this ground; but it was contended that the appellant, being the game watcher of three gentlemen who leased some shooting from the lord of the manor, was exercising the lord's right under an Inclosure Act to shoot over the same; on the first day, the appellant being unprepared with his evidence, the magistrate adjourned the further hearing of the information, and, as he states, when it came on again, it was incumbent on the appellant to prove his right to go on this land; in this the magistrate was quite right, at least, to the extent that the appellant had to show a *bonâ fide* claim to shoot upon the particular land on which he was alleged to be trespassing. A plan and a draft lease were produced as evidence on his behalf, and we must take it that at this period of the case before the magistrate the onus of proof rested upon the appellant. No question, however, was asked by him as to whether the land on which he was shooting was included in the demise of which the document produced was a draft. It did not appear, indeed, that any of the appellant's witnesses knew where the alleged trespass had taken place. The magistrate intimated to the appellant's solicitor his opinion of this deficiency in the defence, and offered an adjournment to supply it; but the appellant declined the offer, and elected to stand upon what he had proved. The magistrate may fairly have presumed that his inability to establish this identity of the land was the cause of his refusal to accept another adjournment. He at all events held that the appellant's omission to prove what, if possible, must have been very easy, was sufficient to throw doubt upon the good faith of his claim of right. The magistrate, concluding that the appellant had no *bonâ fide* excuse for the trespass, exercised his jurisdiction and convicted him; and I think, under the circumstances, he was justified in doing so.

GROVE, J.—I am of the same opinion. I am not prepared to say this case might not be read in a different way, but I think it is capable of being interpreted so as to justify the conclusion of the magistrate. It seems to me, we may fairly take it that at the first hearing the rector was proved to have always exercised the right of shooting over this ground; and it became then

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the duty of the appellant to show a *bona fide* claim of right to shoot at the same place. This I assume is all the magistrate meant when he said, "it was incumbent on the appellant to prove his right to go on this land." Instead of showing a *bona fide* claim which would answer the charge against him, the appellant called a witness who gave some evidence of his right to shoot over some land not identified with the *locus in quo* of the alleged trespass, but he never asked him a question about that particular spot; and his other two witnesses carried his case no further. The magistrate, upon this, and upon the appellant's refusal of another adjournment, not unreasonably, I think, concluded that the appellant's claim of right was not *bona fide*, and that he was trespassing upon the particular land concerning which he was charged, although he might have some claim to shoot elsewhere. I regret that the case is not stated more clearly and decidedly; it certainly is not free from ambiguity, but reading it as I do, I think there is enough in it to show that the magistrate might have been right.

FIELD, J.—I am not able to come to the same conclusion. There is no distinction in the principles of law upon which we base the inferences we draw from the case, but the statements are so ambiguous that we differ as to their effect. Lord Campbell said in *Reg. v. Cridland* (at p. 867), "Though no evidence of title was actually offered, it was quite clear that a *bona fide* claim of title was set up; and when such a claim is so set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction." And in *White v. Feast* (L. Rep. 7 Q. B. 353), Blackburn, J., said, at page 360, with respect to a fair and reasonable supposition of right, "I am far from saying that there may not be many cases where orders of a superior might well afford fair and reasonable ground," and he held the justices were right in their conviction there, because, on the evidence, there was no fair or reasonable ground shown for the appellant's supposition. I think, upon the strength of those authorities, that when the *bona fides* of a defendant's claim of title is ignored by a magistrate, he is bound to state clearly his grounds for arriving at such a conclusion. I doubt, upon the statements in this case, whether the magistrate understood what was sufficient for the appellant to prove, or even what a *bona fide* claim of right means. I can well imagine a claim of this kind being raised upon a good foundation, even although the rector has long enjoyed the shooting. It was proved that the appellant was authorised to go upon this land by the people who rented the shooting from the lord of the manor, and who seemed to have a *bona fide* claim to it. Considering the terms of the lease, and all the circumstances, I do not think the magistrate was justified in drawing the inference that an omission to put a particular question was proof of the appellant's bad faith with respect to his defence. This summary jurisdiction in such cases ought not, in my opinion, to be extended, and the exercise of it in this matter ought not, I think, to be affirmed.

Judgment for respondent.

Leave to appeal was refused.

Solicitor for appellants, *Bischoff, Bompas, and Bischoff.*

Solicitors for respondent, *Helder and Roberts, for J. Webster, Whitehaven.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 10, 11, and 25.

THE DELTA. (a)

Collision—Foreign judgment—Estoppel—Res judicata—Lis alibi pendens.

In an action of collision a judgment of a foreign court given in a cause between the same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no res judicata, but only lis alibi pendens, when the plaintiff instituted his action here, he can claim to proceed to judgment in this country if he chooses.

Semble, a judgment in a foreign court against a person not subject to the jurisdiction of that court to be an estoppel, must be a judgment on the merits, and not merely by default.

THESE were cross causes of collision instituted respectively by the owners of the Italian barque *Erminia Foscolo*, and of her cargo against the French steamship *Delta*, and the French company of the Messageries Maritimes, her owners intervening, and by the owners of the *Delta*, against the owners of the *Erminia Foscolo*.

The collision occurred in the Straits of Gibraltar on 11th Aug. 1871, and resulted in considerable damage being done to both vessels.

The petition (in the principal cause against the *Delta*) was in the ordinary form, alleging the facts charging negligence against the *Delta*.

The answer, after dealing with the facts, and charging negligence against the *Erminia Foscolo*, continued as follows:

7. The *Erminia Foscolo*, at the time of the collision, was an Italian ship, and her owner was then, and always since has been, and now is, resident in Italy, and an Italian subject.

8. In or about the month of Sept. 1871, the owner and master of the *Erminia Foscolo* commenced a suit against the said company, the owners of the said steamship *Delta*, and against the said steamship in the court of the Tribunal of Commerce at Marseilles, in the republic of France, and prayed the said tribunal to declare the said owners of the *Delta* responsible for the consequences of the collision between the *Erminia Foscolo* and the *Delta*, on the night of the 11th Aug., as hereinbefore mentioned, and to condemn the said defendants, the owners of the *Delta*, to pay to the said plaintiffs in the said suit the amount of their damages and costs.

9. In or about the said month of September 1871, the master of the *Delta* and the company of the Messageries Maritimes, the owners of the said steamship, instituted proceedings against the master and owner of the *Erminia Foscolo*, and the said barque in the said Tribunal of Commerce at Marseilles, and prayed the said tribunal to condemn the defendants in the said suit jointly and severally, the one as master and the other as owner of the *Erminia Foscolo*, to be civilly liable to pay to the said company the amount of the damage and losses occasioned to the *Delta* in the said collision between the *Delta* and the *Erminia Foscolo*, which had taken place in the Strait of Gibraltar, as hereinbefore mentioned, by the improper navigation of the captain of the *Erminia Foscolo*, together with costs.

10. At the time of the institution of the said respective suits and proceedings, and until and at the time of the judgments given in the same as hereinafter mentioned, the said Tribunal of Commerce was a court of competent jurisdiction to entertain the said suits and proceedings, and to adjudicate thereupon, and had jurisdiction over the said parties to the said suits and proceedings in and about the premises.

(a) Reported by JAMES P. ASPINALL, Esq., Barrister-at-Law.

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11. The master and owners of the *Delta* duly appeared as defendants in the suit brought against them by the said master and owner of the *Erminia Foscolo*, in the said Tribunal of Commerce as aforesaid, and the said master and owner of the *Erminia Foscolo* appeared and defended the suit brought by the said master and owners of the *Delta*. Subsequently to such appearances proceedings were duly had and taken in the said suits before the said tribunal in accordance with the laws of France.

12. After several adjournments, granted at the request of the master and owner of the *Erminia Foscolo*, the cause which they had brought against the said company of the Messageries Maritimes, the owners of the *Delta*, was definitely fixed for hearing by the said tribunal upon the 22nd Dec. 1871. Upon the said 22nd Dec., the said Tribunal of Commerce delivered judgment by default against the plaintiffs in the said suit, and rejected their claim against the said company, and dismissed the said company from the suit brought against them as aforesaid.

13. The cause brought by the owners of the *Delta* against the master and owner of the *Erminia Foscolo* was also appointed by the said Tribunal of Commerce to be heard upon the said 22nd Dec.; and upon the said day the plaintiffs in the said cause having proved their case to the satisfaction of the court, and the defendants in the said cause not appearing to contradict their evidence, the said Tribunal of Commerce delivered its judgment in the said cause, and condemned the master and owner of the *Erminia Foscolo* to pay to the said company the amount of the loss and damage sustained by the *Delta* by reason of the said collision, which was, by the said judgment, determined to have been occasioned by the improper navigation of the *Erminia Foscolo*.

14. Notice of the said decrees was duly given to the said owner and master of the *Erminia Foscolo* in accordance with the requirements of the law of France, and all things on the plaintiffs' part have been done to make, and the said judgments have now by the law of France become, and are valid and conclusive, and final judgments, and binding upon the plaintiffs, and are still in full force and effect.

15. The defendants submit to this honourable court that by reason of the aforesaid judgments, the plaintiffs ought not to be allowed to further prosecute the suit against the *Delta*.

To this answer the plaintiffs' solicitor replied, and, after dealing with the facts, averred as follows:

3. He denies the truth of the several allegations contained in the 8th, 9th, 10th, 11th, 12th, 13th, and 14th articles of the said answer.

3a. He says that if any such suit as stated in the 8th article of the said answer was brought in the names of the master and owner of the *Erminia Foscolo*, the bringing of such suit was never authorised or ratified by the plaintiff, the owner of the cargo of the *Erminia Foscolo*.

4. He says that if any suit was commenced by the owner and master of the *Erminia Foscolo*, as in the said 12th article alleged, it was commenced against the owners of the *Delta* only and not against the *Delta*, and that it was subsequently, and before the 22nd Dec. 1871, and before the 18th Nov. 1871, the day of the institution of his suit, and before the 30th day of the same month, the day of the appearance of the defendants herein, abandoned by the master and owner of the *Erminia Foscolo*, and that the judgment in the 12th article of the said answer stated was and is a judgment of nonsuit only, and not a judgment on the merits.

5. If any such judgment, as in the said 13th article alleged, was delivered by the said Tribunal of Commerce, it was delivered in default of appearance of the said master and owner of the *Erminia Foscolo*, and without any evidence being previously given before the said tribunal, and was not and is not a judgment on the merits.

6. The said owner and master of the *Erminia Foscolo*, and the said owners of cargo respectively, were not, nor as or were any or either of them at the time of the happening of the said collision, or at any time afterwards, agents or a subject of France, or resident or present therein.

7. The said owner and master of the *Erminia Foscolo*,

and the said owners of cargo respectively, had not any notice of the said alleged decrees within the time allowed by the law of France for an appeal therefrom respectively.

To this reply the defendants' solicitors rejoined as follows:—

1. As to the 4th article of the reply, they deny that at any time before the said 22nd Dec. 1871, the said owner and master of the *Erminia Foscolo* abandoned the said proceedings and suit instituted by them in the said Tribunal of Commerce at Marseilles.

2. They deny the allegations contained in the 5th and 7th articles of the said reply.

3. They submit that the allegations contained in the 6th article of the reply are immaterial under the circumstances set forth in the 8th article of the answer.

4. By the law of the kingdom of Italy, and by treaties between France and Italy heretofore, and now existing and in force, and particularly by the treaty between the said countries of the 24th March 1760, it is provided that the Supreme Courts of Italy should be guided by letters of request of the Supreme Courts of France in giving executory effect and force within the said kingdom of Italy to the sentences and judgments of the courts of France according to law.

5. On the 12th Feb. 1872, the defendants in this suit duly obtained from the Court of Appeal of Aix in the Republic of France, being a Supreme Court of France within the meaning of the said laws and treaties, a letter of request addressed to the Court of Appeal of Genoa in the said kingdom of Italy requiring executory force and execution within the said kingdom to be given to the sentences and judgments of the said Tribunal of Commerce of Marseilles alleged in the 12th and 13th articles of the answer, and the said owner and master of the *Erminia Foscolo* were duly cited to appear before the said Court of Appeal of Genoa to answer to the prayer and request that executory force should be given to the said judgments as aforesaid; the said owner of the *Erminia Foscolo* appeared, and opposed the said prayer and request.

6. On the 4th day of June, 1872, the said Court of Appeal of Genoa, being a Supreme Court of Italy within the meaning of the said laws and treaties, after hearing the pleadings and exceptions of the said owner of the *Erminia Foscolo* in opposition and contrary thereto, rejected every petition and exception of the said owner of the *Erminia Foscolo*, and decreed and declared that executory force must be and thereby was given to the said sentences and judgments delivered by the said Tribunal of Commerce of Marseilles in the suits respectively brought by the defendants and the said owner and master of the *Erminia Foscolo* as set forth in the answer filed herein, and declared the said judgments to be executory within the said kingdom of Italy.

7. The said judgments of the said Tribunal of Commerce of Marseilles set forth in the 12th and 13th articles of the answer, and the said judgment of Court of Appeal of Genoa are, by reason of the premises valid and binding, and conclusive upon the said owner of the *Erminia Foscolo* in Italy as well as in France, and by the law of Italy as well as by the law of France, the said owner of the *Erminia Foscolo*, one of the plaintiffs in this suit, is barred and precluded from recovering any damages from the defendants in respect of the collision between the *Delta* and the *Erminia Foscolo*, alleged in the petition.

8. The defendants repeat the submission contained in the 15th article of the answer.

The plaintiffs' solicitor concluded the pleadings by denying the allegations of the rejoinder, and alleging that the rejoinder was bad in substance.

The pleadings in the cross cause merely raised the question of the negligence of the two vessels, and made no mention of the point of law raised in the principal cause.

The causes were first called on for hearing in July 1874, before the judge (Sir E. Phillimore), assisted by Trinity Masters, but at that time the parties were not prepared to go into the defence raised upon the pleadings under the judgment of the French tribunal, and on that point the case

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was adjourned; but on the merits the judge determined to hear the cause *de bene esse*, and the cause was accordingly heard on the merits, and the *Delta* was found alone to blame for the collision, and the further hearing on the points of law was adjourned.

July 10 and 11.—The cause again came on for hearing before Sir R. Phillimore, in the Admiralty Division. It was then proved that the judgments stated in the pleadings had been given by the French tribunal at Marseilles, and that under the treaties mentioned in the fourth article of the rejoinder the Court of Appeal at Aix, the proper tribunal, addressed *lettres rogatoires* to the Court of Appeal at Genoa, and that in consequence of such letters the Court of Appeal at Genoa declared the said judgments to be executory within the kingdom of Italy; and it was also proved that the plaintiff appeared and opposed such declaration by the Italian tribunal. The judgments mentioned were respectively, in the case against the owners of the *Delta*, a judgment for the owners of the *Delta* by reason of want of prosecution by the owners of the *Erminia Foscolo*; and in the case against the owners of the *Erminia Foscolo*, a judgment for the owners of the *Delta* by default of appearance by the owners of the *Erminia Foscolo*; and there was no decision on the merits of the case either in the French or Italian tribunal. Several French and Italian advocates were called to give evidence as to the foreign law. They stated that in a case of collision a judgment given against a ship and its owners was, by French and Italian law, also binding upon the owners of the cargo representing that ship, as the ship and its owners represented all the interests embarked in the ship at the same time. The owners of the cargo of the *Erminia Foscolo* had no notice of, and had never been summoned in the proceedings in the French and Italian tribunals, although they had a house at Marseilles. There was a difference of opinion between the French advocates as to the binding effect of a judgment by default, some asserting that a judgment by default not appealed from was as binding as a judgment on the merits, and prevented any further proceedings between the same parties; and others being of opinion that a party condemned by default might under certain circumstances renew proceedings against the same parties, as, for instance, where a judgment by default has not been executed within six months from its being pronounced, and it consequently becomes lapsed (*non avenue*: See Code de Procedure, sect. 156). Neither of the judgments before-mentioned had been executed either by the French or Italian tribunals. French and Italian law are the same upon these matters.

The remaining facts and dates are fully stated in the judgment.

Milward, Q.C. and E. C. Clarkson, for the *Erminia Foscolo*.—We ask for judgment notwithstanding the defence made by the owners of the *Delta*. As far as relates to the owners of the cargo of the *Erminia Foscolo*, they never were summoned, and had no notice of the foreign proceedings, and hence cannot be bound by them. The present action was commenced (18th Nov. 1871) before they obtained judgment in the French actions (22nd Dec. 1871), and they appeared in this action without protest (20th Nov. 1871) and gave bail, and then they subsequently (15th Jan.

1872) commence a cross action in this court against the *Erminia Foscolo*. In none of their proceedings do they mention the French judgments until the answer in the action against the *Delta*. In the petition against the *Erminia Foscolo* there is no mention of those proceedings. These judgments are a good answer to the action if they amount to an estoppel, and a judgment, to be an estoppel, must be a judgment on the merits of the case. There is no case which establishes that a judgment other than a judgment on the merits is an estoppel. Again, before a judgment can be pleaded by way of estoppel, such estoppel must have been operative at the time of the institution of the cause in which it is pleaded; it cannot become an estoppel during the process of the cause. There was no judgment in the French tribunals until after this cause was instituted in this court, and consequently there can be no estoppel. The owners of the *Delta* should have followed the course indicated in *The Mali Ivo* (L. Rep. 2 Adm. & Ecc. 356), and have put the owners to their election as to which action they would continue, and should have pleaded *lis alibi pendens*, not *res judicata*. There was no judgment in Italy until 4th June 1872, that is, after the defendants' answer was filed (22nd March 1872), and consequently at that time there was no judgment in Italy. An English court will examine into a foreign judgment before giving it effect: (*Don v. Lippman*, 5 C. & F. 1.)

The Admiralty Advocate (Dr. Deane, Q.C.) and R. E. Webster, for the *Delta*.—This is *res judicata*. There have been judgments by default against plaintiffs, and these are binding against them, and must be acted upon by English courts so long as they are in accordance with French law, and there is a duty upon the plaintiffs to obey those judgments: (*Schibaby v. Westenholz*, L. Rep. 6 Q. B. 155.) That they are binding upon the plaintiffs in accordance with French law is clear from the evidence laid before the court. There was a duty upon the plaintiffs to obey the judgments, because they themselves were suing the defendants in respect of this same collision, and were constructively present in Marseilles by their agent or advocate when the actions in the Tribunal of Commerce were commenced and judgment was given. Moreover, in consequence of the treaties existing between France and Italy, the judgments became Italian judgments, and the plaintiffs were Italian subjects and resident in Italy, and hence there was a duty to obey those judgments. A judgment not appealed from, whether by default or not, passes into *res judicata*, and when once it is *res judicata* it bars further proceedings between the same parties, and is a good plea to an action brought by the party who has been condemned.

Marten's Droit des Gens, vol. 1, s. 94;

Westlake's International Law, p. 376;

Story's Conflict of Laws, ss. 598, et seq.;

General Steam Navigation Company v. Guilleu, 11

M. & W. 877;

Dig. c. 44, tit. I. II., De exceptionibus, De exceptionibus rei judicate.

A judgment by default in a foreign court cannot be questioned by the party against whom it has passed, where he has subjected himself to the jurisdiction and has had notice of the proceedings, and even in some cases when he has had no notice:

Tarleton v. Tarleton, 4 M. & S. 20;

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Copia v. Adamson, L. Rep. 9 Ex. 845; L. Rep. 1 Ex. Div. 17; 31 L. T. Rep. N. S. 222; 33 L. T. Rep. N. S. 860;

Vallee v. Dumeryue, 4 Exch. 290.

[Sir R. PHILLIMORE.—It seems clear that a foreign judgment on the merits of a case may be an estoppel, but how can that be the case where there has been no decision on the merits? Where there has been notice to the party in default he must answer for his own default.

Milward, Q.C., in reply.—No judgment can be an estoppel unless it has been controverted on the merits: (*Langmead v. Maple*, 17 C. B., N. S., 255.)

Our. adv. vult.

July 25, 1876.—Sir R. PHILLIMORE.—These are cross causes of collision, brought originally in the High Court of Admiralty; the first by the owners of the barque *Erminia Foscolo*, and the owners of the cargo, against the steamship *Delta*; the second by the owners of the *Delta* against the *Erminia Foscolo*. In the suit against the *Delta* the proceedings, besides narrating in the ordinary form the incidents of the collision, raise a further issue, or further issues, in the following manner. Articles 7 to 15, inclusive, of the answer as amended, are as follows: (The learned judge then read those articles of the answer as given above.) Articles 3 to 7, inclusive, of the reply, as also amended, are as follows: The truth of the allegations of the answer is denied, and it is further stated: (the learned judge then read the reply as given above.) A rejoinder was put in, which was as follows: (as given in the rejoinder set out above.) The pleadings in the *Erminia Foscolo* merely raise the issue as to the blameworthiness of the two vessels. When the causes came on for hearing, by arrangement, the last question was determined first, and in the result I then found the *Delta* alone to blame for the collision. The point, however, remains—on which opinions of foreign jurists and others have been since taken, and which was finally argued on the 10th of this month—whether the question in dispute between the parties had not previously been determined by another competent court, so that the matter was in the category of *res judicata*. The collision occurred on 11th Aug. 1870, off Gibraltar. On 9th Sept. 1871, the captain and owners of the *Delta* instituted a suit in the Court of Commerce at Marseilles against the captain and owners of the *Erminia Foscolo*. On 12th Sept. a suit was instituted in the same court by the owner of the *Erminia Foscolo* against the owners of the *Delta*. Some adjournments of the two suits were had, and on the 22nd Dec. the tribunal, in the suit brought against the captain and owners of the *Erminia Foscolo*, pronounced judgment against the defendants, for default of appearance, condemning them in the plaintiffs' damages and costs. On the same day the tribunal, in the suit brought against the owners of the *Delta*, pronounced judgment against the plaintiff for default of prosecution, condemning him in costs. By a treaty of 1760, between France and the kingdom of Sardinia, the Supreme Commercial Courts of either country were to execute the decrees of each other. A petition was presented by the owners of the *Delta* to the Court of Appeal at Aix, praying that court to put in force the provisions of this treaty by sending letters of

request (*requisitiones—lettres rogatoires*) to the Court of Appeal at Genoa. Such letters were accordingly decreed by the court at Aix on 12th Feb. 1872. On 24th Feb. a citation out of the Court at Genoa was served on the owners of the *Erminia Foscolo*; a further citation seems to have been served on the 12th of the month, and on the 4th June the Court at Genoa, having heard arguments on both sides, decreed that executive force must be given to the judgment of the Court of Commerce, and condemned the owners of the *Erminia Foscolo* in costs. Some attempt seems to have been made to execute this judgment, but ultimately it remained unexecuted. In the meantime the suits in the High Court of Admiralty had already been instituted. That against the *Delta* was instituted on the 18th Nov. 1871, and an appearance was entered by the owners of the *Delta* on the 20th, that appearance being not under protest, but absolute. The suit against the *Erminia Foscolo* was instituted on the 13th Jan. 1872, and an appearance was entered on the same day. The judgments in the Court of Commerce were not rendered till the 22nd Dec. 1871, so that at the time of the institution of the suit against the *Delta* and of the appearance of the owners of the *Delta* the suit in the Court of Commerce had not passed into *res judicata*, but was only a *lis alibi pendens*. After the judgment in the Court of Commerce the owners of the *Delta* instituted this suit here against the *Erminia Foscolo*, and filed pleadings in their suit, in which no mention is made of the judgment of the Court of Commerce. On the question of foreign law, both French and Italian advocates were examined. Their evidence left it at last doubtful whether the judgment of the Court of Commerce, rendered as it was in default of appearance, never having been executed, would now have in France or Italy the force of a *res judicata*. But I think it unnecessary to go into their evidence in detail, as I am of opinion that this defence must fail for two reasons. The first is, that at the time when the suit against the *Delta* was begun here there was confessedly no *res judicata*, there was only a *lis alibi pendens*. If the owners of the *Delta* had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the *Erminia Foscolo* to their election, compelling them to abandon one or either of the suits, according to the rule laid down by me in *The Mali Ivo* (L. Rep. 2 Adm. & Ecc. 356), and quite recently applied in the *Cattarina Ohiazaro* (L. Rep. 1 P. D. & A. 363; 34 L. T. Rep. N. S. 312; 3 Asp. Mar. Law Cas. 170). As regards the suit against the *Erminia Foscolo*, it was brought by the owners of the *Delta* while a foreign *lis* was pending. They cannot be heard, therefore, to object that that *lis* is a bar to the decision on the merits of the suit. The second reason is, that the foreign judgment not having been rendered on the merits of the case, but on matter of form only, cannot be set up as a bar to a decision on the merits. It is, however, upon the former ground that this judgment is principally founded. I have already pronounced the *Delta* to be alone to blame for the collision. I must now pronounce that the further defence raised on behalf of the owners of the *Delta* is not sustained, and that they must be condemned in the damages occasioned by the collision, and in the costs of the suit, and I must

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Re SMITH AND OTHERS—GLADSTONE v. GLADSTONE.

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dismiss the suit against the *Erminia Foscolo* with costs.

Solicitor for the owners of the *Erminia Foscolo*, Thomas Cooper.

Solicitors for the owners of the *Delta*, Gellatly, Son, and Warton.

Tuesday, May 16.

Re SMITH AND OTHERS.(a)

Practice—Collision upon high seas—British and foreign ship—Jurisdiction—Service out of the jurisdiction—Rules of the Supreme Court, Order II. r. 4; Order XI. r. 1.

Where an English ship is damaged in collision upon the high seas, outside any territorial jurisdiction, by a ship owned by a foreign company established abroad, there is no power to issue a writ for service out of the jurisdiction upon, or of which notice is to be given out of the jurisdiction to, the foreign company, and claiming damage in respect of the collision.

Semble, that "within the jurisdiction" in Orders II. and XI. of the Supreme Court Rules, means within the territorial jurisdiction.

In Jan. 1876 the British steamship *City of Mecca*, being about nine miles from the mouth of the river Tagus, and upon the high seas, came into collision with the steamship *Insulana*, belonging to the Empresa Insulana Company—a company owning steamships, and carrying on their business at Lisbon. Considerable damage was done to the *City of Mecca*.

An application was made by summons in chambers, on behalf of the owners of the *City of Mecca* (Smith and others), under the Rules of the Supreme Court, Order II., rule 4, and Order XI., rule 1, that a writ endorsed with a claim for compensation for the damage so done might be issued for service out of the jurisdiction upon, or of which notice might be given out of the jurisdiction to, the Empresa Insulana Company.

In an affidavit used in support of the summons, it was stated that the Empresa Insulana Company carried on business at Lisbon, that the members of the company were not British subjects, and that the *Insulana* was registered at Lisbon as belonging to the directors of the company.

The judge having adjourned the summons into court,

E. O. Clarkson, on behalf of the owners of the *City of Mecca*, contended that the collision having occurred on the high seas, which is within the jurisdiction of the Admiralty, the act done was done within the jurisdiction. Hence, under Order XI., rule 1, and Order II., rule 4, of the rules of the Supreme Court, the court has power to order the writ to issue, and can direct service of notice of the writ out of the jurisdiction.

Sir R. PHILLIMORE.—In this case the court would, if the *Insulana* could have been arrested within the territorial jurisdiction, have exercised jurisdiction so far as the *res* was concerned, but it would, under the old law, have possessed no jurisdiction in *personam* over the owners of the vessel, unless they could have been served with a citation within the territorial jurisdiction. I do not think that the Legislature, in enacting the 1st rule of the 11th order in the schedule to the Judicature Act, contemplated any alteration of the law in cases

similar to the present, and, in the circumstances, I am not satisfied that I can grant the leave asked for. If I acceded to the application I should be exercising a jurisdiction in *personam* over persons for doing an act at a time when they were without the territorial jurisdiction of this country.

Motion refused.

Solicitors for the owners of the *City of Mecca*, Gellatly, Sons, and Wharton.

DIVORCE BUSINESS.

Tuesday, May 2.

GLADSTONE v. GLADSTONE.(a)

Marriage settlement—Decree absolute for divorce—Variation of settlement after decree absolute—Income of wife where husband the respondent—Conditions—Dum casta vixerit—Dum casta et sola vixerit.

Where the court has varied a settlement after decree absolute for a divorce, and ordered payment of a fixed income to the wife, if she be an innocent party, the court will not impose the condition *dum casta et sola vixerit*, or *dum sola vixerit*.

In this case Mrs. Gladstone petitioned the court for a dissolution of her marriage with Capt. Gladstone, and obtained a decree, which has since been made absolute. After the decree was made absolute, the court varied the marriage settlements by ordering the trustees to pay over to Mrs. Gladstone 200l. a year, the income of the property brought into settlement by her, as if the respondent Capt. Gladstone, who under the settlements had a first life interest in all the settled property, were dead; and also ordered that 100l. a year out of the property brought into settlement by Capt. Gladstone should be applied to the maintenance and education of their child. The order did not contain any restriction as to Mrs. Gladstone's future life and conduct.

Bayford now moved the court, on behalf of Captain Gladstone, to refer the matter back to the registrar, on the ground that Captain Gladstone's income had been over-estimated; and he further submitted that the order was deficient, inasmuch as it did not contain the clause *dum casta et sola vixerit*, which he submitted was an essential and necessary clause in all such orders. He cited

Fisher v. Fisher, 2 Sw. & Tr. 410;

Chetwynd v. Chetwynd, L. Rep. 1 P. & D. 39.

Inderwick, Q.C. and Searle, for Mrs. Gladstone, resisted the application.—Captain Gladstone had an opportunity before the registrar of proving his income, and it was not within his power to come to the court now. As to the clause *dum sola et casta vixerit*, it was unnecessary, and not in accordance with the practice that such a clause should be inserted in the order. In the case of *Narracott v. Narracott and Hesketh* (4 Sw. & Tr. 76), the clause *dum casta vixerit* alone was inserted; therefore, clearly, it was optional for the court to insert or not what clause it pleased in such an order.

The PRESIDENT.—Captain Gladstone has had ample opportunity of having his whole case as to income investigated before the registrar, and I am of opinion upon that ground alone that his appli-

(a) Reported by JAMES P. ASHFALL, Esq., Barrister-at-Law.

(a) Reported by H. B. DRAKE, Esq., Barrister-at-Law.

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cation should be dismissed. It is to be observed that in both the cases which Mr. Bayford has mentioned, the husband was ordered to make an allowance out of his private means to his wife, and it is obvious that the considerations which are applicable in such cases are very different to those which would be applicable to the case of a husband not called upon to make any provision for his wife out of his own means. It is perfectly reasonable where a husband is called upon to sacrifice a portion of his means for the support of his divorced wife, that the condition contained in the words *dum casta et sola vixerit* should be insisted on; but I am of opinion that where the effect of the order only is that the husband shall be deprived of his first life interest in the wife's fortune, and that all that the variation of the settlement does is to put the innocent wife into the immediate possession of her own income, no such condition ought to be imposed. Therefore, even if asked to do so when the order was drawn up, I should not have imposed the condition on the petitioner, seeing that the only effect of the order is to put her into immediate possession of her income of 200l. a year to the exclusion of her guilty husband. The case of *Narracott v. Narracott and Heskeith* is an authority in favour of this view, that I ought not to interfere where the order has once been made, unless under extraordinary circumstances, which do not exist in this case, as they did not in that. I therefore dismiss this motion with costs.

Solicitors for the petitioner, *Lewis and Whitshed*.
Solicitors for the respondent, *Park Nelson*, and *Morgan*.

House of Lords.

June 30 and July 3.

(Before Lords CHELMSFORD, HATHERLEY and O'HAGAN.)

REG. v. THE CHURCHWARDENS OF WIGAN AND OTHERS. (a).

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Loan for repairing church—Assignment of rates—Rate after lapse of twenty years—5 Geo. 4, c. 36, s. 1—Mandamus.

By 5 Geo. 4, c. 36, s. 1, the churchwardens of any parish are empowered to borrow money of the Public Works Loan Commissioners for specified purposes, and from time to time to make such annual or half-yearly rates for the repayment of the loan, in such proportions and at such times as shall be directed by the commissioners, and to assign the rates so to be made as a security for the repayment of the loan in such manner as the commissioners shall appoint, and so as to secure the repayment of the principal with interest at the rate of 4l. per cent. per annum, by annual or half-yearly instalments within the period of twenty years at farthest from the advancing of the loan.

In 1849 the churchwardens of W. duly borrowed 4540l., and by indenture, reciting that the commissioners had directed them to make annual or other rates to secure the repayment, they assigned to the commissioners all the rates from time to time to be made pursuant to such direc-

tions or otherwise, under the provisions of the Act, with a proviso that on the repayment of the principal sum by twenty yearly instalments of 227l., together with interest, then the assignment should be void. Four instalments were paid, but after 1853 no payment was made, and in 1871 the commissioners obtained leave to issue a mandamus to the churchwardens to make a rate to pay the instalment and interest due in 1854.

On a return to the mandamus setting out the facts and dates:

Held, on demurrer (affirming the judgment of the court below), that the return was a good answer to the writ, for the statute expressly and implicitly forbade the making of a rate after the lapse of twenty years from the advance of the loan.

A peremptory writ of mandamus issued by the Queen's Bench being, in effect, a decision upon the merits of the case, is subject to review by a Court of Appeal.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber (Lord Coleridge C.J., Bramwell, Cleasby, and Pollock, BB., Keating, Grove, and Denman, JJ.), reported in L. Rep., 9 Q.B., 317, and 30 L. T. Rep. N.S. 569, reversing a decision of the Court of Queen's Bench upon a demurrer to returns to a writ of mandamus.

The facts appear briefly in the headnote above, and the writ and returns are fully set out in the reports in the court below.

The Attorney-General (Sir J. Holker, Q.C.) and Cowie appeared for the appellants.

Manisty, Q.C., Lopes, Q.C., Edwards, Q.C., Fitzadam, Kenelm Digby, and Part, for the various respondents.

The argument turned almost entirely upon the construction of the Act 5 Geo. 4, c. 36. The following authorities were cited or referred to:

Cortis v. Kent Waterworks Company, 6 A. & E. 794;
Reg. v. St. Michael, Southampton, 6 E. & B. 807;
Reg. v. Hurstbourne Tarrant, E. B. & E. 246;
Rea v. St. Michael, Pembroke, 5 A. & E. 608;
Rea v. Dursley, 5 A. & E. 10;
Piggott v. Bearblock, 4 Moo. P. C. 399;
Harrison v. Stickney, 2 H. of L. Cas. 108.

At the conclusion of the arguments their Lordships gave judgment as follows:

LORD CHELMSFORD.—My Lords, the determination of the question upon this appeal depends entirely upon the powers of the Public Works Loan Commissioners, and the obligations of the churchwardens of Wigan under the 5th Geo. 4, c. 36. These powers and obligations are clearly explained and limited by the first section of that Act. "It shall and may be lawful for the churchwardens and overseers of the poor in any parish," with certain consents, "to make application to the commissioners authorised and empowered to make advances for public works, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, of such sum or sums as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish; and if such commissioners shall think fit to entertain such application, and shall be satisfied that such consent as required by this Act has been given and obtained, it shall and may be lawful for such commissioners, and they are hereby authorised and empowered to make and grant any such loan or advance for the

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purposes aforesaid, in such manner as such commissioners are empowered to make any loan or advance under the authority of the said recited Acts, or any of them, and it shall be lawful for such churchwardens, together with the overseers of the poor of or for any such parish, with respect to which such application shall be made and granted to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application; and from and after the grant of any such loan or advance it shall be lawful for the churchwardens and the overseers of the poor of the parish, in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time, for the time being, and they are hereby authorised and required to make such annual or half yearly rates for the repayment of the sums so advanced in such proportions and at such times as shall be directed and appointed by the said commissioners in that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced, in such manner and form as the said commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest thereon at and after the rate of 4l. per centum per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within twenty years at farthest from the advancing of any such sums respectively." It was argued, for the commissioners, that these provisions are merely directory. It is difficult to understand in what sense this is meant, for nothing can be clearer to my mind than the imperative character of the Act to prevent the commissioners making a loan on any other terms than the securing the repayment of it by annual or half-yearly instalments within the period of twenty years. It is said that the commissioners might have directed the rates to be made in different proportions, and also at different times in each year. It is true they might, but it certainly would not have been so convenient as what they have done in fixing the annual payment at a certain amount, and in requiring, in general terms, yearly or half-yearly rates to be made. But it is useless to consider what might have been done. The question is, whether the parties have acted in obedience to the Act. The churchwardens, by the indenture of 17th Sept. 1849, assigned to the commissioners the annual or other rates which should from time to time be made under or in pursuance of the direction and appointment of the commissioners, by virtue of the provisions of the 5th Geo. 4, c. 36, with a proviso making void the assignment on payment of the 4540l. borrowed by annual instalments of 227l., which would amount to that sum in twenty years. It was argued that by the terms of this proviso the commissioners might accept, and the churchwardens might pay, the 4540l. in any other manner than by these annual instalments. That proviso provides for the payment first of all of the interest on the amount borrowed; "and the further sum of 227l. in or towards the discharge of the said principal sum of 4540l., until the whole of the said principal sum of 4540l., and the interest thereof, shall be discharged; then, and in that case, or on any other acceptance of the said sum of 4540l., and the interest thereof, by or under the order or direction of the said Public Works Loan Commissioners, the assignment hereby made as aforesaid shall become absolutely

void." Now, it appears to me perfectly clear that any stipulation for the payment of the loan otherwise than is prescribed by the Act, cannot possibly have any effect. The rates having been thus assigned to the commissioners, rates were duly made for four years, and the annual sum of 227l., amounting together to 908l., was paid to the commissioners, the last instalment being paid on the 13th Dec. 1853. It is hardly necessary to advert to the creation of new parishes out of the parish of Wigan, as by sect. 15 of the 5 Geo. 4, this makes no difference in the question. It is stated in the special case that the commissioners applied from time to time for payment of the instalments subsequently due. The nature of those applications is not stated, nor down to what time they were continued. Nor does it appear that the commissioners took any action upon them. The discontinuance of the payment of the instalments was occasioned by the refusal of the vestry in 1854 to levy a church-rate, and no church-rate has been raised in the parish of Wigan since. No proceeding on the part of the commissioners took place until the year 1867, when the Court of Queen's Bench, upon their application, granted a rule calling on the churchwardens to show cause why a writ of *mandamus* should not issue commanding them to make a rate or rates for payment of 4841l. 15s. 10d., interest and instalments due of the principal moneys secured by the indenture of the 17th Sept. 1849. This rule was enlarged in order that a special case might be stated for the opinion of the court. Upon the argument of the case the court ordered a *mandamus* to issue commanding the churchwardens to make, levy, and collect a rate for payment of the sum of 227l., one year's instalment of the loan of 4540l. due on the 17th Sept. 1854, and interest on the balance of the principal sum. Returns were made to the *mandamus* which were demurred to. The Court of Queen's Bench gave judgment for the prosecutors on the demurrer, and ordered the peremptory *mandamus* to issue, which is the subject of our consideration. It is unfortunate that there is not the slightest report of any of these proceedings in the Queen's Bench, so that we are deprived of the advantage of knowing the reasons which led the court to the conclusion that the peremptory *mandamus* ought to be issued. The Court of Exchequer Chamber has decided unanimously that it ought not to have issued. In considering the case, it is necessary to clear the way of a difficulty which has been raised as to the power of any other court to question the issuing of a writ of *mandamus* by the Queen's Bench, which it is said is a matter entirely of discretion. The Chief Justice of the Common Pleas appears to me to give some countenance to this suggestion. His Lordship says (L. Rep. 9 Q. B. 325; 30 L. T. Rep. N.S. 574), "There is nothing shown save that the money has not been paid, and this, it may be, by consent of the commissioners; though, indeed, some years ago they appeared to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shown, and if there was a question whether they had come in a reasonable time, calling on the parish, the same persons as near as might be, to make good their default, then if the right is discretionary the judgment of the Queen's Bench on the motion for the *mandamus* would be final. But no question of discretion of this nature arises in this case." And in another

part of his judgment his Lordship says (L. Rep. 9 Q. B. 323: 30 L. T. Rep. N.S. 573), "The Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the commissioners were entitled to the writ *ex debito justitiæ*, and that no question of discretion arose." Now there appears to me to have been some little confusion upon this subject, which can easily be removed. A writ of *mandamus* is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the court whether it shall be granted or not. The court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter personal to the party applying for it; in this they exercise a discretion which cannot be questioned. So in cases where the right in respect of which a rule for a *mandamus* is granted upon showing cause appears to be doubtful, the court frequently grants a *mandamus* in order that the right may be tried upon the return, this also is a matter of discretion. But where the court grants a peremptory *mandamus*, which is a determination of the right, and not a mere dealing with the writ, they decide according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them. Now ought this *mandamus* to have issued? That question depends entirely, as I have already said, upon the Act of Parliament. The commissioners could only make loans upon certain conditions. The condition upon the commissioners is that they must lend on security of rates for the repayment of annual or half-yearly instalments within twenty years at the farthest. They have no power to lend on any other terms. The condition on the churchwardens is that they must borrow on the terms of repaying the loan by annual or half-yearly rates within twenty years. They can borrow upon no other terms. The intention of the Act with respect to these loans appears to be that the ratepayers in the parish, a fluctuating body, should be chargeable for twenty years with rates in discharge of the loan, but that ratepayers after twenty years should not be liable, which could not be unless after the twenty years the rates were no longer chargeable with repayment of the loan. This is carefully provided for by the direction as to annual payments to be made in twenty years. Now the *mandamus* issued in 1871 is to levy a rate for the payment of the instalment due on the 14th Sept. 1854. This rate must necessarily be levied more than twenty years from the advancing of the loan in 1849, and, as it appears to me, in the teeth of the Act. If this can be supported it will follow that the churchwardens may be called upon year by year for fifteen years to levy rates for the payment of the instalments; for it was not considered by the Queen's Bench that the whole arrears can be required to be discharged by a single rate, which, however, would be equally objectionable. It is unnecessary to examine the cases which have been cited, none of which appears to me to have any application; nor is it necessary to consider whether it was incumbent upon the Commissioners to be active in enforcing their rights, nor whether they had any remedy personally against the

churchwardens under the indenture of the 17th Sept. 1849. I confine myself entirely to the Act upon which the whole question turns, and, looking at that alone it seems to me to be perfectly clear that not by implication only, but by the most express language, it prevents a rate for the repayment of the loan by the commissioners being made after twenty years from the time when the money was advanced. I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY.—My Lords, I have come to the same conclusion after hearing the able arguments which have been advanced at the Bar on both sides of this question. I may put out of the case at once what I may call the incidental question, which my noble and learned friend has touched upon, namely the question of how far the direction of the Court of Queen's Bench is to be regarded as a point of discretion on the part of the Court. I entirely agree in the view taken by my noble and learned friend that, when the Court of Queen's Bench are invited to make an order by way of *mandamus*, it is no more in the power of that Court than of any other court to direct that to be done which is not lawful. Upon a prerogative writ there may arise many matters of discretion which may induce them to withhold it, matters connected with delay, matters connected in certain cases possibly with the conduct of the parties, and when they have exercised their discretion in directing that which is in itself lawful to be done, I apprehend that no other court can question their discretion in so directing. But with regard to that which is in itself lawful to be done, they are open to correction, as every other court is, by the Court of Appeal, or by a higher authority. The question we have really to consider in this case is whether or not that which the churchwardens were directed to do by the *mandamus* in question was a thing which they could by law be ordered under any circumstances to do. That must depend entirely upon the authority derived from the special Act of Parliament under which they professed to act. Undoubtedly they have not at common law any right to raise, or direct to be raised, a rate which is for purposes which are in themselves retrospective. The principle of that is very clear. It is not right on the one hand that those who have had the benefit of work done should be exempt for several years, and perhaps exempt altogether, from the change and fluctuation which takes place among the inhabitants, from making any contribution to the expense of the work, and should throw upon those who succeed them the whole of that duty. And again, as regards the general law, it has been held that with reference to retrospective rates, except under special powers contained in special Acts of Parliament for that purpose, it is not right to throw any past expenditure upon a succeeding class of inhabitants of the district affected by the work. But it was found by the Legislature that there were certain works of a permanent character which it might be wise to execute, and in such cases those who came after would have the benefit of the work proposed to be done; and therefore from time to time Acts of Parliament have been passed with this view, and public moneys have been vested in certain commissioners, called "the commissioners of loans." These commissioners have been authorised to make advances under Acts of Parlia-

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ment, but Parliament has at all times carefully made provision, according to what seemed to the wisdom of the Legislature to be right at the moment, for the repayment of those moneys by charges which would affect subsequent inhabitants of the district which would obtain the benefit which was to be secured by the loan to be advanced. Among other things the object of building or repairing churches has been considered to be a proper object for such advances; and, accordingly, in the Act of Parliament before your Lordships on the present occasion, among various objects for which the power is given of charging the rates upon the parish, we find that one is the repairing of churches, and that is the object we have before us for consideration to-day. Another object, dealt with in the 3rd section, is the building of new churches, and another is increasing the accommodation for students in colleges at the universities. But in all those cases very careful provision is made for the mode in which the loan is to be raised, and the security to be given. My Lords, we find in the 1st clause of the Act, which is the clause we have to construe now, the loan being one for the repairing of a church, that provision is made in the first place that the commissioners may lend moneys, and in the next place that the churchwardens and the overseers of the poor of a parish may receive a loan, under certain provisions as to consents and the like, which have been complied with in this case; and they having received the loan, then comes this clause, under which the commissioners must now seek the repayment of the money lent, if they can obtain it at all. [His Lordship read the latter part of sect. 1 of the Act, as set out above, and continued:] Now, without looking in the first instance to the deed which has been executed under the authority of this clause, let us just see what the authorities and powers of the churchwardens were. They could do nothing except under this Act; let us see what the Act authorises them to do. They were authorised to assign the rates, and they were authorised to assign them in such a manner, and the instalments of the loans were to be payable in such proportions, and at such times, as should be directed by the commissioners. But both the commissioners and the churchwardens were limited, as it appears to me, plainly and distinctly by the close of this sentence, which tells you in what manner the repayment was to be secured. It was to be repaid with interest thereon by instalments spread over a "period of twenty years at farthest" from the advance. It appears to me that they could, therefore, give no security beyond a security for the repayment within that particular time; they could give no security which should postpone the repayment, by instalments or otherwise, to any later period than twenty years from the advance. In giving to the commissioners full authority to direct how and in what form the annual or half-yearly payments should be made, the Legislature appears to have thought they could trust a public body like the commissioners with the power of seeing that all should be done justly and fairly; otherwise it might be said that it would be possible, under the particular words of this section, for the commissioners to say, you can begin to pay the instalments at the tenth year from the date of the advance, paying none in the interim, and so, by means of an operation of double instalments,

as it were, secure the payment of the advance by the end of the twenty years. But I apprehend that that would not be a reasonable exercise of their duty, and it would not be one which we ought to impute to them, or which the Legislature contemplated as possible on the part of the commissioners. I make the observation that they have considerable powers given to them as to proportions and as to times, for they are to be such proportions and such times as the commissioners may direct, and I apprehend that that power was given for the express purpose of enabling the commissioners, in a reasonable and proper manner, to take the best steps they could for securing to themselves the repayment of the money within twenty years from the advance. They would have to see what a reasonable rate to be raised in each succeeding year would be in the particular parish in question, whether there should be an increase or a diminution in the amount, according as the parish might increase or might diminish in population, or the like. At all events this power furnishes an answer among other things to the objection which has been raised as to the difficulty that might occur with respect to the payment of the last instalment, that difficulty having been of this nature. It was said in the course of the argument, you cannot apply for a rate until the money is due, and if the last instalment will be due at such a time that you cannot secure to yourself the payment by a rate, you will have to lose the last instalment altogether. It is an answer to that to say that the commissioners have power to make such arrangements as to proportions and as to times of making payments as would enable them to have the last instalment paid by means of a rate levied at a time when it would fall within the twenty years. Under this provision in the Act arrangements would be made whereby the commissioners could secure themselves against a loss of that description. Then we come back again to the question what is the power the churchwardens have of levying rates, and what is the power the commissioners have of directing payments? They appear to have acted very properly in their mode of having the deed prepared. I need not go through its details; the deed is so prepared as to recite that it is intended that the payment shall be made in the manner and in the proportions afterwards directed by the commissioners. Then there comes the assignment of the rates; then there is a provision which would be called in an ordinary mortgage deed a proviso for redemption, which points out the particular periods at which the instalments shall be paid. The deed being dated September 1849, the first instalment of a portion of the principal together with interest is directed to be paid in September 1850, and then in each succeeding year the payments of 227*l.* of principal, and an amount of interest, diminishing in proportion as the debt itself would diminish, are to be paid by successive instalments. If everything had been rightly and properly done according to the provisions of the deed this would have been the mode of paying off the debt. Then it says the deed will be completely avoided by paying all those instalments. I apprehend that that was a very proper form of deed, and that all that can be claimed by the commissioners is that which alone the Act authorises them to receive, and that which they have provided should be paid to them by their

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deed. The case is clear of all the authorities which have been cited, because they appear to have been decided upon the simple ground that if there is an express power of charging indefinitely the rates that power will not be diminished because there is a provision made for the payment of the debt in a certain manner, there being no proviso that if the debt is not paid in that manner, it is to be acquitted or discharged. If there is a charge upon the whole of the rates indefinitely and in perpetuity, then the mode of making the payment which is pointed out will not invalidate the charge. But if you find in an Act of Parliament like this one particular power of effecting the object, and that power cannot now be further pursued, because the time has been allowed to pass, then I apprehend that all that one can say is that the security is not one which will carry and proceed further than the very form and extent in which it is framed, which is in pursuance of the Act, and that, therefore, the commissioners, having been directed to take steps to provide for the payment of these sums as they become due, cannot now, in the year 1876, obtain payment of those instalments which were due under the deed in 1854. I do not think that any argument arises from any of the other clauses in the same Act of Parliament. In fact it is only *idem per idem* to a great extent. If anything they would rather incline my mind against the view contended for by the appellants, because after the 4th clause has directed that the colleges shall have the power to borrow money, and make provision by their deeds for the assignment of the college property, so that the debt may be paid off like parochial debts, in the course of twenty years, the following clause, the 5th, contains an express proviso that no other instruments and no other powers of charging college estates shall have any effect under the Act. It is not necessary for me to say any more with regard to those later clauses on the present occasion, for the case we are disposing of is not one of a college at all; but it appears to me that if it were necessary to decide upon the effect of them it would be open to great question and argument whether the successors in the college could not say: "There is no authority to extend this security beyond the period pointed out by the Act of Parliament." However, I say no more upon the other matters contained in the Act of Parliament beyond this, that they do not convince me that one is wrong in coming to the conclusion to which my noble and learned friend has come, and to which I have also come, upon the clause we are called upon to construe, namely the first clause.

Lord O'HAGAN.—My Lords, I concur in the judgment of the Exchequer Chamber, but I do not desire to be understood as adopting all the reasons on which that judgment was grounded. Twenty-seven years have elapsed since the loan was made, of which the Public Works Commissioners seek now the repayment, and twenty-three years ago the parishioners of Wigan and the adjacent townships appear to have repudiated liability for that loan, and declined to pay any instalments upon it, and have ever since been allowed by the commissioners to succeed in their passive resistance to a claim which was apparently made more than once, but when exactly, how often, or under what circumstances, your Lordships are not at all informed. The commissioners in no way account for this singular delay and inaction, which is the

more remarkable as the statute (5 Geo. 4, c. 36) cast upon them the duty of enforcing the discharge of the debt by yearly or half yearly rates, "in such proportions and at such times as they should think proper to direct and appoint." Within the lengthened period during which the commissioners have been so strangely quiescent it is stated in the various returns to the *mandamus*, and not denied, that several districts have been severed from the parish to which the loan was made, on the requisition of a majority of its inhabitants, and have become separate parishes for the purpose of levying rates, and entitled to the benefit of the exemption from liability to contribute to the repair of their respective parish churches, under 58 Geo. 3: c. 45, s. 71, after twenty years from the dates of their consecration. So that if the contention of the appellants be sustained, the debt incurred by one set of people will be enforced against another. Those who have received the benefit will not bear the burden. A new generation, affected by new Acts of Parliament, and holding a new ecclesiastical position, will be visited with the well-defined and limited liability of their predecessors, in whose enjoyment of the advantages to which it was originally referable they may not, possibly, in their new circumstances participate at all, and all this seeming injustice will be accomplished because public officers have failed to do their duty in enforcing a public claim, not from any want of power to do it, or from any suggestion that the parish, which contracted to pay under the statute year by year, had not ample means available for the purpose, but from the unexplained and unwarrantable neglect to take effectual proceedings, which would have been easy and simple, and must have been effectual. In this state of facts we come to consider whether the terms of the statute require us at this time, and after all the events which have taken place, to give effect to a claim so questionable in its staleness, and in its practical operation, if established, so capable of working injustice. I quite adopt the view of the Attorney-General that a retrospective rate is not necessarily illegal, and that if this be a case of the exercise of discretion by the Court of Queen's Bench, *cadit questio*. Neither the Exchequer Chamber nor your Lordships' House has the power to interfere, and the appellant must prevail. But for the reasons already given, there was no exercise of discretion here which could oust the control of this House. In my view the statute, if rightly construed, does not warrant a retrospective rate, but contemplates and requires that the loan should be repaid from rates leviable within a specified period; then the argument as to discretion does not arise, and we are bound to enforce the intention of the Legislature. The dictum of Lord Wensleydale (when delivering, as Parke, B., the unanimous opinion of the judges in *Harrison v. Stickney, ubi sup.*), on which reliance has been placed, not only in the court below, but by the learned counsel who have addressed your Lordships, points to that intention as the determining consideration in the case; and if it be, as I think it is, the words of the Act seem to me decisive. Sect. 1, by the imperative words "it shall be lawful," casts on the churchwardens and overseers the duty of making, for the payment of the loan obtained on the demand of a majority of the inhabitants of the parish, or of four-fifths of the select vestry, if there be such a body, "such

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annual or half yearly rates" for the payment of it "in such proportions and at such times as shall be directed and appointed" by the commissioners, and to assign them, so as to secure the repayment of all sums so advanced with interest, by annual or half yearly instalments, "within the period of twenty years at farthest" from the advancing of such sums. Could a clause have been framed with more elaborate care to secure the payment within the twenty years? It has not a negative provision, but its affirmative words are very stringent. The rates are to be made "so as to secure repayment"—of what?—"of all sums," that is, of everything which has been advanced "within the period of twenty years." This seems clear enough, but to render the purpose of the Act if possible, more unmistakable, it adds, "at farthest," and fixes the period so as to make it run from the time of the first advance made to the parishioners. And this emphatic declaration of intention to have the payment made within the twenty years is repeated over and over again in the 3rd and 4th sections with equal force. I decline to give an opinion upon the construction of the 3rd and 4th sections, because it is not required for the case which is now before the House for consideration. I therefore reserve my opinion, as has been done by my noble and learned friend opposite. But if an opinion were to be given at this moment, I should say that the other section ought to be construed as I construe the first section, and not according to the view presented by the Attorney-General and Mr. Cowie, that those two sections ought to be interpreted as not limiting the period of payment. I do not know how language could have made the intent more clear, and I can see no sufficient reason for holding the clause directory. Words, though affirmative, are not necessarily so if they are absolute, explicit, and peremptory; and so, in my opinion, they are here. No doubt express words forbidding any action after twenty years might have been added, and then there would have been no room for controversy. But Lord Wensleydale held of course that the prohibition of a retrospective rate might well be made either impliedly or expressly, and if the intention here is indicated by words which are unequivocal, and if the Legislature has supplied all facilities for carrying that intention into effect by compelling the parish to make the rate, and arming the commissioners with ample authority to regulate the making of it, so as to have full payment assured within the time specified, the implication seems to me natural and reasonable that the Legislature did not mean to allow the making of it after that time had passed. I, therefore, agree with the Exchequer Chamber as to the construction of the statute, and I do so the more willingly because it is in manifest accordance with its policy and, as I conceive, essential to its equitable operation. It is of importance that public officers should not be encouraged to sleep at their posts, and postpone the fulfilment of their duties in the expectation that their delays will be condoned and their demands conceded, whatever may have been the lapse of time or the change of circumstances. It is important to the community that the public funds, advanced for meritorious purposes, should not be lost from neglect in enforcing the repayment of them; and it is of equal importance that persons who never sought the advance or derived benefit from it should not

be made responsible when those who became liable at their own instance have passed away. As to the 19 & 20 Vict. c. 104. sect. 15, it leaves the legal liabilities of borrowers under Acts of Parliament where it found them, and does not, in my judgment, operate the least to revive the claim of the commissioners if it ceased to be enforceable at the end of the twenty years. As to the authorities which have been cited for the appellants, my noble and learned friends have dealt with them sufficiently. In all cases of construction like this, the specific terms of each statute must be carefully considered, and those authorities will be found to apply to Acts quite distinguishable from that before us. Lord Coleridge has pointed out that in *Reg. v. St. Michael's, Southampton (ubi sup.)*, and *Reg. v. Hurstbourne Tarrant (ubi sup.)*, the amounts in question were charged upon the rates, whereas in this case they were not. In the first of these cases, Erle, J. relies on the fact that the obligee of the bond was not required to enforce annual payments, as he hopes, in justice towards future rate-payers, future legislation may provide. In the second case, Lord Campbell, U.J., takes notice of the fact that the rates are charged; Erle, J., and the other judges note that no duty to enforce payment is imposed on the bondholder, and Erle, J., says, "It would I think be highly satisfactory if it were in all such cases made obligatory on the creditor to enforce payment at once. If the Act had said that the charge should be paid off within five years, and not otherwise, it would have made it the duty of the creditor to secure it in time." Here the Act clearly says that the debt shall be paid "within twenty years at furthest," and the commissioners get power to have payment made "in such proportions and at such times as they shall direct and appoint." I shall only add that in those cases, and in every other which has been relied on, the phraseology of the Acts has been very different from that with which we are dealing, and in none of them will be found the strong, clear, and unequivocal limitation which warrants us in adopting a view consonant, in my opinion, at once with legal principle and natural justice.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Barnes and Bernard*.
Solicitors for the respondents, *Paterson, Snow, and Burney; Sharpe, Parkers and Co.; Chester and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Friday, May 12.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Ex parte MOORE; Re STOKOE. (a)

Bankruptcy—Disclaimer of lease by trustee—Notice by lessor—Waiver—Extension of time—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), ss. 23, 24, A lessor wrote a letter to the trustee of a liquidating debtor's estate, requiring him to decide whether

(a) Reported by H. PRAT, Esq. Barrister-at-Law.

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he would disclaim a lease which formed part of the debtor's estate. After some correspondence, the lessor, before the expiration of twenty-eight days, being the time limited for disclaimer by the 24th section of the Bankruptcy Act 1869, wrote to the trustee, asking for a reply at his "earliest convenience" as to whether he intended to retain the lease.

On an application by the trustee, after the expiration of the twenty-eight days, for leave to disclaim:

Held (affirming the decision of Bacon, C.J.) that the lessor's last letter amounted to a waiver of his right to have the trustee's decision within the twenty-eight days, and leave to disclaim was accordingly given.

This was an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the judge of the County Court at Sunderland.

The facts of the case were shortly as follows:

W. S. Stokoe, a shipbuilder, carrying on business at Sunderland, held a piece of land under a lease for a term of fourteen years from Nov. 1871, at the yearly rent of 50l.

On the 21st Sept. 1875, he filed a petition for liquidation of his affairs by arrangement, and resolutions were duly passed and confirmed in favour of liquidation and appointing a trustee.

On the 24th Nov. 1875, the lessors' solicitor wrote a letter to the trustee in the liquidation, informing him that the lessors could not allow any goods to be removed from the premises until the rent was guaranteed, and adding, "They also require to know from you within the usual time, if you intend to retain the lease, or whether you wish to relinquish it."

On the following day the trustee wrote in reply that he had called a meeting of the committee for the following Monday with reference to the lease, and that he would write shortly afterwards as to their decision.

On the 16th Dec. the trustee's solicitor wrote to the lessors, asking if they were disposed to treat in any way for immediate possession.

On the 22nd Dec. the lessors wrote, asking for further explanations of the trustee's meaning, and stating that they would be prepared to consider any offer the trustee might make.

On the same 22nd Dec. the lessors' solicitor wrote to the trustee in the following words:—"We shall be glad to have a reply to our letter of the 24th ult. as to whether you intend to retain the lease, at your earliest convenience."

The trustee forwarded this letter to his solicitor, who had not in his hands the letter of the 24th Nov. and did not receive it in time to comply with the requirement of the 24th section of the Bankruptcy Act 1869, which provides that "the trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice, whether he disclaims the same or not."

The twenty-eight days expired on the 28th Dec., and it was not till the 6th Jan. 1876, that the trustee, through his solicitor, gave verbal notice of his intention to disclaim.

On the 17th Jan. the trustee applied to the County Court at Sunderland for leave to disclaim, and for an extension of the time limited by the 24th section of the Act.

The Judge of the County Court having refused the application, the trustee appealed.

The appeal was heard on the 20th March, before Bacon, C.J., who delivered the following judgment.—The statute is very plain. The rights conferred upon the lessor under the statute are very distinct. Beyond all doubt the trustee has a right conferred upon him by the statute, and if there was nothing in the case but the statute, I could not hesitate to do as the Lords Justices did in *Ex parte Lovering, re Jones*, No. 1 (30 L. T. Rep. N. S. 621; L. Rep. 9 Ch. 586), and as the registrar has done in this case. The attempt to enlarge the time had nothing to do with the question, and when lessors are insisting upon their strict right, that may be qualified if they have done anything to put the trustee off his guard. Now, to anyone who reads the letter of the 24th Nov., and then the letter of the 22nd Dec., it is clear that the person entitled to insist upon the twenty-eight days says—not in words, but in substance—"the twenty-eight days are very nearly expired; give me an answer to my letter of the 24th Nov.; but do it at your earliest convenience." In my opinion that was calculated to put the trustee off his guard; it was calculated to induce him to believe that these and all other matters which were in difference and controversy between them should wait until there had been further discussion, and wait until it was convenient for the trustee to disclaim. I do not dispute that the Act of Parliament is binding upon them, and upon me, and everybody else; but I say that the right conferred by the statute on the lessor may be waived. In my opinion it has been so far waived that the lessors have no right to insist that by reason of non-waiver for twenty-eight days, and because the twenty-eight days expired a day or two after they wrote the letter, they are entitled to impose upon the trustee the onerous consequence of making him take the lease upon his own shoulders. The registrar's order will therefore be discharged, on the trustee disclaiming and undertaking to pay all the rent due up to the next quarter day.

From this decision the lessors appealed.

De Gez, Q.C. and Finlay Knight, for the appellants.—The 24th section of the Act requires the trustee to disclaim within twenty-eight days from the receipt of an application in writing, requiring him to decide, and though that section empowers the court to extend the time, it has been held that an application for extension of time must be made before the expiration of the twenty-eight days. In *Ex parte Lovering, re Jones*, No. 1 (L. Rep. 9, Ch. 590—1; 30 L. T. Rep. N. S. 622), Mellish, L. J. says: "Unless something extraordinary happens, from such a cause as illness, or unless the landlord has done something to put the trustee off his guard, I think that the time ought not to be enlarged unless the trustee applies before the expiration of the twenty-eight days." In this case the negotiations between the lessors and the trustee related to matters which had nothing to do with the disclaimer of the lease.

Winslow, Q.C. and Doria for the trustee.—This is just one of the exceptions mentioned by Mellish, L. J., in *Ex parte Lovering (ubi sup.)*. The landlord put the trustee off his guard by getting his

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solicitor to write the letter of the 22nd December, requesting a reply at his "earliest convenience." [They were stopped by the court.]

JAMES, L. J.—I think the negotiations which were going on between the parties were quite sufficient to justify the Chief Judge in making the order which he did. The appeal must therefore be dismissed, but there will be no costs of the appeal.

MELLISH, L. J., and BAGGALLAY, J. A., concurred.

Solicitors for the appellants, *J. W. Hickin*, agents for *Robinson and Longden*, Sunderland.

Solicitor for the respondent, *H. Dixon*, Sunderland.

May 12 and 19.

(Before JAMES and MELLISH, L. J. J., and BAGGALLAY, J. A.)

Ex parte CARTER; Re CARTER. (a)

Bankruptcy—Suspension of bankruptcy—After acquired property—Rights of assignee—Debtor's summons by uncertificated bankrupt—Bankruptcy Act 1861 (24 & 25 Vict. c. 134), s. 110.

An uncertificated bankrupt, whose creditors had passed a resolution under the Bankruptcy Act 1861, s. 110, suspending proceedings in the bankruptcy, brought an action in his own name against a debtor and recovered judgment for 500*l.* The assignee then gave notice to the judgment debtor not to pay the amount to the bankrupt, but subsequently withdrew the notice, and then the bankrupt took out a debtor's summons against the judgment debtor in respect of the debt:

Held, that the debtor's summons could not be sustained, as it was not the bankrupt, but his assignee who was entitled to the money.

This was an appeal from a decision of Mr. Registrar Keene, sitting as Chief Judge in Bankruptcy.

On the 21st Sept. 1869, W. Jacobs Thornhill was adjudicated bankrupt under the name of W. Jacobs.

On the 1st Nov. 1869, his creditors passed a resolution suspending all further proceedings in the bankruptcy under the 110th sect. of the Bankruptcy Act 1861, which provides that in case at any meeting of creditors "any proposal shall be made by or on behalf of the bankrupt, which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days in order that notice of such resolution may be given to every creditor by the official or creditor's assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge." And the creditors directed that the estate and effects of the

bankrupt should be wound up and administered by C. L. Brook, the assignee in the bankruptcy.

In June 1875, the bankrupt, who had not obtained his order of discharge, brought an action against Carter and recovered judgment for 500*l.* and costs.

On the 18th Aug. 1875, the assignee's solicitor gave a written notice to Carter's solicitor not to part with any moneys recovered from his client by Thornhill in the action, adding, "and I must ask you to give up such moneys to my client as such assignee as aforesaid, who claims the same, the bankrupt never having obtained his discharge.

Subsequently an arrangement was made between Thornhill and his assignee that 100*l.* of the judgment debt, when recovered, should be paid to the latter, and the rest be retained by Thornhill, and on the 3rd Sept. 1875, the assignee's solicitor wrote a letter to Carter's solicitor withdrawing the notice, and stating that he did not object to the payment of the money to Thornhill's solicitor; but there was some doubt whether this letter ever reached Carter or his solicitor.

On the 9th Nov. 1875, Thornhill took out a debtor's summons against Carter in respect of the judgment debt.

The registrar having refused an application by Carter to have this summons dismissed, Carter appealed.

Winslow, Q. C. and Robertson Griffiths, for the appellant.—To support a debtor's summons there must be such a debt as would support a petition for an adjudication in bankruptcy, and it is settled by the old cases of *Ex parte Robinson*; *re Freer* (Mont. & Mac. 44), and *Ex parte Mascarenas*; *re Dawson* (1 Deac. & Ch. 507), that an uncertificated bankrupt cannot be a petitioning creditor. The future property of the bankrupt as well as his present property vested in the assignee, and there was nothing in the resolution, or in the 110th section, to take the property out of the assignee. Till he obtained his discharge the bankrupt could acquire no property as against his assignee, except his personal earnings necessary for his support. Moreover, the assignee having given notice of his claim, the debtor could not safely pay the money to the bankrupt. They also cited

Ex parte Taylor, 3 De G. & J. 480;

Ex parte Musgrove, 3 M. D. & De G. 396;

Ex parte Pain, *re Pain*, 28 L. T. Rep. N. S. 753; L. Rep. 3 Ch. 639;

Ex parte Leathley, *re Hodges*, 28 L. T. Rep. N. S. 323; Bankruptcy Act 1869, s. 15, sub. sect. 3.

De Gez, Q. C. and *Bagley*, for the respondent.—An uncertificated bankrupt may sue in his own name, although the assignee is entitled to whatever he recovers. And it is well settled that when the assignee gives up his right the debtor cannot refuse to pay the bankrupt: (*Williams v. Chambers*, 10 Q. B. 337; *Herbert v. Lwyer*, 5 Q. B. 965.) But we also say that the passing of the resolution suspending the bankruptcy deprived the assignee of the future acquired property of the bankrupt. They also cited

Re Visard's Trusts, 14 L. T. Rep. N. S. 815; L. Rep. 1 Ch. 589;

Bankruptcy Act 1861, s. 110;

Bankruptcy Act 1869, s. 28.

Winslow, Q. C. in reply.

JAMES, L. J.—I am of opinion that this appeal must succeed. As regards the principal ground urged on behalf of the appellant, it seems to me utterly impossible to say that the 110th section of the Bankruptcy Act 1861, can have the effect of

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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empowering the majority of creditors to deprive the minority of the bankrupt's after acquired property without taking the opinion of the court. The 110th section, no doubt, appears at first sight to proceed upon the footing that only the existing estate of the bankrupt is to be wound up in such manner as the majority of the creditors shall resolve; but if it had been intended that the resolution should release all the after acquired property of the bankrupt, the section would have said that the bankrupt should be entitled to his order of discharge, and not merely that he should be entitled to apply for it. As it stands, the section leaves it open to any creditor to show cause why an order of discharge should not be granted. The 110th section cannot of itself have the effect of an order of discharge—it leaves all the bankrupt's estate vested in the assignee. Then the case stands thus: A debt was due from the appellant to the bankrupt; the bankrupt brought an action in his own name, and recovered judgment; thereupon the assignee intervenes and says: "I am beneficially entitled to the money, whatever legal title the bankrupt may have had to recover it; do not pay it to him." I am of opinion that the moment this notice was given to the appellant by the assignee the debt vested in the assignee, and no subsequent arrangement between the bankrupt and the assignee can enable the bankrupt to sustain a debtor's summons in respect of a debt so vested in the assignee.

MELLISH, L.J.—I am of the same opinion. I think the words of the 110th section do not enable the majority of the creditors by a resolution to take out of the assignee anything that is vested in him. The words are: "The proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound-up and administered in such manner as such majority shall direct, and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge." This only provides for the mode of administration but it was not intended to take from the assignee the legal estate in any property that was vested in him. Under the Bankruptcy Act 1861, all the bankrupt's estate present and future vested in the assignee until something was done to take it out of him. An action of trover or detinue to recover any part of the bankrupt's estate must have been brought by the assignee, and I do not see anything in the 110th section to take the estate out of the assignee, and I think it was intended to remain in him till the bankrupt obtained his discharge. That being so, the right to this judgment debt is vested in the assignee, and he gave notice to the debtor to pay it to him. That notice was subsequently withdrawn, but it is not necessary for me to express an opinion whether it could be legally withdrawn. Then a debtor's summons was taken out by the bankrupt, who, though he may have had a legal right to bring the action for the debt, and probably also to levy execution on the judgment, was not beneficially entitled to the money. The assignee, and not the bankrupt, is the creditor of the appellant, and therefore the latter is entitled to have the debtor's summons dismissed with costs.

BAGGALLAY, J.A.—I am of the same opinion. I have nothing to add.

Appeal accordingly allowed with costs.

Solicitor for the appellant, *J. Bourdillon*.

Solicitor for the respondent, *H. Montague*.

Thursday, July 27.

(Before JAMES and MELLISH, L.JJ., and
BAGGALLAY, J.A.)

Ex parte DAVIS; *Re* SNEEZUM. (a)

Bankruptcy—Bankrupt's contract continued by trustee for a time—Omission to disclaim—Subsequent repudiation of contract by trustee—Liability of trustee—Remedy of other party to contract—Damages—Proof against bankrupt's estate—Bankruptcy Act 1869, ss. 23, 24, 25 (subsect. 2), 31.

When the trustee in a bankruptcy, having received notice under the 24th section of the Bankruptcy Act 1869, requiring him to decide whether he will or not disclaim a contract of the bankrupt, does not disclaim within the twenty-eight days limited by the Act, but carries on the contract for a time for the benefit of the estate, and subsequently abandons it, the trustee does not thereby render himself personally liable, nor does he render the estate liable as if he had entered into a new contract on behalf of it, but the only remedy of the other party to the contract is to prove under the 31st section of the Act for the damages occasioned by the breach of the contract.

Decision of Bacon, C.J., affirmed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The hearing in the court below is reported in 34 L. T. Rep. N. S. 805, where the facts of the case are fully stated.

They were shortly as follows:

In 1869 and 1872, William Sneezum, a railway waggon builder, entered into contracts with Messrs. Davis and Sons, colliery proprietors, to maintain and keep in repair for them a large number of railway waggons for periods of seven years.

In Feb. 1873, Sneezum filed a petition for liquidation of his affairs by arrangement, and in April 1873, Davis and Sons gave the trustees appointed under the petition a notice under the 24th sect. of the Bankruptcy Act 1869, requiring them to decide whether they would disclaim the contracts or not.

The trustees did not disclaim within the twenty-eight days limited by the Act, but, on the contrary, they continued to perform the contracts until January 1875, when they gave notice to Davis and Sons that they would cease to perform them after the 30th Jan. 1875.

On the 23rd Dec. 1875, Davis and Sons commenced an action in the Queen's Bench Division against the trustees for breach of the contract.

The judge of the Cardiff County Court granted an injunction restraining Davis and Sons from proceeding with this action, and on appeal the Chief Judge in Bankruptcy affirmed this order.

Davis and Sons again appealed.

Benjamin, Q.C. and Finlay Knight, for the appellants.—The trustees not having disclaimed the contracts within twenty-eight days after they received notice under the 24th section of the Act requiring them to decide whether they would disclaim or not, that section expressly provides that they shall not be entitled to disclaim after the expiration of the twenty-eight days. By not disclaiming, they adopted the contract on behalf of the creditors, who would have received any bene-

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fits that might have accrued from the contracts, and must also bear the burden. The result of the non-disclaimer, therefore, is that the damages occasioned by the breach of the contracts must be paid in full out of the estate before any distribution is made to the creditors. Where the trustee disclaims a contract, the 23rd section provides that it shall be deemed to be determined from the date of the order of adjudication; but when he omits to disclaim, the contract is adopted on behalf of the creditors, and then it ceases to be the bankrupt's contract, and becomes the creditors' contract. The 2nd sub-section of the 25th section empowers the trustee "to carry on the business of the bankrupt as far as may be necessary for the beneficial winding-up of the same," and the 7th sub-section of the 83rd section empowers him, "amongst other things, "to make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office," &c. By not disclaiming the trustees here virtually entered into a new contract on behalf of the creditors. When once he has allowed the twenty-eight days limited by the 24th section to elapse, the trustee cannot repudiate the contract; otherwise there would be no meaning in the limit of twenty-eight days. *Ex parte Llynvi Coal and Iron Company, re Hyde* (25 L. T. Rep. N. S. 609; L. Rep. 7 Ch. 28) shows that whether the trustee accepts the contract or not, the bankrupt is absolutely discharged from liability. Therefore, the creditors must be liable, that is to say, the damages occasioned by the breach must be paid before they receive anything out of the estate. In *Ex parte Chalmers, re Edwards* (28 L. T. Rep. N. S. 325; L. Rep. 8 Ch. 289) where there was a contract for the delivery of bleaching-powder by monthly instalments, and the purchaser became bankrupt before the completion of the contract, it was held that the vendor had a right to refuse to deliver any more goods till the price was tendered to him. In his judgment in that case Mellish, L.J. says: "I agree with what was said by Crompton, J. in *Griffiths v. Perry* (1 E. & E. 688), that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors, or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by the creditors or by the court." Here the contracts having proved unprofitable, the creditors cannot, after having for a time adopted them, now repudiate them without paying the damages so occasioned. They also referred to

Ex parte Waters; Re Hoyle, 28 L. T. Rep. N. S. 757; L. Rep. 8 Ch. 562.

De Gez, Q.C. and *Winslow, Q.C.* for the trustees. —Under the Bankruptcy Act 1869, the remedy of the other party to the contract under circumstances such as those in the present case is by proof against the bankrupt's estate under the 31st section. *Gibson v. Carruthers* (8 M. & W. 321) shows that under the old law an assignee in

bankruptcy could carry on such a contract as long as he chose, and then abandon it, and when he abandoned it, the only remedy of the other party to the contract was an action against the bankrupt personally. The Bankruptcy Act 1869, has substituted the right to prove against the estate for the right of action against the bankrupt; and that is the only change it has made in cases where the trustee does not disclaim.

Benjamin, Q.C. in reply.

JAMES, L.J.—I am of opinion that the judgment of the Chief Judge, affirming the judgment of the County Court Judge, ought to be affirmed. No doubt there is great weight and great force in the argument addressed to us by Mr. Benjamin, and possibly the Legislature may be induced, upon consideration of many of the topics upon which he has dwelt, to alter, or rather to improve, the provisions of these sections of the Bankruptcy Act 1869. The state of the law before the Act of 1869 was certainly such that no such claim as that which is now made by the persons with whom the contract in this case was made, could have been effectually made. Up to the time of the passing of the Bankruptcy Act 1869, in the case of such a contract as that in question in the present case, the assignees in bankruptcy could have gone on performing the contract as long as they were minded to do so, and when they were no longer minded to perform it, they might have discontinued it, and thereupon the bankrupt himself would have been liable under the contract. The performance of the contract by the assignee in bankruptcy for a limited period did not relieve the bankrupt from his obligation, and the other party to the contract, as long as the contract was fulfilled according to its terms, could not be heard to say that he would put an end to the contract. That was the state of the law before the passing of the Act of 1869. By that Act the law was altered to a very considerable extent so as to free the bankrupt from any future liability in respect of breaches of contract, and to give the persons whose contracts were broken or put in jeopardy by the bankruptcy a right to prove for the loss they thus sustained, instead of the continuing personal liability of the bankrupt to perform the contracts. The main provisions by which this change in the law was effected are contained in the 23rd section of the Act which provides that "when any property of the bankrupt acquired by the trustee under this Act consists of . . . unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee . . . may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication." . . . Mr. Benjamin was pressed by the language of this section, and was forced to admit that in order to give effect to his argument he must contend that upon the true construction of the section we must imply from the provision that upon the execution of the disclaimer of the contract by the trustee the contract shall be deemed to be determined from the date of the order of adjudication; and that if the contract is not disclaimed after notice from the other contracting party, then the contract is to be

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deemed and taken to have been adopted by the trustee, upon the responsibility and at the expense of the bankrupt's estate. That is a provision which might have been very properly inserted in the section by the Legislature, but, to my mind, to imply such a provision from the other words of the section would not be to construe the section, but to alter it, and perhaps in the opinion of some persons to improve it, but it would certainly be to alter the Act of Parliament, and enlarge still further the provisions which the Legislature has thought fit to make with respect to such contracts. All we can say is that, except to the extent mentioned in the Act of Parliament, the law remains exactly as it was before the passing of the Act, that is to say, that if the contract is not disclaimed by the trustee the contract is not determined. It is true that that may leave the bankrupt liable for the future breaches, but that seems to be provided for by the 31st section, which says in effect that where there is a breach during the continuance of a bankruptcy of a contract entered into by the bankrupt before the bankruptcy, the damages may be proved for exactly in the same way as if the breaches had taken place before the bankruptcy. I am of opinion, therefore, that, having regard to the 31st section, and to the 23rd and 24th sections of the Act, the real remedy of the appellants is that to which the Chief Judge and the County Court Judge have held them to be entitled, that is, to prove against the estate for the damages occasioned by the breach of the contract just as if the breach had occurred before the bankruptcy. And as to the other clause to which Mr. Benjamin has called our attention, the 2nd sub-section of the 25th section of the Act, that does not seem to carry his argument to the extent to which he sought to carry it. The fact is that that clause does not provide that the trustee shall be at liberty to carry on any contracts of the bankrupt, whatever may be their nature, for any time, but only that he shall be at liberty to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same. That is meant as a temporary provision until the trustee can dispose of the goodwill. It does not appear to me that we can extend that clause so as to make it mean that the trustee may take upon himself the obligations of a contract which might last for seven or fourteen years.

MELLISH, L.J.—I am of the same opinion. I think that when the law as it existed prior to the passing of the Act of 1869 is really understood there will not be so much difficulty in understanding what is the real effect of the Act of 1869 itself. It had been settled before the passing of the Bankruptcy Act 1869 that the mere fact of one of two parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt the person who had contracted with the bankrupt was not bound to deliver goods to a man who had become insolvent unless he got paid for them beforehand, and a man who had agreed to do work and labour for a man who subsequently became bankrupt—for instance, a foreman who had been engaged for three years—was not bound to go on serving him without the prospect of being paid. He would be entitled to say, "I cannot go on unless I am secured my wages." But subject to that the bankrupt's contract continued, and the assignee was always entitled to perform the contract, and so long as he performed the contract he

got the entire benefit of it, but he might at any time stop. He might either not take up the contract at all, or he might take it up for a certain time, and then afterwards, if he found that it was not a beneficial contract, he might abandon it, and the person who had contracted with the bankrupt had no remedy except to bring an action against the bankrupt personally to recover damages for breach of the contract. That, no doubt, was a hard state of things, both for the person who had contracted with the bankrupt and for the bankrupt himself. Now the question is, to what extent has that law been altered. Beyond all question, as we have already laid down in several cases, it has been altered to this extent: no action can any longer be brought against a bankrupt for breach of contract subsequent to the bankruptcy, but then it is to be seen how the statute has dealt with the matter. The 23rd and 24th sections really deal only with the power of the trustee to disclaim a contract, and state what is to be the effect if the trustee elects to disclaim a contract. If the trustee elects to disclaim a contract, then the contract is to be deemed to have been determined from the date of the order of adjudication, and the person who had entered into the contract with the bankrupt is to have a right to prove against the estate upon the footing that the contract was put an end to at that time. He is entitled to prove for the amount of damages he has sustained by losing the contract as from that period. Neither the 23rd nor the 24th section really enacts anything as to what is to be the effect if the trustee does not disclaim. The 24th section, no doubt, says that if he does not disclaim within twenty-eight days after notice he cannot disclaim the contract at all, and if he cannot disclaim it the contract has not become rescinded as from the date of the order of adjudication. But then what takes place if the trustee goes on with the contract for a certain time and then abandons it? What is the result of that? Now, the only words really on which the appellants can rely are those in the 2nd sub-section of the 25th section, which provide that, "subject to the provisions of this Act the trustee shall have power to carry on the business of the bankrupt as far as may be necessary for the beneficial winding-up of the same." Now, are those words sufficient to make the trustee personally liable for any damages the other party to the contract may have sustained by reason of the trustee abandoning a contract of the bankrupt after he had carried it on for a certain time, and after he had declined to disclaim it, or are they sufficient to make the trustee liable to pay out of the bankrupt's estate the full amount of the damages occasioned by the breach? In my opinion, the words are wholly insufficient for that purpose. They merely say that the trustee "may" carry on the business so far as is necessary for the purpose of a beneficial winding-up, and in my opinion they do not give the trustee any power beyond what the assignees in bankruptcy had previously to the passing of this Act. The words do not give the trustee power to enter into any new business, but only give him power to carry on the existing business so far as may be necessary for a beneficial winding-up. If there is any beneficial contract existing, he may carry out that contract, but, in my opinion, that is not sufficient to make such a change in the

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law as to make the trustee personally liable, or to make him liable out of the assets of the bankrupt to pay damages if the contract is subsequently broken. If the statute had stopped there the law would have remained just as it was before. The bankrupt would have been liable to have an action brought against him on account of a breach of contract occasioned by the trustee having carried on the contract for a time, and then having abandoned it. But the 31st section comes in, and in express terms gives a right to prove for damages sustained by reason of the breach during the continuance of the bankruptcy of a contract made prior to the order of adjudication. That shows there is a right to prove. At one period of the argument I thought the effect of the decision of the court below was this, that there was no difference between a case where there was a disclaimer and a case where there was no disclaimer by the trustee. But upon consideration I think that there is a clear distinction. Where there is a disclaimer the contract is to be determined as from the date of the order of adjudication. Where there is no disclaimer the contract continues in force until it is broken. Indeed it is never put an end to at all, properly speaking, but it is broken, and the question is what are the damages occasioned by reason of its being broken at the time when it is broken. Those damages, under some circumstances, might be large, but they would be quite different from the damages which would be sustained by reason of the contract being rescinded at the date of the order of adjudication. I am of opinion, therefore, that the decision of the court below is quite right, there being no words in the Act of Parliament which make the trustee, either personally or out of the estate, liable for the breach of contract, and that the only remedy of the appellants is to prove, under the 31st section, for the damages occasioned by the breach of the contract.

BAGGALLAY, J. A.—I am of the same opinion. I was for some time much impressed by the argument of Mr. Benjamin, and was disposed to think that if the trustee did not when called upon disclaim the contract, he ought to be treated as having adopted it on behalf of the estate. But upon a mature consideration of the provisions of the Act, I think that the Act has not altered, and was not intended to alter the state of the law affecting a bankrupt's contracts, where the trustee does not disclaim. In the first instance a general power is given in terms to the trustee to disclaim contracts, but then there is a subsequent provision that that power shall not be exercised after the expiration of twenty-eight days from the time when the trustee has been called upon to state whether he will disclaim or not. It has been argued that a power to adopt contracts is conferred on the trustee by the 7th sub-section of the 83rd section of the Act. The contracts there alluded to are, I think, contracts to be entered into after the commencement of the bankruptcy, and that it has no reference whatever to contracts existing at the date of the bankruptcy.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitors for the appellants, *Ingledeu, Ince, and Greening*, agents for *Ingledeu, Ince, and Vachell*, Cardiff.

Solicitors for the respondents, *Vizard, Crowder and Co.*, agents for *Daltons, Spencer and Corbett*, Cardiff.

Tuesday, Aug. 8.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

Ex parte DEFRIES; Re MYERS (a).

Bankruptcy—Foreign trader—Assignment of all property in England—Bill of sale—Fraud—Act of bankruptcy—Bankruptcy Act 1869, s. 6, subsect. 2.

*M., a foreigner, who carried on business in Paris as a circus proprietor, was under a contract to bring over his animals, and plant, to England for exhibition, and being prevented from removing them by an attachment levied in Paris, he procured D. to become surety for the return of the animals and plant to Paris, and thereupon he removed them to England for the purpose of fulfilling his engagement, and gave D. a bill of sale of the animals and plant, which were of the value of 80,000*l.*, to secure 5000*l.*, in which sum the bill of sale recited that M. was indebted to D. for moneys lent and advanced, no moneys having in reality been advanced, but the bill of sale being intended to be a counter security to D. M. had no other property in England, but had other property in Paris and other foreign places: Held (affirming the decision of Bacon, C.J.), that the execution of the bill of sale was not an act of bankruptcy.*

But, quære, whether an assignment by an English trader, having property abroad, of all his property in England would not be an act of bankruptcy.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy reversing a decision of the judge of the County Court at Croydon.

The facts of the case were shortly as follows:

James Washington Myers, an American subject, who carried on business in Paris and in various places in America and on the Continent of Europe, entered into a contract with the Crystal Palace Company on the 24th March 1876, whereby he agreed to bring over his circus, animals, and plant for exhibition at the Crystal Palace in the month June.

Messrs. Defries and Son, who carried on business in London as gas engineers and contractors, had done work for Myers in Paris, in respect of which they alleged that a balance of 4550*l.* 5*s.* 11*d.* was due to them, and as he was about to remove his animals and plant from Paris to the Crystal Palace without paying that balance, they and certain French creditors of Myers applied to the French courts, and on the 17th June an order was made restraining him from removing his goods, unless he gave security for the debts.

On the following day Myers procured one Jean Charles Deauvilliers to give security to the French creditors for the debts, and he then went to the private house of the French judge, and got the order rescinded, and forthwith he removed his animals and plant to England.

On the 21st June, the day he arrived in England, Myers executed a bill of sale of the animals and plant to Deauvilliers by way of counter security to him. The bill of sale recited that Myers was "justly and truly indebted to the said Jean Charles Deauvilliers in the sum of 5000*l.* for money lent and advanced by the said Jean Charles Deauvilliers to the said James Wash-

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ington Myers previously to the date of these presents," and for better securing to him the payment of the said sum of 5000*l.* and interest thereon, Myers did thereby bargain, sell, and assign to Deauvilliers, his executors, administrators, and assigns all and every the horses, ponies, mules, elephants, camels, lions, and other animals, tents, furniture, harness, and stables, requisites, forage, show and other carriages of every description, properties, costumes, &c., in, upon, about, or used in connection with the circus of the said J. W. Myers, then on the road to the Crystal Palace at Sydenham, or wheresoever else the same might be, and the principal part of which were particularly mentioned in the schedule thereto. And the bill of sale contained a proviso for redemption on repayment of the 5000*l.* on the 31st Dec. It also contained a covenant by Deauvilliers that Myers should remain in undisturbed possession of the animals and plant comprised in the bill of sale until the 31st Dec., provided always that on giving three calendar months' notice, or on simple demand in case at any time a judgment for debt or charges amounting to 50*l.* or upwards should be signed against Myers, Deauvilliers should be entitled to seize the animals and goods comprised in the bill of sale.

This bill of sale was duly registered on the 24th June.

It comprised all Myers's property in England, but there was evidence that Myers possessed other property of considerable value in Paris, Hamburg, and America.

When Messrs. Defries and Sons became aware that Myers had executed the bill of sale, they immediately filed a petition for an adjudication of bankruptcy against him, on the ground that it was a fraudulent transfer of his property under sect. 6, sub-sect. 2 of the Bankruptcy Act 1869.

The petition came on for hearing before the County Court judge on the 17th July, and an order was made adjudicating Myers a bankrupt.

On appeal the Chief Judge in Bankruptcy discharged this order.

Bacon, C.J., in delivering his judgment, said: But for the very able argument I have heard from Mr. Gates, I should have thought that this case would dispose of itself. It is as plain a case as ever was. A man possessed of chattels worth 80,000*l.*, in the pursuit of his business, finds that he is hampered by an attachment levied in France where his goods were at that time, and he procures a person of the name of Deauvilliers to become surety for the return of these goods, so that the creditors proceeding in France should not be injured by the removal of the goods from Paris. He thereupon removes his goods from Paris in the course of his business. The transaction between him and M. Deauvilliers was plainly entered into in order that he might thereby be enabled to carry on his business. It has been called a transfer of his property because he executed the bill of sale. But that is a mortgage of his property, and no more. It is, in effect, a transfer in one sense, because it contains words of assignment; but it also contains a stipulation that until the day fixed for the repayment of the sum mentioned in the bill of sale, the mortgagor shall remain in the undisturbed possession of the property, without any interference by the mortgagee. It is argued that the large amount of the value of the property assigned is a badge of fraud, and that

a man who mortgages 80,000*l.* worth of property to secure 5000*l.* must necessarily mean thereby to defeat or delay his creditors; but the magnitude of the pledge never could have anything to do with this or any other such-like question. The question is whether the security into which M. Deauvilliers entered on behalf the debtor was an equivalent for the liability he incurred. The claim in Paris being for 4000*l.* the security was given for a sum of 5000*l.* Another badge of fraud suggested is that as there was no sum of 5000*l.* passing between the parties the recital in the bill of sale is false, and so false that I must infer fraud from it. Incorrect it is, but in no sense fraudulent. Myers is not prevented by the terms of this bill of sale, or by the recitals in it, from filing a bill in this court if necessary, or commencing an action in this court to have the operation of the bill of sale cut down to its true limits, not taking 5000*l.* as the limit, but whatever liability Deauvilliers might come under by reason of that transaction which is in evidence before me. There is no pretence for saying that this is a fraudulent transaction on the part of Myers. He remained in the undisputed possession of his property from the day he executed the bill of sale till some day in December, which is the day appointed for the payment, and there is a proviso for redemption in the meantime. There is no ground whatever for saying that that is an act of bankruptcy; and the learned County Court judge's judgment having gone upon the ground that an act of bankruptcy had been proved to his satisfaction that judgment was erroneous and wrong in my opinion, and therefore the order must be discharged.

From this decision Messrs. Defries appealed.

Gates, Q.C. and Brough, for the appellants.—The bill of sale is void, inasmuch as there was no consideration at all for it. In *Ex parte Zwilchenbart* (3 M. D. & De. G. 671) the debtor and his partner had made a composition, and the assignee had given security for the payment of the composition, and an assignment by the debtor of all his property to indemnify the assignee was held to be an act of bankruptcy. In his judgment in that case Knight-Bruce, V.C., said: "I am of opinion that this is not a sale, so as to bring the case within the principle on which *Baxter v. Pritchard* (1 Ad. & El. 456) and *Rose v. Haycock* (1 Ad. & El. 460) were decided, and that even if it was the intention of the parties that the assignees under the composition deed should take absolutely, still the execution of the deed was an act of bankruptcy, consistently with the doctrine of *Baxter v. Pritchard* and *Rose v. Haycock*, it being an instrument disposing of all the joint property of traders, who had little or no separate property, for the purposes of a composition, which did not include all the creditors." [MELLISH, L.J.—There the decision, as I understand it, is that an assignment of all a man's property as a counter security is an act of bankruptcy. JAMES, L.J.—That has no bearing upon the present case, for here the bill of sale does not comprise all the debtor's property.] It comprises all his property that is available in this country. [MELLISH, L.J.—How far that might be an act of bankruptcy in the case of a man trading in London might be another question; but how can it be an act of bankruptcy in the case of an American who contracts this debt in Paris, where he is carrying on business, and who brings part of his property to London?] If

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the effect of it is to defeat or delay his creditors, it is surely an act of bankruptcy. There are two grounds on which this is an act of bankruptcy: first, the whole transaction was a deliberately fraudulent design on the part of the debtor, and, secondly, its effect, whether he intended it or not, was to defeat his creditors. They also cited:—

Ex parte Fisher; re Ash, 26 L. J. Rep. N.S. 931; L. Rep. 7 Ch. 636;

Smith v. Cannon, 2 El. & Bl. 35;

Peake v. Young, 5 El. & Bl. 955.

De Gee, Q.C. and *Clay*, for the respondent, were not called upon.

JAMES, L.J.—This case really, as it seems to me, is entirely free from all reasonable doubt. With all respect to the decision of the learned County Court Judge, the transaction seems to be as thoroughly an honest transaction as ever was brought into question in a court of law. The debtor, who has a circus in Paris, was under a contract entered into with the Crystal Palace Company on the 24th March 1876, to bring his circus plant over here for the purpose of performing at the Crystal Palace on a particular day; he was bound to fulfil that contract, and was quite entitled to do what he could to escape the penalties which a breach of the contract would have involved. He had got his plant in Paris; that plant was subject to attachments put in by several creditors, amongst others the petitioning creditors here, under the French law. By the French law that attachment was removed; it was done in due course of the French law, and of course we can have nothing to say to that. There were other attachments then standing which it was important for him to get removed. Well, for that purpose he goes to his bankers; they refuse to assist him, and he then goes to a friend, who undertakes to give security for the return of the goods to France, and upon that security the attachments of the other creditor or creditors are removed. But the bargain was that he should give a counter security by way of bill of sale upon the goods, which would never have come to England at all but for the bargain between the parties that they should come back. The engagement was that they should come to England for the purpose of fulfilling Mr. Myers' contract with the Crystal Palace Company, and then be brought back again to France. That being so, it is utterly impossible to say that this was not a perfectly honest transaction. Myers wanted to take his animals to England that he might perform with them here, and this is the bargain by which he undertakes that he will bring them back. It is utterly impossible to say under those circumstances that this case at all comes within the principle of the cases of the assignment of all a man's property or goods. Myers had a great deal of property in France besides this, which was to be taken away and brought back again under the agreement; but not only was it intended between the assignee and the debtor that these goods should go back, but the petitioning creditors have got a judgment in France under which they will be able to seize the property in France. I cannot say, therefore, in a case of this kind, that that actual or constructive fraud which is held to be proved by the assignment of all a man's goods has been committed so as to make the execution of this bill of sale an act of bankruptcy, and, therefore, I am of opinion that the decision of the Chief Judge is

quite right, and that the appeal must be dismissed with costs.

MELLISH, L.J.—I am of the same opinion. The argument of Mr. Gates depends upon establishing two propositions, as far as I can understand it, the first that the assignment of all a debtor's property available in England—all the property which he possesses in England and against which writs of execution could go out of English courts—is equivalent to an assignment of all his property, and that his property in foreign countries is not to be regarded; and the second proposition is that such an assignment as this is, by way of countersecurity to a person who has become surety for the debtor, is not equivalent to a fresh advance, but is in fact the equivalent of a past debt, so that the two propositions taken together make this assignment one act of bankruptcy as being an assignment of all the debtor's property for a past debt. Well now, although I would not say that there might not be cases in the instance of an ordinary English trader where the assignment of all his available property in England, if he is in a general state of insolvency, would be an act of bankruptcy although he might have some other property abroad, yet I cannot think that that applies to this case, because I think there is here, in the first place, no evidence whatever that the debtor is insolvent; and, in the next place, he is not an English subject; he is not a man ordinarily trading in England, but he is trading in America, in Paris, and in Hamburg, and he says he has property in all those three places. He has a particular engagement for a particular time at the Crystal Palace, and it cannot be that a man in that position is to be considered as insolvent and to have committed an act of bankruptcy simply because he makes an engagement in Paris, where an attachment has been issued against these goods that, M. Deauvilliers having become security for him in respect of that attachment, he will, when he gets over to England, and has brought his circus to the Crystal Palace, assign the whole affair, circus, animals, and plant, over to him as a counter security, to the effect that he will bring them back to Paris. Is that a fraud upon a creditor whose claim is in respect of work done in France, and who has obtained a judgment in respect of it in France which will apply to the goods still in France, and to these very things themselves when they go back to France? I cannot see how the debtor's bringing the property over from France will prevent the creditor getting execution against him, and how can he say that the security, the effect of which is to enable these goods and animals to be brought to England for a particular purpose only, is a fraud upon him? No doubt our law does enable persons who obtain French judgments to sue upon them in England; still, where a man is carrying on business abroad in Paris to a much greater extent than in England, it is no fraud on his part to remove part of his property from Paris to the Crystal Palace here, and there is no inference to be drawn from it that he had any intention to defeat his French creditors, or his creditors for a debt incurred in France, or that his conduct is calculated to delay or damnify his French creditors. That being so, I am of the same opinion as the Lord Justice in thinking that there is no ground for saying that fraud is to be inferred from this transaction so as to make it

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an act of bankruptcy under the 6th section of the Act.

BAGGALLAY, J.A.—I am of the same opinion. The act of bankruptcy alleged to have been committed by this debtor is that pointed out by the 2nd sub-section of the 6th sect. of the Act, which says that an act of bankruptcy shall be deemed to have been committed if "the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof." Now by the evidence to which our attention has been drawn to-day, not only does it appear to me that there is no proof of any fraudulent intent, but the whole transaction, as explained in the course of that evidence, was entered into for the purpose of carrying out an antecedent contract, and was entered into in good faith and perfect honesty on the part of the debtor.

JAMES, L.J.—The appeal is dismissed with costs.

Solicitors for the appellants, *Skard and Son*.

Solicitors for the respondent, *Denton, Hall, and Barker*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON).

Feb. 29 and 30 and March 15.

RUSSELL v. ST. AUBYN. (a)

Covenant to leave share by will—Satisfaction—Rule against double portions.

S., on the marriage of his daughter, covenanted with the trustees of the marriage settlement that he would leave her by his will a moiety of his residuary estate, the settlement providing that the same should be held upon the same trusts in favour of the husband and wife and children of the marriage as were therein declared concerning other funds settled by the husband.

By the settlement, the first life interest in the moneys thereby settled was given to the husband for life, remainder to the wife for life, remainder to the children as the husband and wife should jointly appoint.

S., by his will, gave a moiety of his residue, subject to his debts and certain legacies, to the trustees of the settlement, upon trust for his daughter for life, for her separate use, with remainder to the husband for life, or until bankruptcy, remainder to the children or more remote issue of his daughter, as she should appoint:

Held, that the presumption that the covenant by *S.* had been satisfied by the gift in the will, was not rebutted by the difference in the limitations in the two instruments, and that the daughter and her children must elect whether they would rely on the covenant or would take under the will.

By an indenture dated the 21st Oct. 1851, made between Geoffrey St. Andrew St. Aubyn of the first part, Peter Smith of the second part, Agnes St. Aubyn of the third part, and James Pearse St. Aubyn and Henry Musgrave Wilkins (trustees) of the fourth part, being the settlement executed on the marriage of Geoffrey St. Andrew St. Aubyn and Agnes his wife, after reciting that the husband was entitled to certain Stock and cash,

which it was agreed should be assigned to the trustees upon the trusts thereafter declared, and that the said Peter Smith (the father of Agnes St. Aubyn) should secure, by his covenant, the payment to the said trustees, during the life of the said Peter Smith, of an annuity of 50*l.* to be held upon the trusts therein declared, and that the said Peter Smith should covenant in manner therein-after-mentioned, to devise and bequeath by his will to or for the use of the wife her heirs executors and administrators, or, in case she should die in his lifetime, then to the trustees, one moiety of all the real and personal estate to which the said Peter Smith should be entitled at the time of his decease, subject to the payment out of such real or personal estate of his debts and funeral and testamentary expenses, and of such devises and bequests as were thereafter mentioned, and that the husband and wife should enter into such covenant as was thereafter contained in regard to any property which, by virtue of such devise or bequests as therein last aforesaid, or otherwise, she might derive from the said Peter Smith it was witnessed that in pursuance of the said agreement, and in consideration of the marriage, the husband assigned to the trustees the said Stock and cash, subject to certain life interests therein, to hold the same upon trust after the marriage to convert and invest the same as therein mentioned, and hold the securities on which they should have been invested, thereafter referred as "the first thereby settled trust moneys," upon trust to pay the income thereof to the husband during his life, and from and after his decease, in case the wife should survive him, to pay the income to her during the remainder of her life, and after the decease of the survivor of them, the said first thereby settled trust moneys and the income thereof should be in trust for all and every or such one or more exclusively of the others or other of the children or child of the husband and wife, with such provisions for their respective maintenance or education, and at such age, day, or time, or respective ages, days, or times, and if more than one, in such parts, shares, and proportions, and charged with such sums or sum of money, or limitations over for the benefit of the said children or any one or more of them, upon such conditions and with such restrictions, and in such manner as the husband and wife should, during their joint lives, by any deed or deeds, to be executed as therein mentioned, direct or appoint; and in default of such joint direction or appointment, or so far as any such joint direction or appointment, if incomplete, should not extend, then, as the survivor of them (and if the wife should be the survivor whether she should be covert or sole) by any deed or deeds, to be executed as therein mentioned, or by his or her last will or codicil should from time to time direct or appoint; and in default of such last-mentioned direction or appointment, and so far as any such last-mentioned direction or appointment if incomplete should not extend, upon trust for every the children and child of the marriage in equal shares as tenants in common, and in case there should be but one such child then the whole of the said first thereby settled trust moneys to be in trust for such only child. Provided always, that no child taking any part of the said first thereby settled trust moneys under any appointment to be made in exercise of the said powers or either of them, should be entitled to any share in the unappointed part thereof without bringing the appointed

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

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share into hotchpot. Provided further that if any one or more of the children of the marriage, being a son or sons, should die under the age of twenty-one years, or being a daughter or daughters should die under that age without being or having been married, then, as well the shares thereby originally intended for the child or children so dying, as the share or shares which by virtue of that clause would have survived or accrued to him, her, or them, of and in the said first thereby settled trust moneys, should be in trust for the others and other of them and if more than one in equal shares as tenants in common. And after the usual clauses providing for maintenance, accumulation, and advancement, it was further agreed and declared that if there should be no child of the marriage who being a son should attain the age of 21 years or being a daughter should attain that age or marry, then the first thereby settled trust moneys should be upon the trusts following *i.e.* if the wife should die in the lifetime of the husband, then, after her decease, and such default or failure of children as aforesaid, in trust for the husband absolutely, and if the wife should survive the husband then, after her decease, and such default or failure of children as aforesaid, in trust for the executors and administrators of the husband. And the said indenture contained a covenant by the said Peter Smith to pay to the trustees an annuity of 50*l.* during his life, to be held upon the trusts therein declared concerning the same, with a proviso for the cesser of the said annuity upon the death of the husband and wife and failure of any child children or issue of the marriage during his life. And the said Peter Smith thereby covenanted with the trustees, that in case the marriage should be solemnized he would, in and by his last will and testament, well and effectually devise and bequeath unto and to the use of the wife absolutely or, in case she should die in his lifetime, to the trustees, absolutely, one moiety or equal half part or share of and in all and singular the real and personal estate of or to which he the said Peter Smith, or any person or persons in trust for him should be entitled at the time of his decease, subject to the payment out of such real and personal estate of his just debts funeral and testamentary expenses, and all such devises or legacies, not exceeding in the whole one fourth part in value of the said real and personal estate, as he might think fit to devise or bequeath. And it was further witnessed that the husband and wife thereby jointly and severally covenanted with the trustees, that if the marriage should take place, and if, at any time during the life of the wife, any real or personal estate whatsoever to which the said Peter Smith or any person or persons in trust for him were or should become seised or entitled (being the absolute property of the said Peter Smith) should, in pursuance of the covenant on the part of the said Peter Smith be devised or bequeathed to or in trust for the wife, or in case any such real or personal estate as last aforesaid should in the lifetime of the said Peter Smith, or by reason of the decease of the said Peter Smith intestate or from any cause, and in any other manner whatever, descend or devolve upon, or become the property of the wife, or of the husband in her right then and in that case, and so often as the same should happen, the husband and wife would, as soon thereafter as conveniently might be do and execute all such acts, deeds, and

assurances, as the said trustees should require, for conveying such real and personal estate to the said trustees. And it was further agreed and declared that the trustees should stand seised and possessed thereof, and of all such real and personal estate as should be devised or bequeathed to them by the will of the said Peter Smith under his covenant in that behalf, upon trust for calling in and conversion and investment thereof as therein mentioned; and should stand possessed of the investments, thereafter called "the secondly thereby settled trust moneys" upon and for the like trusts intents and purposes, and with under and subject to the like powers, provisions, agreements, and declarations, in favour of the husband and wife and the children of the marriage, as were thereinbefore declared and contained concerning the said first thereby settled trust moneys. And it was thereby agreed and declared, that if there should be no child of the wife who, being a son should attain the age of 21 years or, being a daughter, should attain that age or marry under that age then the said secondly thereby settled trust moneys should be upon the trusts following *i.e.* If the husband should die in the lifetime of the wife, then, after the decease of the husband and such default or failure of children as aforesaid, in trust for the wife absolutely, but if the husband should survive the wife, then, after the decease of the husband and such default or failure of children as aforesaid, upon such trusts as the wife notwithstanding coverture should by will appoint, and in default of such appointment in trust for the person or persons who under the statutes for the distribution of the personal estate of intestates would, at the death of the wife have become entitled to her personal estate in case the husband had died in her lifetime, and she had died possessed thereof and intestate.

The said marriage took place shortly afterwards and there was issue thereof five children, one of whom only had at the time of the institution of the suit attained the age of 21 years.

The said Peter Smith duly made his will dated the 15th Sept. 1864 and thereby, after directing all his debts and funeral and testamentary expenses to be paid out of his personal estate, and that his executors should set apart a sufficient part of his personal estate to produce the annual sum of 40*l.* clear of legacy duty, and should stand possessed thereof upon trust for an annuitant therein named for her life, and that after her death the sum so set apart should fall into his said residuary estate, and after bequeathing certain specific chattels and a legacy of 10*l.*, the testator devised all his real estate and parts and shares of real estate and also all the residue of his personal estate to the plaintiffs Russell and Mallet upon trust for sale, conversion, and investment, as therein mentioned, and to stand possessed of the same and the income thereof as to one moiety thereof, upon trust to pay the annual income thereof to his daughter, the said Agnes St. Aubyn, during her life for her sole and separate use, as an inalienable fund, and the said testator declared that the same should not be subject to the debts, control, or disposition, or engagements of her present or any future husband, and her receipt alone, whether covert or sole, should be a good discharge to the said trustees for the same income, and after the decease of his said daughter, should pay the income of the same moiety to the said Geoffrey

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St. Andrew St. Aubyn during his life, or until he should become bankrupt or insolvent, or compound with his creditors, or do or suffer any act which, but for that provision would by operation of law or otherwise, be a sale, pledge, mortgage, or other prospective disposition of the said income or any part thereof, and after the decease of the said Geoffrey St. Andrew St. Aubyn, or the happening of either or any of the said events in his lifetime, should assign and transfer the same moiety of the said trust money, and all accumulations of income thereon to all and every or such one or more exclusively of the others or other of the children or more remote issue of his said daughter Agnes St. Aubyn, (such issue to be born in her lifetime) at such ages, or times, not more remote than twenty-one years from the date of her decease, and in such shares and in such manner and form in all respects, as his said daughter should by deed or will appoint, but not so as to give an absolute transmissible interest to any child or issue who, being a male should not attain the age of twenty-one years, or, being a female, should not attain that age or marry; and in default of such direction or appointment should assign or transfer the said moiety to the child, if only one, or, unto and equally between all the children, if more than one, of his said daughter the said Agnes St. Aubyn who should be living at the time of her decease or the decease of the said Geoffrey St. Andrew St. Aubyn, or the happening of any of the events whereby his life interest would be determinable, and who, being a son or sons should attain the age of twenty-one years, or, being a daughter or daughters should attain that age or marry, and the issue then living of any of them who might have died previously and who, being males should attain the age of twenty-one years, or, being females, should attain that age or marry, such issue to take only their deceased parents share, and such children and issue respectively to take as tenants in common, and if there should be no such child or issue of his said daughter Agnes St. Aubyn, then to stand possessed of the said moiety of the said trust moneys upon the trusts next thereafter declared concerning the other moiety thereof bequeathed in trust for the testator's daughter Constance Masset and her children and issue or such of the said trusts as should be then subsisting or capable of taking effect; and as to the other moiety of the said trust moneys and the annual income thereof, upon the trusts therein declared for the benefit of the said Constance Masset and her issue, and if there should be no child or issue of his said daughter Constance Masset who, under the said trusts, should become entitled to such last mentioned, moiety then should stand possessed of the same moiety in trust for his granddaughter Agnes Mary St. Aubyn (the daughter of the said Agnes St. Aubyn), if she should be then living and should attain, or should thereafter attain, the age of twenty-one years, for her own use and benefit, but if she should not be living at the time of the decease of his said daughter Constance Masset, and such failure of her children and issue as therein aforesaid, or, being then living should not attain the age of twenty-one years, then the said testator declared and directed that the said trustees should stand possessed of the same moiety upon the trusts thereinbefore declared concerning the moiety thereinbefore directed to be

held in trust for his said daughter Agnes St. Aubyn and her husband and children and issue, or such of the said trusts as should be then subsisting or capable of taking effect. And the will also contained clauses relating to advancement and hotchpot.

The testator died on the 20th March 1870, leaving real and personal estate.

Alfred M. Masset, the husband of the testator's daughter, died on the 29th March 1865, leaving the said Constance Masset and one infant daughter surviving him.

Questions having arisen as to how far the bequest in the will in favour of Mrs. St. Aubyn and her husband and issue ought to be taken to be a whole or partial satisfaction of the latter of the covenants on the part of the said Peter Smith contained in the settlement,

A suit was on the 10th Nov. 1873 instituted by the trustees of the will against the trustees of the settlement, Mr. and Mrs. St. Aubyn and their children and Mrs. Masset and her infant daughter, for the administration of the trusts of the will, and the question whether or not there had been such satisfaction was now argued on further consideration.

Badcock for the plaintiffs.

Sir H. Jackson, Q.C. and Smart, for the trustees of Mr. and Mrs. St. Aubyn's marriage settlement.—The limitations and trusts declared by the will of the testator, concerning the share of his residue bequeathed in favour of Mr. and Mrs. St. Aubyn and their children, are so different from those contained in the marriage settlement, as to rebut the presumption against his having intended to give Mrs. St. Aubyn a double portion, or having intended the gift by will to be taken as a satisfaction of his covenant contained in the settlement. Nor does any case for election by Mrs. St. Aubyn arise, as the testator has not attempted to dispose of anything which was not his own. We submit that the trustees are entitled first to three-eighths of the testator's estate under the covenant, and then to a moiety of the remaining five-eighths under the will. They cited

Chichester v. Coventry, 17 L. T. Rep. N. S. 35; L.

Rep. 2 H. L. 71;

McCarogher v. Whieldon, L. Rep. 3 Eq. 236;

Lady Thynne v. Earl of Glengall, 2 H. of L. Cas.

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Weall v. Rice, 2 Russ. & My. 251.

Kay, Q.C. and Freeling, for Mrs. Masset and her children.—There is nothing in this case which is sufficient to rebut the usual presumption against the testator's having intended to give a double portion to one of his daughters. As to the difference of the trusts declared by the will and settlement, the case of *Lady Thynne v. Earl of Glengall* shows that will not prevent the presumption of satisfaction. We submit that Mrs. St. Aubyn and her children are put to their election. They cited also

Hutchinson v. Skelton, 2 Macq. 492;

Streatfield v. Streatfield, Cas. temp. Talbot, 176;

1 Wh. & Tud. Lead. Cas. Eq. 303.

Sir H. Jackson in reply.

Cur. adv. vult.

March 15.—The VICE-CHANCELLOR.—The question now to be decided arises mainly upon the will of a Mr. Peter Smith, dated in 1864, whereby he devised and bequeathed all his real estate and the residue of his personal estate to the plaintiffs

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trust as to one moiety thereof for the benefit of his daughter, the defendant, Mrs. St. Aubyn, and her husband and children, who are defendants in the suit, with divers limitations over. The same testator had in the year 1851 been one of the parties in a settlement executed upon the marriage of the same daughter, whereby he covenanted to devise to her or to the trustees of the settlement one moiety or rather three-eighths of all his real and personal estate, and it is now insisted on behalf of the persons interested under the settlement that they are entitled to have three-eighths of the testator's real and personal estate raised for them in the first instance, and that what shall then remain will constitute the residue given by the will to a moiety whereof Mrs. St. Aubyn and her family are entitled. The persons interested in the other moiety of the testator's estate residuary dispute this construction of the will. In order to arrive at a solution of the questions thus raised it is necessary to consider particularly the facts of the case and the instruments by which the rights of all the parties interested are created. In the year 1851, one of the two daughters, who were the only children of Mr. Peter Smith, was about to be married to Mr. Geoffrey St. Aubyn. The portion which the father upon that occasion gave to the future Mrs. St. Aubyn was included in the marriage settlement then executed, and it consisted not of money paid down nor money covenanted to be paid at a future time, but of a covenant inserted in the settlement. [His Lordship read the material portion of the settlement.] The purport and effect of this covenant appears to be so clear and explicit as to admit of no doubt. To the extent of one half of all his property, subject only to the payment of his debts and funeral expenses, and to the satisfaction of such legacies as he might think proper to leave, not exceeding in the whole one-fourth of all his property, he entered into a binding engagement that the one-half I have mentioned should upon his death be held and limited upon the trusts of the settlement he then executed. A doubt has been suggested as to the construction to be put upon the words by which his right to deal with the one-fourth which is excepted from the covenant is reserved to him; whether its meaning was and is that only one-fourth of the entirety should in any case be excepted, or whether it meant that, his debts being paid, he should still be at liberty to dispose of one-fourth of what might remain. It has become unimportant to consider this, for it is admitted that all his debts have been paid, and that he has not exercised such power as he had reserved to himself of leaving legacies, the only legacy left by him (except a small specific bequest of chattels of inconsiderable value) being an annuity of 40*l.* charged upon his personal estate alone, which, as there are no funds to satisfy it, must fail. It is clear, however, that as to the moiety of all his property which he did not engage or bind by his covenant he remained full master of it, and retained to himself the full and absolute power of disposing of it as he might think fit. Mr. Smith lived till the year 1870, and by his will, dated in Sept. 1864, after giving the annuity of 40*l.* payable out of his personal estate and the specific bequest of chattels before mentioned, he devised as follows. [His Lordship read the will.] The will contains no mention of or allusion to the settlement, and the trusts declared of the moiety

given to Mrs. St. Aubyn are, as it will have been seen, different in several important respects from those of the settlement; but the subject matter dealt with by the will includes and is identical with that comprised in the settlement, although the portion given to Mrs. St. Aubyn is of larger amount than that which was comprehended in the settlement. Upon this it has been argued on behalf of the parties entitled under the settlement, that they are entitled to have the covenant performed, and that they are under no obligation to accept the moiety given by the will as a satisfaction of that covenant, but, on the contrary, that there can be no residue to which the testator's gift applies until the covenant shall have been satisfied out of the entirety of the testator's estate, and that when that shall have been accomplished, but not until then, what may then remain of the estate will be residue, divisible into moieties, one of which is subject to the trusts declared by the will in favour of Mrs. St. Aubyn and her family, and the other to the trusts declared for Mrs. Masset and her family. The consequence of this contention, if it should prevail, would be very greatly to reduce the amount of residue passing by the will, and it has therefore been strenuously resisted on behalf of Mrs. Masset. In support of what I may call, for shortness, the St. Aubyn contention, it was insisted that the rule which courts of equity have adopted in disfavour of double portions, being merely one of presumption, is capable of being rebutted, as undoubtedly it is, and that it is effectually rebutted by the fact that no mention of the settlement is to be found in or to be inferred from the expressions of the will, and more especially by the difference between the trusts of the settlement and those declared by the will. Among other cases which were cited great reliance was placed upon the comparatively recent decision by the House of Lords in *Chichester v. Coventry*. In that case a father had covenanted upon the marriage of one of his two daughters and only children to pay on demand 10,000*l.* to the trustees of her settlement, with interest in the meantime. He afterwards made his will, directing his trustees in the first place to pay his debts and legacies, and then to divide the residue of his estate into moieties, and to hold them upon trust for his two daughters, the trusts being very different from those declared by her settlement. It was there decided that the gift of a moiety of the residue was not to be taken as a satisfaction of the debt of 10,000*l.*, but that it was to be paid out of the testator's estate before the residue, which was divisible into moieties, could be ascertained. The great difference between the trusts of the settlement and those declared by the will is particularly noticed by the noble and learned lords who assisted in the decision of that case, and seems to have enabled their Lordships to distinguish that case from *Thynne v. Lord Glengall*. In the latter case a testator upon the marriage of one of his two daughters and only children, had partly paid and partly secured 100,000*l.* upon trust for the daughter's separate use for life, and after her death for the children of the marriage as the husband and she should jointly appoint; he afterwards gave by his will a moiety of the residue of his personal estate in trust for the daughter's separate use for life, with remainder for her children generally, as she should by deed or will appoint. It was held by the House of Lords in that case, that the moiety of

the residue given by the will was a satisfaction of the bond debt, notwithstanding the difference of the trusts, and the daughter and her children, if she should have any, were put to their election whether they would take under the will or insist upon satisfaction of the bond debt, and it being found that it would be for the benefit of the daughter and her children that she should take under the will, it was decreed that she was bound to elect so to take. The law upon the subject of double portions—for the law it is though it has sometimes been called a rule and sometimes the leaning of the court—has been the subject of very frequent discussion, and may, I think, be taken to be conclusively settled. In *Weall v. Rice*, an authority frequently referred to, but which has never been dissented from, the question arose upon a case in which a father had agreed upon the marriage of his daughter to settle bonds to the value of 3000*l*. The judgment of Sir John Leach was in these terms. [His Lordship read from the judgment.] I have thought it right to read so much of the judgment, not only because it contains a very clear and unquestionably an authoritative exposition of the law, but because the case has in fact as well as in principle a closer resemblance to that before me than any of the others which have been cited. The sum of 3000*l*. is mentioned in the agreement for a settlement, the donation by the will was larger by one-fourth than the amount of the obligation which the testator had imposed upon himself. The difference in the limitations contained in the two instruments was held to leave the two provisions of substantially the same nature. Now, what is the difference between the obligation which the testator assumed in the present case and the provision which he has made by way of portion for his daughter by his will? By the settlement the husband would take an interest for life; by the will the wife takes the first life interest to her separate use, and the subsequent life interest is given to the husband determinable upon his bankruptcy or alienation by him. By the settlement there is a joint power of appointment by the husband and wife, or the survivor of them, among the children of the marriage; by the will a power of appointment is given to the wife among her children generally or more remote issue, with an ultimate limitation, in default of such issue, upon the trusts declared of the other moiety of the testator's estate in favour of his daughter Mrs. Masset. The provision by the will for Mrs. St. Aubyn and her children being, as is not disputed, a portion given by a father to his daughter, and, therefore, not effectual if it be a double portion, are the circumstances so slight as to bring it within the rule? I have adverted to the differences which were held in *Weall v. Rice* to be so slight as to make the rule against double portions applicable. In that judgment the question is said to be one which every judge must decide for himself. In discharging this difficult task, I am assisted and guided by the decision of the House of Lords in *Thynne v. Lord Glengall*, where the differences being that by the settlement the appointment amongst the children was to be joint by the husband and wife, and under the will by the wife alone, and that under the settlement the children of the marriage were the only objects of the appointment, and under the will the children of the daughter generally, those differences were held, according to the rule applicable to double

portions, not to negative the presumption of satisfaction. In considering the cases of *Thynne v. Lord Glengall*, and *Chichester v. Coventry*, it may be borne in mind that the court in the first case applied the rule against double portions to a subject in which the amount of the testator's agreement was somewhat less than 67,000*l*. while the residue given by his will was more than 185,000*l*. In the second case the court came to a contrary conclusion, the testator's obligation there being 10,000*l*. and the residue given by his will is stated to have been very considerable. What influence, if any, the difference between the amounts may have had in the judgments in the two cases I am unable to ascertain, and although if there be any substantial discordance between the cases it is not for me to attempt to bring them into harmony, I have the satisfaction of being convinced that nothing was said in the latter case to dissent from the law as decided in *Weall v. Rice*. That case, and also *Thynne v. Lord Glengall*, were both referred to in the arguments, and are noticed in the judgments. If the difference between the trusts in the settlement and those expressed in the will in *Weall v. Rice*, were held to be slight, I think I cannot possibly hold that the differences in the two instruments in this case ought to be considered as otherwise than slight. But that is not all, and it is not only upon the circumstances I have mentioned that the question is to be decided. That question, as it was stated in *Chichester v. Coventry* (p. 82) to be, and as it always must be, "is one of intention." The presumption which the law makes may, in the words of Sir J. Leach, "be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence." The facts in this case are clear. A man with only two children contracts, upon the marriage of one of them, that he will leave to or for her three-eighths of all that he shall die possessed of. Can any other presumption be drawn from this than that he means to retain to himself the power of disposing of all the rest of his property as he might think fit? When at a later period of his life (thirteen or fourteen years afterwards) he makes such a will as is now before me whereby he divides his property, being the same identical subject of which a division is contemplated by the settlement, in equal portions between his two daughters, can it be rationally or lawfully presumed that he intended one of them to have three-eighths of the entirety and the half of what should remain, and to leave to the other only one-half of what should remain after three-eighths had been deducted? or that his covenant in the settlement is to be treated as if it were a bond debt for a liquidated sum payable at his death, or, as was the case in *Chichester v. Coventry*, payable on demand? In my opinion no such conclusion can be drawn from the instruments, and from the undisputed facts of the case. I find the subject of the covenant and of the will to be identical, except only (if it be an exception) that the will gives a larger quantity of the same identical subject than was comprised in the settlement. I find upon the face of the will that the testator, giving a portion to one daughter, gives an equivalent portion to the other daughter. Can I, by law or in justice, say that it was his intention that the provisions so made for his daughters should be so grossly unequal? I think not; on

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the contrary, I think that the presumption which the law makes against double portions is established and must prevail. The consequence is that the several persons interested under the settlement, all of whom are *in esse*, must elect whether they will rely upon the provision covenanted to be made by the settlement, or whether they will take under the will.

Solicitors: *Vizard, Crowder, and Co.*

QUEEN'S BENCH DIVISION.

June 20 and Nov. 7.

HOLBORN GUARDIANS v. ST. LEONARD'S VESTRY, SHOREDITCH. (a)

Duty of vestry—Want of consideration—Action for breach—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), s. 125.

The plaintiffs' workhouse had been built on land in the defendants' parish under 22 Geo. 3, c. 56, by which it was provided that the building should not be liable to be charged with any greater taxes or assessments than to such amount as the land and tenements were assessed before they became vested in the plaintiffs.

By 18 & 19 Vict. c. 120, s. 125, the vestry of each metropolitan district is required to appoint and employ a sufficient number of persons, or to contract with any company or persons for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth in or under houses and places within the parish.

Upon defendants' refusal to collect or remove the dirt from the plaintiffs' workhouse, the plaintiffs employed persons to do so, and brought this action for the amount charged by them.

Held, that the plaintiffs' exemption from increased rates did not exempt the defendants from performing the same duties in respect of the plaintiffs' premises as of all other householders; that this duty was not that of a surveyor of highways, and therefore the defendants were liable for a non-feasance concerning it; and that the amount claimed by the plaintiffs was recoverable in this action.

THIS was a special case, stated in an action between the parties.

The plaintiffs, as such guardians, are and were, at the time of the occurrence of the defendants' acts and defaults, hereinafter complained of, the occupiers of, and entitled to certain lands, with a workhouse and other buildings thereon, known as the City-road Workhouse, and situated within the said parish of St. Leonard, Shoreditch, and of a dust-hole within and under or connected with the said workhouse, also situated in the said parish.

The said workhouse was, under the provisions of the statutes 22 Geo. 3, c. 56, and 48 Geo. 3, c. 97, built for the parish of St. Luke, in the county of Middlesex, on land situated in the said parish of St. Leonard, Shoreditch. By the said Act of 22 Geo. 3, c. 56, intituled "An Act more effectually to enable the inhabitants of the parish of St. Luke, in the county of Middlesex, to purchase, hire, or erect a workhouse within or near the said parish, for the better reception and employment of the poor of the said parish," it was among other things enacted, by sect. 1, that the rector, church-

wardens, and overseers of the poor for the time being, and the vestrymen of the said parish, and their successors for ever, should be appointed trustees for the purposes of the said Act; and, by sect. 11, that it should be lawful to and for them, or any seven or more of them, after the time therein mentioned, to treat and agree with the owners and occupiers of all and every other person and persons interested in any freehold, leasehold, or copyhold grounds, tenements, or hereditaments within the said parish of St. Luke, or within the said parish of St. Leonard, Shoreditch, for the purchase or hire of such lands, grounds, tenements, and hereditaments; and they were thereby enabled to take a conveyance thereof to them and their successors, upon lease or for ever, for the purposes in the said Act mentioned; and in the said sect. 11 it was further enacted that the said lands or grounds, tenements, or hereditaments, so to be leased or purchased from and immediately after the same should be conveyed or leased to the said rector and churchwardens, and their successors, or any workhouse or other buildings which should be erected or built thereon for the reception and employment of the poor of the said parish of St. Luke should not be liable to or be charged with any greater parochial or Parliamentary taxes, rates, or assessments (during such time and as long as the same shall be used and occupied for those purposes) than to such amount as such lands and grounds, tenements, or hereditaments were assessed before the same became vested in the said rector and churchwardens as aforesaid.

The aforesaid Act of 48 Geo. 3, c. 97, entitled "An Act for making more effectual provision for maintaining, regulating, and employing the poor of the parish of St. Luke, in the county of Middlesex," repealed the said Act of 22 Geo. 3, c. 56, and by ss. 10, 11, and 12, provisions were made for the election of forty-eight vestrymen, to be with the rector, churchwardens, and overseers of the poor of the said parish for the time being, guardians of the poor of the parish.

Sect. 74 enacted that all and every the messuages or tenements, poorhouses, workhouses, edifices, buildings, lands, hereditaments, moneys, and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects which by virtue of the said recited Acts, or one of them, the persons acting in the execution thereof, and their successors, or any other person or persons whomsoever were entitled unto or possessed of, in trust for the parishioners or vestrymen of the said parish, or which were vested in such persons and their successors, or other person or persons whomsoever for and towards the relief, maintenance, use, and benefit of the poor of the parish, or for any other purpose whatsoever in which the said parish is interested, shall from and immediately after the passing thereof be vested in, possessed by, paid, delivered, and belong to the guardians of the poor, acting in the execution of this Act, and their successors, as fully, effectually, and beneficially, and in as large and ample a manner and form, to all intents and purposes whatsoever, as they the said persons acting in execution of the said recited Acts or any of them, and their successors or other person or persons, were entitled to be possessed of such messuages or tenements, poor houses, workhouses, edifices, buildings, lands, hereditaments, moneys,

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects, or as the same respectively were vested in such persons acting in execution of the said recited Acts or any of them, and their successors or other person or persons, but subject, nevertheless, to be used, possessed, applied, and disposed of only upon the trusts and for the uses and purposes and in the manner by and in this Act directed, declared, and appointed.

The effect of this section was to preserve the exemption from increased rating given by sect. 11 of 22 Geo. 3, c. 56, notwithstanding the repeal of that statute (*Reg. v. St. Leonard Shoreditch*, 13 Q. B. 964).

In the year 1836 part of the parish of St. Andrew's, Holborn, the parish of St. George-the-Martyr, and the liberty of Saffron-hill, Hatton-garden, Ely kents, and Ely-place, were united under the name of the Holborn Union, for the administration of the poor laws. Afterwards part of the parish of St. Sepulchre, Furnival's Inn, and Staple Inn, were added to the union; and, finally, in 1869, the parish of St. James, Clerkenwell, and the parish of St. Luke, were by order of the Poor Law Commissioners also added to the said union.

Upon such union the said workhouse and the workhouses of the other parishes comprised in the union, became and still are for the common use of the union; and the Poor Law Commissioners under the powers of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 26), issued rules, orders, and regulations, for the classification of the poor of the united parishes, and for their reception, maintenance, and employment in the various workhouses of the united parishes, without reference to the particular parishes in the union to which the poor may belong.

On the 25th Jan. 1873, the Court of Queen's Bench decided on a special case that notwithstanding the incorporation of the said parish of St. Luke into and with the Holborn Union, the exemption from increased rating given by sect. 11 of 22 Geo. 3, c. 56, was still preserved to the said workhouse.

By sect. 125 of an Act of Parliament passed in 18 & 19 Vict. c. 120, entitled an Act for the better Local Management of the Metropolis, the defendants were, as such vestry as aforesaid, required to appoint and employ a sufficient number of persons, or to contract with any company or persons for, amongst other purposes, collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, in or under houses and places within their parish; and it was thereby enacted that such company or persons, and who were thereafter referred to as scavengers should, on such days and at such hours and in such manner as the vestry should from time to time appoint, sufficiently execute and perform all such works and duties as they respectively should be employed, or contract to execute or perform, and if any such company or person should fail in any respect properly to execute and perform such works and duties, such company or person should for every such offence forfeit a sum not exceeding 5*l*.

On or about the 13th March 1875, the clerk of the defendants, with their authority, and at their desire, wrote and sent to the plaintiffs' clerk the following letter:

St. Leonard, Shoreditch, Vestry Offices,
Town Hall, Old-street, E.C.
March 13th 1875.

Dear Sir,—I have to inform the guardians of the Holborn Union that after Lady Day next it will be necessary for them to make their own arrangements for the removal of the dirt from St. Luke's Workhouse and Infirmary.—I am, yours truly,

G PARKER, Vestry Clerk.

The St. Luke's workhouse and infirmary referred to in the above letter is the said City-road Workhouse.

From and after the said Lady Day 1875 (*viz.*, the 25th March 1875), the defendants have ceased and neglected to appoint and employ, or to contract with anyone to remove the dirt, ashes, rubbish, and filth from the said dusthole, within and under or connected with the City-road Workhouse.

On or about the 3rd May 1875, the solicitors of the plaintiffs, with their direction and authority, wrote and sent to the defendants' clerk a letter, of which the following is a copy:

23, Ely-place, London, E.C.
3rd May 1875.

Dear Sir,—We have been consulted by the guardians of the Holborn Union with reference to the neglect of the contractor employed by the vestry of St. Leonard, Shoreditch, to take away the dust, &c., from St. Luke's Workhouse. It would appear from your letter to Mr. Hill of 13th March last, that the contractor's neglect is consequent on the instructions given to him by the Shoreditch Vestry; but as the duty of the vestry under the 125th section of the Metropolis Local Management Act appears to be very clear, we are inclined to think the instructions in question have been given under some mistake. We, therefore, write on behalf of the guardians of the Holborn Union, to demand of the vestry of St. Leonard, Shoreditch, the performance of their duty under the 125th section of the Metropolis Local Management Act, in respect of the guardian's workhouse in the City-road, and within the said parish, by causing to be removed therefrom the dirt, ashes, rubbish, &c., in one of the ways directed by the said Act. Since your contractors ceased to remove the dust from the workhouse, our clients have had it removed at their own expense, and they will require the repayment of all such expenses from your vestry.—We are, dear Sir, yours truly,

JAMES, CURTIS, and JAMES.

To G. Walker, Esq., Vestry Clerk,
St. Leonard, Shoreditch.

On or about the 4th May 1875, the clerk of the defendants, with their direction and authority, wrote and sent to the plaintiffs' solicitors a letter, of which the following is a copy:

St. Leonard, Shoreditch, Vestry Offices,
Town Hall, Old-street, E.C.,
May 4, 1875.

St. Luke's Workhouse dust removal.

Gentlemen,—In reply to your note of yesterday, I may say that the vestry is quite aware of the obligation of the 125th section of the Act alluded to, but they consider that the workhouse of St. Luke is by the Local Act rendered extraparochial. You will see that the contractor has nothing to do with it. If, therefore, the guardians of the Holborn Union think that the ratepayers of Shoreditch ought to pay the cost of removing the refuse, the Holborn ratepayers not contributing one farthing towards the cost, the guardians must take such steps as they may be advised to compel this vestry to do so.

I am, Gentlemen, yours obediently,

G. WALKER, V.C.

Messrs. James, Curtis, and James.

By reason of the premises the plaintiffs were damaged and obliged to employ, and did employ, persons to remove the said dirt, ashes, rubbish, and filth, and became liable to pay, and paid them for so doing, and the expenses incurred by the plaintiffs in removing the same, amounted to 50*l*. 1*s*.

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The plaintiffs claim as damages that amount.

The questions for the opinion of the court are:

First, whether the defendants are bound to appoint and employ a sufficient number of persons, or to contract with any company or persons for the removal of the dirt, ashes, rubbish, and filth from the said dusthole within and under, or connected with the said City-road workhouse?

Secondly, whether the plaintiffs can recover from the defendants the damages sustained by them by reason of the expenses incurred by the plaintiffs in the removal of the said dirt, ashes, rubbish, and filth during such time as the defendants have neglected and refused to provide for the removal of the same?

In case the opinion of the court shall be in the affirmative of the above questions, then judgment shall be entered for the plaintiff for damages to the amount of the said 50*l.* s., and costs of suit.

In case the opinion of the court shall be in the negative, then judgment shall be entered for the defendants with costs of defence.

Murphy, Q.C. (with him *Sutton*) argued for the plaintiffs.—It cannot be contended that the exemption by statute from an increase of rates should deprive the plaintiff of their ordinary rights as shareholders. This is a breach of the defendants' duty as specifically defined in sect. 125 of the Metropolis Act 1855, and an action will lie for damage caused by their breach of it. In *Couch v. Steele* (3 E. & R. 402), the declaration alleged that the defendant neglected to supply and keep on board his vessel a proper supply of medicines, whereby plaintiff, who was a seaman engaged by him, suffered in his health. It was held on demurrer that, as 7 & 8 Vict. c. 112, s. 18 makes it the duty of the shipowner to have on board such medicines, although the Act imposes a penalty, recoverable by a common informer, as the specific punishment for the breach of that duty as to the public, yet sailors sustaining a private injury from the breach of that statutable duty are entitled to maintain an action to recover damages, and that the declaration was good. A similar conclusion was arrived at in *Ruck v. Williams* (3 H. & N. 308). The following sections of the Metropolis Act 1855 tend to support this contention: for s. 126 provides a penalty for obstructing scavengers, and sect. 127 vests the refuse collected in the vestry or district board, [*LUSH*, J.—At common law I suppose the action would lie for the removal of a nuisance caused by the defendants.] That is our point.

Lanyon (with him *Lane*) for the defendants.—The defendants are a vestry, which by sect. 96 of this Metropolis Act, is to exercise the office of and to be the surveyor of highways for the district, and they cannot be liable for anything from which such surveyor would have been exempt. It has been held that no surveyor nor vestry can be liable for non-feasance of any kind, and *Parsons v. St. Mathew, Bethnal Green* (L. Rep. 3 C. P. 56), is an authority on this very point that an action for the non-repair of a highway will not lie against a vestry appointed under this Act. Willes, J., is reported to have said, at p. 59, that the defendants must act in this respect either as officers of the parish, and then the parish must answer as principal for the neglect of their duties, and *Young v. Davis* (7 H. & N. 760; in error 2 H. & C. 197) is an express authority that the officers are not liable; or else they must act as representatives of

the parish, and then their liability will be a reflection of the liability of the parish which they represent, and against the parish no such action as this could be brought. The case of *Mackinnon v. Penon* (8 Ex. 319; in error 9 Ex. 609), would, then, be in point. On either supposition, then, no action will lie against them for mere non-feasance, such as is the ground of the present action." And further on, "I cannot bring myself to think that it was the intention of the Legislature in transferring to the vestry the duties of the surveyor of highways, to give to everyone who may meet with any accident from an imperfection in the road a right of action which he never previously possessed, and thus open a wide door to continual litigation." It was conceded in a recent case in the Court of Appeal (*Pendlebury v. Greenhalgh*, L. Rep. 1 Q. B. Div. 32), that no action for nonfeasance would be against a surveyor of highways. [*LUSH*, J.—Here the action is brought against the vestry upon their obligations created by the statute, not upon the duties of the surveyor of highways.] The work required to be done here by the plaintiffs was the duty either of the parish or surveyor. [*LUSH*, J.—I think not. This was an especial duty of metropolitan districts. No parish could be indicted for not sweeping up ashes, &c.] To keep streets clean is part of the duty to repair a highway. Sect. 125 is merely a detailed description of the duties which the vestry is to perform as the surveyor of highways. The cases cited on the other side are applicable only when the statute is for the benefit of individuals, and not when for the benefit of the public generally. In such a case as this no action will lie at the suit of an individual:

Gorris v. Scott, L. Rep. 9 Ex. 125;

Atkinson v. Newcastle and Gateshead Waterworks Company, L. Rep. 6 Ex. 404.

Murphy, Q.C. in reply.

MELLOR, J.—I am of opinion that the plaintiffs are entitled to succeed in this action. The defendants are incorporated by the 42nd section of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), and are empowered to sue and be sued in the name thereby given them. This does not rest upon their authority to execute the office of surveyor of highways given them by sect. 96 of the same Act, and there is nothing in the Act to limit their duties and position to those pertaining to that office. I think, therefore, this case is not analogous to those cited by Mr. Lanyon, which relate only to the inhabitants of a parish or the surveyor of highways. The duties which the defendants have to fulfil are given at length in the 125th section of the Metropolis Act of 1855, and are beyond those which were ever undertaken by a surveyor of highways; every vestry and district board are required "to appoint and employ a sufficient number of persons, or to contract with any company or persons for the sweeping or cleansing of the several streets within their parish or district, and for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth," &c.; and such scavengers or their servants shall sufficiently execute and perform their duties or incur a penalty. The next section, the 126th, provides a penalty for obstructing scavengers in the performance of their duty; and the 127th vests all the refuse collected in the vestry or district board, who may dispose of the same towards defraying their expenses. With respect to these duties, I do not think the defen-

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dants can claim the exemptions applicable only to those of a surveyor of highways. It appears to me also that the defendants have misunderstood their obligation with respect to the plaintiffs' buildings, which are situated within their district. The old Act of 1782 provided that the plaintiffs should never be liable for any rates beyond those at that time payable, and this exemption from increased rates has been preserved by subsequent legislation, but the duties imposed upon vestries and district boards by the Metropolitan Management Acts have no regard to that limitation of rates. Whatever rates the plaintiffs pay, there is nothing to interfere with the rights which they enjoy as owners or occupiers of premises in the defendants' district. The plaintiffs have a sufficient interest in the district to claim the performance of the duties imposed upon the defendants, and they cannot be met by the answer that they do not pay enough rates. I think that under the circumstances, the plaintiffs' remedy is not by indictment only, but that the amount expended by them in performing the defendants' duties may well be recovered in this action.

LUSH, J.—I am of the same opinion. I see no analogy here with the case of *Parsons v. The Vestry of St. Matthew, Bethnal-green*. That decision is clear, upon the effect of the 96th section of the Metropolis Act of 1855, that there can be no liability for nonfeasance upon a vestry when acting as a surveyor of highways. But this action is founded upon a breach of the specific duty imposed upon vestries and district boards by section 125, quite apart from the duty of a surveyor. This is a duty towards the householders of the district and not merely a duty to the public, which is the limit of the liability of the inhabitants of a parish or the surveyor of highways. The plaintiffs are entitled to the same rights as any other householders in the district, although they are by express statutory enactment exempted from the payment of the full rates for which other householders are liable. There is a specific duty upon the defendants to do this work by the 125th section, and other sections of the Act have the effect of depriving the occupiers of any right to interfere with the defendants' duties. This being so why should not an action lie for damage caused by the breach of this duty? The case finds that "by reason of the premises the plaintiffs were damaged and obliged to employ and did employ persons to remove the said dirt, ashes, rubbish, and filth, and became liable to pay and paid them for so doing; and the expenses incurred by the plaintiffs in removing the same amounted to 50l. 1s." The defendants are not a fluctuating body, but are liable to be sued, and the plaintiffs are therefore entitled to the ordinary remedy by action for the damage so caused by breach of the defendants' statutory duty.

Judgment for plaintiffs.

Solicitors for plaintiffs, *James, Curtis, and James*.

Solicitors for defendants, *Mills and Lockyer*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Friday, April 28.

BURY (app.) v. CHERRYBOHN (resp.) (a).

School board byelaw—Attendance at school—Workshops—30 & 31 Vict. c. 146, s. 14; 33 & 34 Vict. c. 75, s. 74.

A byelaw made by a school board, with the approval of the Education Department, under the Elementary Education Act 1870 (33 & 34 Vict. c. 75), s. 74, provided that all children in the district subject to the Act should attend school for thirty hours a week.

The justices refused to convict the respondent for neglecting to cause his son, between five and thirteen years of age, to attend school as required by that byelaw, because the son was employed in a boot manufactory, and attending school more than ten hours a week, pursuant to the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), s. 14.

Held, upon a case stated, that this byelaw was not contrary to the said section of the Workshops Act, which requires every child who is employed in a workshop to attend school for at least ten hours a week; and that the respondent ought to have been convicted.

THIS was a case stated for the opinion of this court by two justices of the peace in and for the West Riding of the County of York under the statute 20 & 21 Vict. c. 43, on the application in writing of the said Reginald Bury, the appellant, who was dissatisfied with their determination, the appellant having duly entered into a recognisance to prosecute the appeal.

On the 19th Feb. 1876, the said Reginald Bury duly laid information in due form of law as follows:

To Joseph Cherrybohn, of Barnsley, in the County of York, shoemaker.

West Riding of Yorkshire.—Whereas information hath this day been laid by Reginald Bury on behalf of the School Board for the district of the Borough of Barnsley in the said Riding before one of the said justices acting in and for the West Riding of the County of York for that you the said Joseph Cherrybohn, residing within the said district of the said School Board, and within the said borough of Barnsley, being the parent of a certain child called John Cherrybohn, residing with you within the said district, and being not less than five nor more than thirteen years of age, did within six months last past, to wit on the 18th Feb. inst., unlawfully neglect and omit to cause the said child to attend school as required by the bye-laws of the said School Board, made and confirmed in pursuance of the Elementary Education Act 1870, there being no reasonable cause for such non-attendance, contrary to the said bye-laws.

On the 8th March 1876, the said information came on to be heard before the said justices at a petty sessions at Barnsley in the West Riding of the County of York, when the said Reginald Bury appeared before the said justices, and also the wife of the said Joseph Cherrybohn.

Upon the hearing of the information, Benjamin Clegg, school warden to the said board, proved the non-attendance of the child at school on the day named, and that the child was twelve years of age on the 11th May 1875, also the bye-laws of the said school board, and that the child was in the third standard of the Government code of February 1871.

It was proved by the wife of the said defendant, and admitted by the said informant

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Reginald Bury, that the said child was employed in the boot manufactory of Charles Rollinson, in Barnsley aforesaid, and attended school half time regularly, pursuant to the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146.)

On the part of the appellant it was contended that by virtue of the bye-laws of the said board made in pursuance of the 74th section of the Education Act 1870, the said board could, if they thought fit, compel children to attend school full time, notwithstanding that such children were working at a workshop and attending school in conformity with the provisions of the aforesaid Workshops Regulation Act. That there was nothing in the Workshops Regulation Act restraining the compulsory powers conferred on the board by the Education Act, as the former Act merely provided that children should not work except on certain conditions as to time and education. That there was nothing contrary in the said bye-laws to anything contained in any Act for regulating the education of children employed in labour, and that the said Education Act overrode the said Workshops Act.

The said justices, after hearing the whole of the evidence, dismissed the information, they being of opinion that as the said child was fulfilling the conditions and provisions of the said Workshops Regulation Act, the School Board could not compel him to attend school full time under the said byelaws.

The question of law arising is, are the Barnsley School Board able to enforce their byelaws against children under thirteen years of age, who, although not obeying such byelaws, attend school and otherwise observe the conditions of the Workshops Regulation Act?

Does the Education Act 1870 override this and other Acts regulating the education of children employed in labour?

The opinion of the court is therefore asked upon this point.

The bye-laws of the Barnsley School Board had been duly approved by the Education Department. By one of them the time required for the attendance at school of children, subject to the provisions of the Elementary Education Act 1870, was thirty hours a week. Another bye-law, the third, repeated the provisoes contained in sub-sect. 2 of sect. 74 of that Act, the last being that nothing in the bye-laws was intended to be contrary to anything contained in any Act for regulating the education of children employed in labour.

Hugh Shield argued for the appellant, the clerk of the School Board.—The question is whether the bye-law of this School Board, requiring the attendance of all children within the district for thirty hours a week, is contrary to the provisions of the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), and therefore invalid. By sect. 14 of that Act "The following regulations shall be made (subject to the provisions hereinafter mentioned) respecting the education of children employed in workshops: (1) Every child who is employed in a workshop shall attend school for at least ten hours in every week, during the whole of which he is so employed. (2) In computing for the purpose of this section the time during which a child has attended school there shall not be included any time during which such child has attended either (a) in excess of three hours at any one time, or in excess of five hours on any day; or (b)

on Sundays; or (c) before eight o'clock in the morning, or after six o'clock in the evening: provided that the non-attendance of any child at school shall be excused—(1) For any time during which he is certified by the principal teacher of the school to have been prevented from attendance by sickness or other unavoidable cause; (2) for any time during which the school is closed for the customary holidays, or for some other temporary cause; (3) for any time during which there is no school which the child can attend within one mile (measured according to the nearest road) from the workshop or the residence of such child." The bye-laws are subject to sect. 74 of the Elementary Education Act 1870 (33 & 34 Vict. c. 75), by which "Every school board may from time to time, with the approval of the Education Department, make bye-laws for any of the following purposes: (1) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school; (2) Determining the time during which children are so to attend school; provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour; thirdly, providing for the admission or payment of the whole or any part of the fees of any child, where the parent satisfies the school board that he is unable from poverty to pay the same; fourthly, imposing penalties for the breach of any bye-laws; fifthly, revoking or altering any bye-law previously made. Provided that any bye-law under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school, if one of her Majesty's inspectors certifies that such child has reached a standard of education specified in such bye-law. Any of the following reasons shall be a reasonable excuse, viz.:—First, that the child is under efficient instruction in some other manner; secondly, that the child has been prevented from attending school by sickness or any unavoidable cause; thirdly, that there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the bye-laws may prescribe. The School Board, not less than one month before submitting any bye-law under this section for the approval of the Education Department, shall deposit a printed copy of the proposed bye-laws at their office for inspection by any ratepayer, and supply a printed copy thereof gratis to any ratepayer, and shall publish a notice of such deposit. The Education Department before approving of any bye laws, shall be satisfied that such deposit has been made, and notice published, and shall cause such inquiry to be made in the school district as they think requisite. Any proceeding to enforce any bye law may be taken, and any penalty for the breach of any bye law may be recovered in a summary manner, but no penalty imposed for the breach of any bye law shall exceed such amount as, with

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the costs, will amount to 5s. for each offence, and such bye laws shall not come into operation until they have been sanctioned by her Majesty in Council. It shall be lawful for Her Majesty, by order in council, to sanction the said bye laws, and thereupon the same shall have effect as if they were enacted in this Act." With respect to this particular point, the Workshops Act merely limits the common law right of parents to employ their children in the various kinds of labour there mentioned. They are bound, at the same time, to make their children attend school for ten hours a week at least, or are otherwise liable to a penalty. The whole statute is a restraining, not an enabling piece of legislation; the preamble says, "Whereas by the Factory Acts Extension Act 1867, provision is made, amongst other things, for regulating the hours during which children, young persons, and women are permitted to labour in any manufacturing process conducted in an establishment where fifty or more persons are employed. And whereas it is expedient to extend protection so far as respects the regulation of the hours of labour to children, young persons, and women working in smaller establishments."

The respondent did not appear.

BRAMWELL, B.—I certainly wish we could have heard what arguments might have been advanced on the respondent's side; but I hope another appeal may be brought upon a similar case, and in that hope I am prepared to give my judgment now upon the best consideration we have been able to give to the matter. It seems to me our judgment should be for the appellant. I think Mr. Shield took an accurate view of the Workshops Regulation Act 1867, when he contended that it was not an enabling, but only a restraining statute. It provides that a parent shall not work his children at a certain age except upon certain terms. Amongst other restrictions no child under thirteen is to work unless he attends school for ten hours a week. The object of the statute is to regulate the labour of children, and incidentally it provides them with a certain amount of education. The Elementary Education Act 1870, was passed with an entirely different object. It aims at and provides for education only, and applies not only to children employed in labour but to all children. Unless there were an express limitation, this Act would govern all previous Acts relating in any way to the same subject; and it is perfectly clear that this byelaw would be justified, except for certain words in the Act itself. Let us consider what it is that limits the effect of the Act. The question turns more upon the provision in the Act than the restriction in the byelaws. The 3rd byelaw has not so much effect upon the question as the proviso in the 74th section, being merely a precautionary limitation. They may, therefore, be both of them interpreted together by the meaning of the words in the section providing that no byelaw "shall be contrary to anything contained in any Act for regulating the education of children employed in labour." In one sense, it is impossible to say that this does not introduce a state of things contrary to that which existed before; it is, at all events, different, but to my mind it is not contrary in the sense intended by the Act. I think, with respect to the hours for attendance at school, the effect is that a school board may determine the required number of hours per week, provided that in the

case of children employed in workshops those hours are not less than ten hours a week. If the time fixed for all children were less than ten hours, that would have been "contrary" to something contained in the Workshops Regulation Act 1867. This interpretation, no doubt, gives rise to a difficulty; for under the Workshops Act, a child employed in labour must attend school ten hours a week until he is thirteen, without qualification, but under the Education Act he is exempt from that duty after ten years of age, if he attains to a particular standard, and receives a certificate. It certainly seems, looking at the two Acts together, that even with such certificate a child employed under the Workshops' Act must attend ten hours a week at school until he is thirteen, although not required to do so by the School Board. Notwithstanding this possibly unintended consequence of the combined working of the two Acts, I can entertain no doubt that these provisions ought to be read together. Is it conceivable that a school board should be compelled to limit the better education to children not employed in certain particular kinds of labour, when the education of those children has hitherto been better provided for than that now subject to its control? When one looks at the objects of both statutes, it cannot be supposed that the children brought up to certain named trades should be worse off in the way of education than those employed in trades not mentioned in the Workshops Regulation Act. Looking at the words of the two enactments, these bye-laws are not contrary to, although making some alteration in, the previous legislation concerning children employed in labour. In no sense can they be said to repeal or to oppose the provisions of the Workshops Act, and therefore they are valid. I think the appeal must be allowed.

MELLOR, J.—I am of the same opinion. It strikes me that this Elementary Education Act 1870, was intended to increase the amount of education which had been required by preceding legislation, and we have merely to see whether these bye-laws are in excess of the power conferred upon school boards by sect. 74. The principal object of the Workshops Regulation Act 1867, was to limit the hours of children's work, parents and employers being made liable to carry out that object. Incidentally, as I understand, some provision was made for children engaged in the work concerning which this enactment was passed, the penalty for breach of this provision being imposed upon the parents only and not upon the employers. The statute, however, only applied to handicrafts, and contained no enactments for the education of children otherwise employed. The Elementary Education Act, on the other hand, applies to all children, and there is nothing contrary to any Act for regulating the education of children employed in labour in enabling school boards to compel such children to attend school for longer periods than those required by such Acts. It would be monstrous to hold that, because children are employed in handicrafts, their parents are to be absolved from affording them so good an education as if they had adopted other kinds of labour, or were not at work at all. We should circumscribe the effect of the Education Act in a manner which I think was never intended if we were to hold that because the labour laws required of these children ten hours' attendance at school

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a week, therefore they should be excused from the thirty hours' attendance demanded of all children by the bye-laws under the Education Act. I think there is nothing in these bye-laws contrary to the Workshop Act, and I arrive at the same conclusion as my brother Bramwell that the refusal of the justices to convict the respondent was wrong. I should have been glad to hear argument of counsel on the other side, but I entertain no doubt at all on the subject.

DENMAN, J.—I quite agree that it is unfortunate we have had no argument for the respondent, but I feel no doubt about the matter, and I fully concur in allowing this appeal. The magistrates have decided on the ground that this bye-law was bad in that by its general words it required children employed in workshops to attend school thirty hours a week instead of the ten hours necessary under the Workshops Regulation Act. The magistrates consider that this bye-law is contrary to the ten hours' provision of the statute; but in order to adopt that view we should have to read the words "ten hours at least" to mean "ten hours and no more." That difficulty is a sufficient reason for me, but I agree also on the other grounds given by my brothers Bramwell and Mellor.

Judgment for appellant.

Solicitors for appellant, Sanderson and Corpe.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, Aug. 3.

THE THOMAS LEA. (a)

Sailing rules—Regulations for preventing collisions at sea—Rule 20.

When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, and where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, and to have a lookout to give warning to approaching vessels of her position by the best means in her power.

THIS was a cause of damage instituted by the owners of the screw steamer *Belmont* against the screw steamer *Thomas Lea*.

There was no cross cause.

The *Belmont* was a vessel of 576 tons register, belonging to the port of Sunderland, and the *Thomas Lea* was a vessel of 486 tons register, belonging to the port of London.

The collision occurred on the 19th Jan. 1876, about 8.15 p.m. The *Belmont* was then lying on the ground at the entrance of the tidal basin of the Sunderland Docks, and the *Thomas Lea* was about to enter the basin, inward bound from London.

It was alleged by the plaintiffs that those on board the *Thomas Lea* did not keep a proper lookout, and by the *Thomas Lea* that the *Belmont* neglected to give proper warning of her peculiar position, and that a light alleged to have been shown over her stern was either not exhibited at all or of insufficient power, and obscured and red-dened by smoke on the glass of it.

Webster and Phillimore, for the plaintiffs.

Butt, Q.C. and Myburgh, for the defendants.

(a) Reported by F. W. RAIKES' Esq., Barrister-at-Law.

Sir R. PHILLIMORE.—This is a case of collision between two steamships near the tidal basin in the river Wear, at the entrance of the Sunderland South Dock. The plaintiffs in this case, the owners of the *Belmont*, had finished loading her cargo, on the morning of the 19th Jan., and she drew 16ft. and 3 or 4 inches of water. She seems to have had two courses before her—either to have gone through the South Dock, or to have at once straightened down the river over the bar—she elected the former. It was a neap tide, and as the vessel was entering the basin she took the ground upon the eastern side of it; she remained fast, lying a little on her side, her head towards the dock gates, and her stern projecting into the river. She took the ground at 10 a.m., and remained fast till 10 p.m. The collision took place at 8.15 p.m. At this time a steamship, the *Thomas Lea*, was entering the river and going into the South Dock. The wind was blowing very hard from the S.W., and the night was dark and cloudy, though lights could be seen at some distance. The *Thomas Lea* had her proper lights up and burning, but there is a dispute as to whether she had a good lookout. Her own account is, that "whilst rounding to out of the river into the harbour, her engines were going easy astern, and they had but little headway on her," about half a knot, and she ran into the *Belmont*, striking her about 20ft. from the stern upon the port side. Now, on the one hand, it is urged by the *Belmont* that the collision was in consequence of the want of a proper lookout on board the *Thomas Lea*; and, on the other, it is contended by the *Thomas Lea* that it was caused by the want of due notice being given, by proper signals, to vessels entering the harbour, of the position of the *Belmont*. There can be no doubt that it was the duty of the *Belmont*, whilst she remained in this position at the entrance of the dock, to take every precaution in her power to warn other vessels entering of that position. She says she satisfied that requirement in the following way: she put up two lights, one in her starboard fore rigging, and the other 3ft. above the wheel at the stern, the wheel itself standing 2½ft. from the deck. It is admitted that the light in the fore rigging could have no effect in apprising vessels entering of the position of the *Belmont*; as it could not be seen by them in consequence of intervening objects on shore; it may, therefore, be left out of consideration. The only question then is, whether, if she had a light over the wheel or the stern, and if that light was of sufficient power in itself, and at the time in a proper condition, and if so, whether that was a sufficient precaution. Now the first duty of the *Belmont*, in the circumstances, was to have a good lookout. The mind of the court, assisted by the attention of the Elder Brethren, has been anxiously directed to an examination of that point. The mate was on shore, and his orders were to put up two lights, one aft and one in the starboard fore rigging; the anchor watch was kept by a sailor who has not been examined, and who is said to be on a foreign voyage. Where was the second mate? It seems that common prudence would have suggested that he should be at the stern looking out. He was not there. He was walking up and down the deck, forward and aft, and he gives this extraordinary evidence, that before he had taken a walk forward he saw the masthead light of a steamer coming up the river, five or six

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miles off; and when he returned from his walk he found the masthead light of a vessel pretty close, coming right into his port quarter. What did he do? Did he take any steps when he first saw the vessel coming up, and knew he was in an anomalous position where no one could expect a vessel to be? He did nothing whatever. In my judgment—and the Elder Brethren are of the same opinion—he ought to have blown the whistle, and taken every precaution to announce his position, instead of which, the converse is the case, and hence the result. What measures were taken to avoid the collision? None whatever; the only precaution alleged was the placing of the light aft, and it becomes important to consider the evidence with regard to that light. Assuming, in favour of the *Belmont*, that the light was there, it is extremely doubtful to me whether it was of sufficient quality and proper colour for the purposes for which it was intended. We are, moreover, of opinion that it was not placed in a proper position, as it ought to have been on a mast, or in some way elevated much higher above the deck than it was; and I have already said that even if the light were properly placed, there ought to have been a better lookout, and other modes adopted of warning an approaching vessel of the position in which the *Belmont* was lying. The result at which I have arrived, with the advice and assistance of the Elder Brethren, is, that the *Belmont* has not shown that she used the precautions it was incumbent on her to adopt in her peculiar position, and that unquestionably she had a bad lookout, and, therefore, she cannot recover in this suit. I dismiss her petition with costs.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Gellatly and Co.*

June 13, July 20, and Aug. 1.

THE STAR OF INDIA. (a)

Damage by collision—Measure of—Damages—Loss of charter-party.

In estimating the loss sustained by a ship in a collision, a charter-party entered into contingent on the arrival of the ship at a fixed date at another place should be taken into consideration, the amount recoverable being the freight that would have been earned under the charter-party, less any expenses which would naturally be incurred in the performance of it.

A CAUSE of damage was instituted by the owners of the *Cheviot* against the *Star of India*, for damages sustained by the former vessel in a collision which took place in Madras Roads on the 1st May 1875, between the two vessels whilst the *Cheviot* was shortening in her cable to proceed to ports on the Coromandel Coast, from which she was chartered to London.

The defendants, the Merchant Shipping Company (Limited), the owners of the *Star of India*, admitted their liability for the damage sustained by the *Cheviot*, and on the 31st Dec. 1875, the amount thereof was referred to the registrar and merchants.

The registrar, after examination of witnesses on both sides, and hearing counsel, reported on the 27th March 1876, as follows:

I find there is due to the plaintiffs in respect of their said claim the sum of 577*l.* 19*s.* 10*d.*, together with interest thereon, as stated in the schedule hereto annexed. And I am also of opinion that each party ought to be left to pay his own costs of the reference, the reference fees to be paid by the plaintiffs.

The following schedule is that referred to:

	Claimed.	Allowed.
	£ s. d.	£ s. d.
1. Demurrage of the barque <i>Cheviot</i> , of 494 tons, at 4 <i>d.</i> per day from 1st May to 4th July 1875, viz., 65 days	535 3 4	535 3 4
2. Loss of charter-party	583 18 9	0 0 0
3. Surveyor's fees at Madras	15 16 3	15 16 3
4. Telegrams from Madras	16 15 3	16 15 3
5. Telegrams from Glasgow to Madras	6 10 0	6 10 0
6. Repairs to figure head	3 15 0	3 15 0
	£1161 18 7	577 19 10

With interest at 4 per cent per annum from the 4th July 1875, until paid.

The plaintiffs, on the 12th April 1876, filed a petition in objection to this report, in so far as it disallowed the second item in the schedule and made the above order as to costs, for these reasons (among others):

(A.) At the time of collision the *Cheviot*, which was in Madras Roads, was under charter to take a cargo from the Coromandel Coasts to London, at the rate of 55*s.* per ton nett weight, delivered, and was heaving short in order to proceed to Gopalpore, the first or only port under the charter. The cargo which she would have carried would have been a dead weight cargo.

(B.) The collision occurred on the 1st May 1875, and as the *Cheviot* was so damaged that she could not possibly reach Gopalpore by the 10th May, the charterers, in accordance with a power given to them to that effect, cancelled the charter.

(C.) By the time the *Cheviot* was repaired, the season had nearly closed and freights had fallen.

(D.) The *Cheviot* was not sufficiently repaired to take in cargo till the 4th July, nor sufficiently repaired to proceed to sea till the 13th July.

(E.) On the 4th July, the *Cheviot* could have been chartered for a similar voyage to that which she had been chartered at the rate of 45*s.* per ton, but she could not have sailed for the ports of loading till on or after the 13th; instead thereof she was loaded at Madras on and after the 4th July, at the rate of 45*s.* per ton of measurement goods.

(F.) The plaintiffs' claim is for the difference between the freight of which the *Cheviot* would have earned under the cancelled charter-party and that which she earned under the loading at Madras.

The plaintiffs have not claimed or received demurrage for the detention of the *Cheviot* after the 4th July.

(G.) If the plaintiffs succeed wholly or partially in their claim, the cost of the reference ought to be awarded to them.

and prayed the court to order the report to be reformed by allowing to the plaintiffs the said sum of 583*l.* 18*s.* 9*d.*, or such part thereof as to the court may seem just, and by condemning the defendants in the costs of the reference, and that the defendants might be condemned in the costs of the appeal.

On the 2nd May 1876, the defendants answered as follows:

1. They say that the respective reasons alleged in the said petition were not borne out by the charter-party and evidence produced before the registrar and merchants, and they crave leave to refer to such charter-party and evidence.

2. They say that the alleged damage claimed by the plaintiffs in respect of the loss of the said charter-party was too uncertain and too remote, and that it was therefore properly disallowed by the registrar.

3. They say that, regard being had to the demurrage allowed to the plaintiffs and to the other facts and circumstances of the case, the plaintiffs failed to prove that

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they had in fact incurred any loss by reason of their not having fulfilled the said charter-party, and that on the contrary the profits actually earned by the plaintiffs were fully equal to the profits which they would have earned had the *Cheviot* performed the said voyage to Gopalpore and received her intended cargo and proceeded to London therewith and delivered the same there.

4. The defendants have always been ready and willing to settle the claims of the plaintiffs other than the said claim for loss of charter-party, from which latter claim alone the necessity for the reference arose.

and prayed the court to confirm the report of the registrar, and to condemn the plaintiff in costs.

June 13 and July 20.—The petition came on for hearing before the judge.

Watkin Williams, Q.C. and Phillimore, for the plaintiffs.—The owners are entitled to recover the loss they have sustained by the tort of the defendants, and to be put in the same position exactly as that they would have occupied but for his misconduct. The question of remoteness does not arise here, as the charter-party was entered into and the plaintiffs were actually taking the first step to earn the money under the charter-party when they were prevented from doing so by the act of the defendants: (*Hadley v. Bazendale*, 9 Exch. 341; *Jebeen v. East and West India Dock Company*, L. Rep. 10 C.P. 300, 32 L. T. Rep. N. S. 321; and the notes to *Vicars v. Wilcocks*, in Smith's Lead. Cas. 7th edit. vol. 2, p. 551, *et seq.*) The case is different from those in which damages are claimed for a breach of contract, where that only can be recovered the loss of which was in contemplation of both parties or which was the natural result of the breach of contract: (*France v. Gaudet*, L. Rep. 6 Q. B. 199.) In *Davis v. Garrett* (6 Bing. 716) the owner of a barge was bound to make a restitution *in integrum* for damage done to a cargo through his wrongful deviation, and that is the proposed measure here; we should have earned all we asked for, and are entitled to recover it. Had the cargo been on board, and the delay occasioned a loss of market, that loss would have been recoverable, and this is really the same case. He also referred to *The Frederick Warren* (Pritchard's Ad. Digest, p. 708 n. 153), and *The Gladiator* (Pritchard's Ad. Digest, p. 707, n. 143).

E. C. Clarkson, for the defendants.—The damage claimed is too remote. Had the ship been at her loading port ready to load under a charter-party the amount might perhaps have been allowed, but here there is the chance, first, of the non-arrival at her loading port at all, and, second, of her non-arrival in time to prevent the charterers taking advantage of their option to cancel the charter party; she had only eight or ten days to reach Gopalpore in, and the ordinary chances of a sea voyage might well prevent her getting there in that time. The case is the same in principle as *Portman v. Middleton* (4 C. B., N.S., 322), and the notes to *Vicars v. Wilcocks*. [Sir Robert Phillimore referred to *The Parana* since reported, *ante*, p. 32.] This principle is further illustrated by *Walker v. Goe and others* (3 H. & N. 395; 4 H. & N. 350). The loss of the charter-party was not the necessary result of the damage, but of a clause in the charter-party itself, requiring the ship to be at Gopalpore by a certain date, and that is a matter which the defendants cannot be supposed to have had in contemplation. *Hadley v. Bazendale* (9 Exch. 341), so far as it is in point at all, favours my contention for the court says: "We think

the proper rule is this—the damages should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things . . . or such as may reasonably be supposed to have been in the contemplation of both parties." But that case is one of the measure of damages for breach of contract, not for a tort; in the latter class of cases only that damage which is the natural and obvious result of the tort can be recovered, for nothing more can be considered to be in the contemplation of the parties at the time. At all events, they can only recover for the loss of the chance of being able to fulfil the charter-party, not for the loss of the charter-party. The vessel might have had another charter-party to come into operation on her arrival in England from Gopalpore; if so, could the plaintiffs recover for the loss of that? The claim is remote and hypothetical. Had the damage not been sustained at all she would have occupied much time and sustained loss by wear and tear in beating back again from Gopalpore, and the insurance for the voyage would have been higher, and all these things were in contemplation of the parties to the charter, and, therefore, the amount of freight was higher; besides, they have got demurrage at 4d. per ton per day, and this is equal to a profitable employment of the ship for the sixty-five days. [The Registrar, in reply to Sir Robert Phillimore, explained that the practice was to allow demurrage at the rate of 2d. per ton per day for the actual costs of the employment of the ship, and another 2d. as representing a reasonable profit on her employment. The plaintiff has not shown that he has suffered any real loss; he has lost 10s. per ton of freight, but he has saved a month's time on the voyage, and all the wear and tear entailed thereby, the extra premium on insurances, and has been paid demurrage representing the profitable employment of his ship for sixty-five days.] *Davis v. Garrett* is different from this case. It was there said truly that a wrongdoer could not qualify his wrong, but the wrong was the direct cause of the damage; in fact, the Registrar, in allowing the demurrage, has gone further than any case at common law.

Phillimore, in reply, referred to *France v. Gaudet* (L. Rep. 6 Q. B. 199), and admitted that some deduction must be allowed for the shortening of the voyage, and saving of wear and tear, but claimed to be entitled to the amount of chartered freight less such deductions. There was an inception of the proceedings to earn freight, and the chance of not earning it was no greater than that of a person for whose death a claim is made under Lord Campbell's Act, not earning wages or making profits: (*Rowley v. London and North-Western Railway Company*, L. Rep. 8 Ex. 221; 29 L. T. Rep. N. S. 180.) Fourpence per ton does not represent a profitable employment of the ship; that is stated in the charter-party to be 120 rupees per diem, and would in sixty-five days make a difference over and above what is allowed of 208l. 15s. We had an insurable interest in the freight, and had we insured it, could have recovered on the policy (Maude and Pollock on Merchant Shipping, 2nd edit. p. 305), and the defendants must indemnify us to the same extent.

Cur. adv. vult.

Aug. 1.—Sir ROBERT PHILLIMORE.—The *Cheviot*, a vessel of 494 tons, was run into on the 1st May

[ADM.]

THE STAR OF INDIA.

[ADM.]

1875, while at anchor in Madras Roads, by the *Star of India*. This vessel admitted her liability, and the usual reference was ordered to the registrar, assisted by merchants, to ascertain the amount of damages. On the 27th March, 1876, the registrar made his report, in which all the items of the plaintiffs' claim were allowed except one; each party to pay his own costs. The item not allowed was for the loss of a beneficial charter-party, estimated at 583*l.* 18*s.* 9*d.*; the whole of this sum was disallowed. Against this ruling, and against that which left each party to pay his own costs, the owners of the *Cheviot* have appealed. The case has been ably and carefully argued before me. The following averments in the petition are proved or admitted. [His Lordship then read the paragraphs (A to E) of the petition set out above.]—The clauses of the charter-party to which it is necessary to refer are the following: "Twenty-five working days are to be allowed the charterers or their agents, if the ship be not sooner despatched, for loading the said ship on the Coromandel Coast, to commence twenty-four hours after the captain has given notice in writing to the charterers' agent that he is ready to receive cargo, and ten days' demurrage over and above the said laying days at 120 rupees per day, to be paid to the master day by day as due at his option. Time occupied in changing ports not to count as lay days. Lay days not to commence before 10th April 1875. Charterers to have the option of cancelling this charter-party if the vessel do not arrive at her first loading port and be ready to take in cargo by 10th May. The main ground upon which the registrar founded his rejection of the loss of the beneficial charter-party, and which has been insisted upon in the argument before me, was that the claim for damages on this account was too remote. This was the main ground, but the registrar appears also to have held that the proximate cause of the loss was the option given by the charter-party to the charterer, and which he exercised, of cancelling the agreement, because the ship did not arrive so as to be ready to take in cargo by the 10th May. I may dispose of this latter question first. I am unable to see how the granting of this option which it was perfectly competent for the owners of the *Cheviot* to do, can be in any legal sense considered the real or proximate cause of the loss. But for the damage, there is every presumption that the *Cheviot* would have arrived in proper time, and that there would have been no opportunity given for the exercise of the option. With regard to the main objection of remoteness, it has been contended that the ordinary length of the voyage was six months and six days; it is admitted that the ship had eight days over the time necessary to enable her to get to her loading port in time to fulfil it, and that at the time the collision occurred, according to the evidence of the captain, the *Cheviot* was ready to proceed to Gopalgore, which was the first port she had to proceed to on the Coromandel Coast to load, and indeed the crew were actually heaving short on board the *Cheviot* for the purpose of getting under weigh to proceed to the said port of Gopalgore. The voyage may, therefore, be said to have begun, but it is contended that nevertheless the ship might have met with some perils before she arrived at her loading port, might have been lost, or at least

delayed by bad weather, and that all the plaintiffs can be said to have lost was the chance of performing the charter-party, which is too remote an item to be taken into account in the consideration of compensation. The answer to these objections appears to me to be that though they may avail to show that the whole sum which represents the loss of the beneficial charter-party cannot be claimed, but that a certain deduction should be made from it, they do not avail to show that the item should be entirely struck out. With respect to various decisions which were cited relating to cases of insurance contracts and the like, I must observe that this is the case of compensation demanded from a wrongdoer and governed by different principles of law. In the case of *The Halley* (L. Rep. 2 A. & E. 3; 17 L. T. Rep. N. S. 329), I said what I must now repeat: "I gladly avail myself of Dr. Lushington's language in this matter in a case in which he distinguishes—speaking of the duty of the registrar and merchants as referees of the High Court of Admiralty—between cases of collision and cases of insurance. 'One,' he says (*The Gazelle*, 2 W. Rob. p. 280), 'of the principal and more important objections to the report under consideration is this: that the registrar and merchants in fixing the amount to be paid for repairs and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one-third from the full amount which such repairs and new articles would cost. This reduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question then which I have to consider is the applicability of the rule in question to a case of the present description, and this question, it is obvious, involves principles of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damage in all other similar cases. Now in my apprehension a material distinction exists between cases of insurance of damages by collision and for the following reasons.' And then the learned judge explains the nature of an insurance contract, and he continues: 'With regard to cases of collision it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the loss arises not *ex contractu* but *ex delicto* of the party by whom the damage has been done, and the measure of the indemnification is not limited by the terms of any contract, but is co-extensive with the amount of the damage. The right against the wrongdoer is for a *restitutio in integrum*, and this *restitutio* he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty, and in these cases difficulties must and will frequently occur, the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise affecting such indemnification without exposing him to some loss or burthen which the law will not place upon him.'" In the more recent case of *France v. Gaudet* (L. Rep. 6 Q. B. 199), the distinc-

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tion between an action of contract for the recovery of damages, and an action against a wrongdoer, appears to have been very clearly taken. Lastly, it has been contended that the grant of demurrage in this case of 4*d.* per ton per day from the 1st May to the 4th July (sixty-five days) puts an end to any claim founded on difference of freight, and includes the profitable employment of the ship during that time: that 2*d.* per ton covers the expenses, and the other 2*d.* per ton compensates the owner for the use of the capital. I am not of opinion that on those accounts the claim founded on the difference of freight is extinguished. It is not merely the beneficial charter-party which is lost, but also the sixty-five days during which the vessel has not been beneficially employed, and upon the whole I am of opinion that I must refer this matter again to the registrar, with the assistance of merchants, to report upon what may be in the circumstances, according to their opinion, a compensation for the loss of the beneficial charter-party. The whole sum, viz., 583*l.* 18*s.* 9*d.*, ought not to be granted, and indeed is not claimed. Among the deductions from this sum will have to be considered the difference between a voyage from Madras to London and from the Coromandel Coast to London; the saving of what is called wear and tear to the vessel, and the uncertainties and perils incident to all sea voyages. Other circumstances justifying deductions will perhaps suggest themselves to the great experience of the registrar and merchants, as to which I have no desire to fetter their discretion. The judgment which I now deliver is that the items for the loss of the beneficial charter-party, which, as being too remote and uncertain has been disallowed, ought to be considered and allowed, subject to all just and reasonable deductions. The question of costs must stand over till the amended report is made.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Saxton and Co.*

Tuesday, July 18.

THE JULINA. (a)

Wages—Cause by default—Waiver of proceedings—Intervention of foreign consul—Solicitor—Officer of court.

Where a ship has been sold in a cause in which no appearance has been entered, and the proceeds remain in the registry, all preliminary proceedings in a cause of wages may be waived, and the money due paid out of court.

The court will not pay the money to a foreign consul at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money.

In this case the *Julina*, which was a Russian vessel, had been sold by order of the court in another suit in which the proceedings had been in default of appearance, and the proceeds of the sale remained in the registry. On the 18th July an application was made by *W. Phillimore*, on behalf of the master and a portion of the crew, that the wages due to them, and a sum of money by way of viaticum, as well as in respect of certain necessary expenses incurred by them, should be paid out of court at once without requiring

them to file pleadings or take the other steps customary in a case of default of appearance.

The Registrar read a letter from the Russian consular officer stating that he had made advances of money to the crew for their expenses, and that by the law of Russia the money payable to the crew ought to be paid to him on their behalf.

Sir R. PHILLIMORE made an order waiving under the circumstances all the preliminary steps in a cause by default, and ordering the money to be paid out of court, on the solicitor of the parties before the court undertaking to pay the Russian consular officer the sums he had advanced for necessities or producing his receipt.

June 27 and Aug. 8.

THE EVANGELISTRIA. (a)

Jurisdiction—Foreign vessel—Possession—Foreign mortgage—Decree of foreign court—Intervention of foreign consul.

The arrest necessary to found the jurisdiction of the High Court of Justice (Admiralty Division) over claims by mortgagees of foreign ships under 3 & 4 Vict. c. 65, must be in a cause over which the court has jurisdiction; a mere de facto arrest is not sufficient.

The High Court of Justice (Admiralty Division) has jurisdiction, independent of the Judicature Acts, to and will entertain, on the intervention of the representative of a foreign state, or by the consent of parties, a cause of possession or mortgage of a foreign ship belonging to such state, so far as to ascertain the true position of the claimants and the nature of their title, and will, where it is for the advantage of all parties, order a sale of the ship.

The See Reuter (1 Dods. 22) followed.

This was a cause of possession.

The *Evangelistria*, a Greek vessel, arrived at Falmouth in April, 1876, and whilst there the defendants, two brothers of the name of Piangos, who at that time had the control of the vessel, were by the authority of the Greek consul dismissed, and the plaintiff *Empirikos* substituted for them, on the ground that by the judgment of a Greek court at Syra the plaintiff was entitled to the possession of the vessel. The vessel sailed under the control of the plaintiff to Swansea, and whilst there the plaintiff was forcibly dispossessed, and the master appointed by him expelled from her by the defendants. Whilst at Swansea the vessel was arrested in a cause of necessities, in which cause the present plaintiff appeared under protest on the ground that the alleged necessities had been supplied in a foreign port, and that the court had no jurisdiction. Whilst the vessel was still under arrest in that suit the plaintiff commenced a cause of possession by issuing the writ with the indorsement on it set out in the 8th paragraph of the petition on protest given below. The plaintiffs in the necessities suit subsequently abandoned their suit, leaving the mortgage suit the only one existing against the ship.

The defendants appeared under protest, and on the 16th June 1876 delivered the following petition on protest to the jurisdiction of the court:

1. The plaintiffs and defendants are subjects of his Majesty the King of Greece, and are resident within the Kingdom of Greece.

2. The defendants are the owners of the ship or vessel

(a) Reported by F. W. RAIKES, Esq., Barrister-at-Law.

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THE EVANGELISTRIA.

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Evangelistria which is a Greek vessel belonging to the Port of Syra, in Greece.

3. On or about the 4th Oct. 1874, at Syra aforesaid, by a certain agreement or instrument of mortgage, which was made at Syra aforesaid, the said vessel was mortgaged by the defendants to the plaintiffs to secure repayment to the plaintiffs of the sum of 54,450 drachmas, together with interest at the rate specified in the said agreement.

4. The said sum, as will appear on reference to the said agreement, was advanced as to one-third thereof, for a period of two years from the date of the said agreement, and it was a further condition of the said agreement that in case of default of payment of either interest or principal, the said ship should be brought by the plaintiffs to Syra to be there sold or otherwise dealt with. No default has been made in payment of interest pursuant to the said agreement, and no part of the said principal sum is due and payable.

5. The *Evangelistria* lately arrived at the Port of Swansea, laden with a cargo of grain from Lagos, and is now lying at the said Port of Swansea.

6. On or about the 10th May 1876, the *Evangelistria* was arrested in a suit for necessities instituted in this honourable court by one John Petters.

7. The said necessities in respect of which the said suit was instituted were supplied to the *Evangelistria* at Syra aforesaid whilst the said ship was building there. On her completion she was registered as a Greek ship, and has since continued so registered. The present plaintiff appeared under protest, and has since filed a petition on protest praying the court to pronounce against its jurisdiction on the ground that the claim of the plaintiff in that suit is not a claim for necessities within the meaning of 3 & 4 Vict. c. 65, s. 6, or 24 Vict. c. 10, s. 5.

8. The present suit was commenced by writ dated the 17th May 1876, after the said ship had been arrested in the said suit for necessities. The endorsement on the said writ is in the words and figures following: "The plaintiff claims to be the sole owner or mortgagee of the ship *Evangelistria*, of the Port of Syra in Greece, and to be entitled to have possession of the said ship decreed to him or to have the said ship sold for the repayment of various sums of money now due and owing to the plaintiffs, and the plaintiffs claim 3500l."

9. This honourable court has no jurisdiction to entertain the said cause of necessities, and by reason thereof the said arrest of the *Evangelistria* is, under the circumstances stated in this petition, irregular and void, and the defendants submit that the said proceedings in the said cause of necessities being null and void, and by reason of the circumstances aforesaid, this honourable court has no jurisdiction to entertain this suit.

The petition then prayed the court to pronounce against its jurisdiction, and dismiss the suit with costs.

June 27.—*E. U. Clarkson*, on behalf of the plaintiffs, moved the court to reject the defendants' petition on protest.—The first question is, whether the arrest in the necessities suit was such an arrest as will enable the court to entertain the present suit of the mortgagee? The court has jurisdiction in a cause of mortgage in the case of a foreign ship only where the ship is under the arrest of the court or the proceeds of the sale of the ship are in the registry: (3 & 4 Vict. c. 65, sect. 3.) Now this vessel was at the time of the institution of this suit *bonâ fide* under the arrest of the court, within the words of that section, and such an arrest is, I submit, sufficient to sustain the jurisdiction; it is only where an arrest is collusive or fraudulent that it can be of no avail to found further jurisdiction. If the court once gets hold of the corpus of the ship, it cannot be ousted of its jurisdiction because some party before it has made a mistake as to his rights. Secondly, this is not a mere mortgage suit; it is a claim for possession by the plaintiff, who claims in the alternative as sole owner or mortgagee (see indorsement on

writ set out in 8th paragraph of the petition above); and over causes of possession the English Court of Admiralty has always exercised jurisdiction independently of statute.

Myburgh, for the defendants, in support of the protest.—It is clear that there is no jurisdiction over a claim for necessities supplied in a foreign port: (*The Anna* (L. Rep. 1 P. D. & Adm. 253; 34 L. T. Rep. N. S. 895; 3 Asp. Mar. Law Cas. 237.) Can it be that the plaintiff can object to the jurisdiction in the necessities suit and take advantage of that very suit to create jurisdiction on his own behalf? If there was no jurisdiction in that suit there was no power to arrest, and, consequently, there was no arrest in law. The indorsement on the writ clearly shows that the suit arises under a claim by a mortgagee, and over such claim the court has only jurisdiction in the case of foreign ships where the ship is under legal arrest.

Clarkson, in reply.—The defendant asks the court to introduce into the 3rd section of 3 & 4 Vict. c. 65, words to the effect that before the court can have jurisdiction over a cause of mortgage the ship must be under arrest in a cause in which the court has jurisdiction. By the words of the section, a *de facto* arrest is sufficient.

Sir R. PHILLIMORE.—There can be no doubt that the "arrest" contemplated by the 3rd section of 3 & 4 Vict. c. 65, is an arrest *de jure*, not a mere arrest *de facto*. The claim in the petition must be considered as that of a mortgagee, and hence I am of opinion, after hearing the arguments on both sides, and considering the statute, that the protest is admissible; and I must refuse the motion to reject it.

The petition on protest was accordingly admitted, and on the 17th July 1876, the plaintiffs delivered their answer, which, after admitting the truth of the 1st, and denying the truth of the 2nd paragraphs of the petition on protest, proceeded as follows:

3. By an agreement or deed of sale, dated the 21st Sept. 1874, and duly made at Syra, in the Kingdom of Greece, before a notary public, with all the formalities required by the law of Greece, and numbered 15,742, the defendants being owners of the *Evangelistria*, sold to the plaintiff the *Evangelistria*, and delivered to him the possession thereof for the price of 54,450 drachmas of government tariff (Greek), paid to them by the plaintiff.

4. The said agreement was valid and effectual according to the law of Greece to pass the property, ownership, and right of possession of the said ship to the plaintiff, in whom such property and ownership and right of possession have been ever since and are now vested.

5. Such sale to the plaintiff was duly registered on the 23rd Sept. 1874, at the Port of Syra aforesaid, by the proper authorities, and the plaintiff thereupon became, and has ever since been, and still is the sole registered owner of the said ship.

6. On the 4th Oct. 1874, an agreement, being the agreement mentioned in the 4th paragraph of the said petition, was entered into between the plaintiff and the defendants. Such an agreement was and is in the Greek language, and the following is a correct translation thereof:

It is this day agreed between the undersigned Constantine Empirikos of the one part, Gianuli N. Piangos and George N. Piangos of the other part, the following:

I. By an agreement made before the notary public, S. Bisti, dated the 22nd Sept. A.D. 1874, No. 15,742, Messrs. Gianuli N. Piangos and George N. Piangos, sold to Constantine Empirikos their ship called *Evangelistria* at the price of 54,450 drachmas, of government tariff.

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- II. Right of repurchase of ship is conferred on the brothers Piangos, such right to be exercised within a period of three years commencing from the date of the sale document No. 15,742, within which time they have the right to pay to Mr. C. Empirikos in full or by any instalments, the above amount, with interest at the rate of 20 per cent. per annum; they will also pay the sum of 5381 drachmas government tariff, with interest thereon, which according to the particulars given below in Clause III., Mr. Empirikos paid up to this day; and also any sum or sums which Mr. Empirikos may in future pay for accounts of Messrs. Piangos. After payment of all the above sums Messrs. Piangos will become the rightful owners of the ship.
- III. M. Empirikos has this day paid to the brothers Gianuli N. Piangos and George N. Piangos 5381 10 per cent. drachmas government tariff, and is a loan for the settlement of the accounts for the purchase of ship, building material, and for the necessary expenses for dispatching the ship. On the above sum interest at the rate of 20 per cent. per annum will be charged from this date.
- IV. The interest on the 54,450 drachmas, and 5381 10 per cent. drachmas must be paid down regularly every voyage, and at the port of discharge of the ship. At the end of the second year one-third of the whole sum at least must be repaid to Mr. Empirikos, and there must not be any default in the payment of interest, otherwise in case of the non regular payment of the interest, or in default of payment of one-third of the original sum at the end of two years, Mr. Empirikos has the right to sell the ship at public auction, hereafter giving notice to the Piangos brothers to be present at such auction. In such case Mr. Empirikos has the right of bidding for the ship at the auction.
- V. After the ship is sold, according to the above clause, out of the price fetched M. Empirikos will be repaid the sum of 59,831 drachmas 10 per cent. government tariff, and interest thereon, and expenses incurred, and whatever other sums he may have paid for account of Messrs. Piangos, and if after deducting the above there is any balance left, such balance remains for the benefit of the brothers Piangos.
- VI. The profits as well as the losses of the ship, for the period of three years, as well as all expenses, are for account of the brothers Piangos, whom they entirely concern, and who have a right to insure in their own name the sum of 15,000 drachmas on the value of the ship, but without any responsibility on the part of M. Empirikos for the payment of the insurance premiums thereon.
- VII. After the expiration of the last day of the three years the right of re-purchase on the part of the brothers Piangos ceases, and the ship remains the indisputable property of M. Empirikos, fixing the value equal to the sums mentioned in the sale document No. 15,742. In addition to this all sums belonging to M. Empirikos that the Piangos' have in their hands at the time will be added to the value of the ship.
- VIII. Captain of the ship for the period of three years will be one of the brothers Piangos, but M. Empirikos has the right to appoint a nautical superintendent on the ship, taking his meals with the captain. In case the captain is dismissed the brothers Piangos have the right of selling the ship through a court of law, and if the superintendent is dismissed M. Empirikos has the right of the sale of the ship. The expenses of the keeping of the superintendent are borne by the Piangos brothers.
- Two similar documents were made and signed by the contracting parties.
Syra, 4th Oct. 1874.

Signed { CONSTANTINE EMPIRIKOS.
 { GIANULI N. PIANGOS.
 { GEORGE N. PIANGOS.

Copied by Constantine Empirikos.

7. In pursuance of the said agreement the *Evangelistria* proceeded upon several voyages in charge of and under the command of the defendants, or of one or other of them.

8. Before the *Evangelistria* could leave the Kingdom of Greece to proceed on such voyages the plaintiff was compelled by the law of Greece to give, and he did before she left the Kingdom of Greece give, with the knowledge of the defendants, a bond to the proper authorities in two-thirds of the value of the *Evangelistria* conditional for the return of the *Evangelistria* to the Kingdom of Greece within the period of two years from the date of her so leaving Greece. The said period of two years will expire in the month of September now next ensuing.

9. The plaintiff denies the allegations contained in the 4th paragraph of the said petition, and says that the sum of 54,450 drachmas and 5381, 10 per cent. drachmas are still owing to the plaintiffs, and the defendants have made default in the payments of interest due under the terms of the said agreement of the 4th Oct. 1874, and that large sums of money are now due and owing to the plaintiff from the defendants in respect of such interest.

10. On or about the 15th Oct. 1875 the plaintiff instituted a suit in the Commercial Division of the Court of First Instance at Syra aforesaid, being a court of competent jurisdiction in that behalf, against the defendants, and prayed the said court by reason of such default as aforesaid, and upon other grounds, to order that the defendants or such one of them as was acting as master of the *Evangelistria* should be substituted by a man of his (the plaintiff's) confidence, and that the said ship should be brought to Syra, and that a provisory execution of the decision should be ordered as well as the personal arrest of the defendants, and that the defendants should pay the costs.

11. The defendants were duly summoned to appear in the said suit in accordance with the law of Greece, but failed to appear therein.

12. On the 22nd April, 1876, the said suit was heard before the said court, and the said court delivered judgment therein, and ordered expulsion of the defendants from the said ship, and that they should be substituted by a captain enjoying the plaintiff's confidence, and ordered the personal arrest of the defendants, and condemned them in costs, and requested the proper officers to execute or assist in executing the said judgment.

13. By order of such judgment the Greek consular authorities in this country, being the proper authorities in that behalf, dismissed the defendants from the said ship on her arrival at Falmouth on or about the 28th April 1876, and put on board her a person appointed by the plaintiff and enjoying his confidence, and put her into the possession of such person on behalf of the plaintiff, and such person took the said ship from Falmouth to Swansea to discharge her cargo.

14. On the arrival of the said ship at Swansea, the defendants, against the will of the plaintiff and of the said consular authorities, forcibly ejected the said master so appointed by the plaintiff from the said ship, and forcibly took possession of her, and they remained in possession of her against the will of the plaintiff and of the said consular authorities.

15. By the law of Greece all persons in charge of any Greek vessel entering a foreign port are required to deposit all the ship's papers with the Greek consular officer at such port. On the arrival of the said ship at Swansea, the Vice-Consul of Greece at that port, being such consular officer as aforesaid, applied to the defendants, and required them to deposit such papers with him. Such papers include the libretto or certificate of registry showing the ownership of the said ship. The defendants have refused and still refuse so to deposit such papers, and the plaintiff is unable to obtain possession of the said papers, including the said libretto, although such libretto shows the plaintiff to be sole owner of the said ship.

16. The plaintiff admits the truth of the allegations contained in the 6th and 7th paragraphs of the said petition.

17. The defendants have threatened and intend, unless prevented by the court, to take the *Evangelistria* to South Africa, or to some other foreign port or place not being a Greek port or place, and to deprive the plaintiff of the power of taking the *Evangelistria* to Greece within the time allowed by the said bond, and of the power of selling the *Evangelistria* at Syra, under the said agreement of the 4th of Oct. 1874, and they ref. to give up possession of the said ship to the plaintiff, and the plaintiff

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cannot obtain possession of the said ship or of the papers, without the assistance of this honourable court.

The answer then prayed the court to pronounce for its jurisdiction, and to overrule the petition on protest, and to condemn the defendants in costs. On the 2nd Aug. the defendants replied by a simple denial of the answer and joinder of issue, and on 8th Aug. the question of jurisdiction came on for argument. The judgment of the Greek Court, with the document (an ordinary bill of sale) referred to in the 3rd paragraph of the answer, attached to it, and also the document set out in the 4th paragraph of the answer, were put in in evidence, and the Greek Consul-General deposed that on the instructions of his government he was desirous that the court should if possible exercise jurisdiction.

Aug. 8.—*Benjamin, Q. C. and W. G. F. Phillimore*, for the defendants, in support of the petition.—The question is not one of ownership or possession, but of mortgage; the payment of interest is inconsistent with ownership. The court has no jurisdiction to entertain a question of mortgage except by statute. 3 & 4 Vict. c. 65, ss. 3, 4, applies only to British ships, and to them only when under arrest; even if it could apply to a foreign vessel at all, it can plainly only do so when the vessel is under arrest, and this vessel cannot be considered to have been under arrest, as the arrest was not a lawful one, and consequently a mere nullity. 24 Vict. c. 10, ss. 8, 11, applies expressly only to British registered ships, and mortgages registered under the Merchant Shipping Acts, and therefore cannot include the case of a foreign ship and foreign mortgage: (*The Innisfallen*, L. Rep. 1 Ad. 72; 16 L. T. Rep. N. S. 71.) The judgment of the Greek court at Syra was given on an obviously defective knowledge of the facts. Only one document is annexed to it, and referred to in it, and that is a document apparently of sale, but the subsequent document which plainly shows the nature of the transaction to be a mortgage, was not shown to the court and is not referred to in the judgment. Besides, the judgment was obtained without any notice being given to the present defendant on protest, and in his absence: (*The Highlander*, 2 W. Rob. 109.) In a matter of co-ownership the court might in virtue of its original jurisdiction entertain a cause by request of the parties or of their government (*The See Reuter*, 1 Dods. 22), but not in a case of mortgage where the authority given by the statute is limited by the statute to British vessels and mortgages under the Merchant Shipping Act. Even if the court could obtain jurisdiction the question must be decided by English law, as it is here a question of procedure and is governed by the *lex fori*. The court must dismiss the suit and allow us to take the ship and pay the mortgagees their interest. A mortgage is unknown to the law maritime, and if the Court of Admiralty had no jurisdiction in this cause, the Judicature Acts have made no difference, for the High Court of Justice has only acquired the same jurisdiction *in rem* as the Court of Admiralty had, and this is a suit *in rem*. They also referred to

Clarkson, for plaintiffs.—Relief *in rem* may be obtained now in any division of the High Court (Supreme Court of Judicature Act 1873, sect. 4, sub-sects. 6, 7), it is only a question of procedure, and each division and every judge has all the powers of any court (Supreme Court of Judicature Act 1873, sect. 39), and, therefore, the court has jurisdiction to entertain the suit, whether *in rem* or *in personam*. Here the writ was *in personam*, but the warrant *in rem* was only a subsequent matter of procedure in the cause. The Greek judgment must be taken to be a good judgment. The absence of the defendant may be immaterial, as it frequently is in the practice of this and the divorce divisions of the High Court, and even supposing this to be a mortgage, the plaintiffs were mortgagees in possession both *de facto* and *de jure* until they were unlawfully ousted by the defendants, and, therefore, this is a suit of possession, and exactly similar to *The See Reuter* (1 Dods. 22).

Phillimore, in reply.

Sir R. PHILLIMORE.—This case has been very carefully and elaborately argued, and it raises a question by no means free from difficulty; but at the same time a careful examination of the matter results in this, that the only question is, whether the court has jurisdiction to examine into the claims of the respective parties or not. It is not a question whether the law of Greece is in favour of one party or the other, but whether, under the circumstances—and they are very peculiar—the court ought to decline jurisdiction to inquire into the matter at all. The contest is between two foreigners, each claiming possession of the vessel, one contending that he was the original possessor and that he has never parted with the property in the ship by sale or otherwise; the other, that the former had parted with the property in the ship, and that the right of possession had passed to him. One of the pieces of evidence which has been submitted to the court, and which has been gravely discussed, is the judgment of the Greek Court of First Instance at Syra, where the court pronounced in favour of the ownership of one of the defendants upon the question of the expulsion of one captain and the substitution of another. Against the judgment many objections have been taken, but it has been enforced by the Consul-General of Greece in this country so far as, in his opinion, it was competent for him to do so, and he has expressed his desire that the court should, if possible, exercise jurisdiction in the matter. It has been contended that this court had no original jurisdiction in questions of mortgage, and many authorities have been cited to establish that proposition, and to show that previously to the statute giving a limited authority over mortgages, the Court of Admiralty had no jurisdiction over mortgages even of British vessels, and that if they had none by English law, still less had they any in a case of foreign law. The question, upon the authorities cited, appears to be still an undecided one. But here the question is whether the plaintiff is not to all intents and purposes the owner of the vessel. The defendants have assumed by their protest, to maintain the position that the court is not competent to entertain a suit of this description. Now this court has always been in the habit of entertaining suits between foreigners in matters of Admiralty law and jurisprudence. In *The See Reuter* (1 Dods. 22), Lord Stowell said:

The Cathcart, L. Rep. 1 Ad. & Ecc. 314; 16 L. T. Rep. N. S. 211;

The Neptune, 3 Hag. 132;

Simpson v. Fogo, 8 L. T. Rep. N. S. 61; 1 Mar. Law Cas. O. S. 312.

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"The court has never entertained suits of this kind"—i.e., causes of possession between foreigners—"unless the cases had been referred to its decision by the consent of parties, or by the intervention of the representative of the foreign state devolving the jurisdiction of his own country on the court." He then proceeds to consider whether the authority in the case before him could be considered equivalent to the consent of an accredited agent of the state, and he said: "Here is a judicial order or decree by the burgomasters and councillors of the city of Rostock in senate assembled, and in whom the admiralty jurisdiction of that city is said to be vested, directing the master to deliver up possession of the ship to Mr. Martens. This document, officially subscribed by the prothonotary of Rostock, is given under the seal of that city, and its authenticity is not denied on the part of the master. I am of opinion that this instrument arms the court with sufficient authority." What are the facts here? That there is *prima facie* a judgment of a competent Greek court in a matter where two Greeks are concerned, pronouncing in favour of the plaintiff's right to this vessel, that that judgment, whatever its faults may be, has been acted upon by the Consul-General in this country, and that he has expressly said that he wishes this court to exercise jurisdiction. Now, without entering into the argument based on sect. 39 of the Supreme Court of Judicature Act 1873, and on the intention of the Legislature that every court should exercise the jurisdiction of any court in matters that come properly before it, which appears to deserve considerable attention whenever it becomes necessary to decide the point, I think, for the reasons I have stated, that I ought not to decline to exercise jurisdiction in this case so far as I am asked to do—that is, to inquire into the question between these two parties. The real owner is entitled to possession of the ship, and it may turn out that the parties in this case are neither of them mortgagees, or that the plaintiff in this case is not the owner. All that I am about to pronounce is that I will exercise jurisdiction so far as to inquire into the position of the respective parties, and no further. I pronounce for my jurisdiction, and order the ship to be sold, the money to be brought into court, and put out at the usual interest, both parties to be entitled to bid at the sale, and all questions of costs to be reserved.

Solicitors for the plaintiff, *Pritchard and Sons*.
Solicitor for the defendants, *Toller*.

House of Lords.

June 23 and 26.

(Before Lords CHELMSFORD, HATHERLEY, and O'HAGAN.)

MISA v. CURRIE AND OTHERS (a).

Banker's lien—Cheque—Consideration—Post-dated draft—Stamp Act.

A banker's lien upon all securities deposited with him by a customer, and received by him bond fide, is not affected by any equities which may exist between that customer and a third party.

The appellant purchased from L. drafts on Cadiz.

The day before the purchase-money was payable, L. deposited with the respondents, his bankers, to whom he was largely indebted, a document dated the following day, requesting the appellant to pay the purchase-money to the respondents. The next day the appellant paid the amount by cheque, but on the same day L. stopped payment, and the appellant refused to pay the cheque. The drafts were subsequently dishonoured. In an action on the cheque,

Held (1) That there was a good consideration between L. and the appellant at the time the cheque was given, which could not be affected by subsequent events. (2) That the surrender by the respondents of the document deposited with them amounted in law to a good consideration for the cheque. (3) That the document was not a draft payable at a future time within the meaning of the Stamp Act, and that therefore the respondents were entitled to recover.

Judgment of the court below affirmed.

This was an appeal from the decision of the Court of Exchequer chamber, reported in L. Rep. 10 Ex. 153, affirming a judgment of the Court of Exchequer in an action brought by the respondents against the appellant.

The facts of the case were as follow: A firm of Lizardi and Co., who were merchants in London, and carried on an extensive business with Spain and the Continent, had been customers of Messrs. Glyn, Mills, & Co., bankers, with whom they had two accounts, a drawing account, and a loan account. In the year 1873, Lizardi and Co. were largely indebted to Glyn and Co. on both accounts. Misa was a wine merchant carrying on business in London, and at Xeres, near Cadiz, in Spain. In the beginning of February 1873, Misa instructed his agent in London to purchase from Lizardi drafts on Cadiz to the value of about 2000*l*. Accordingly on Tuesday, Feb. 11, a contract was effected between Lizardi and Misa for the sale and delivery by Lizardi to Misa of four drafts to the amount of 2000*l*, at fifteen days' date; and the same evening Lizardi left at Misa's office four drafts upon Manuel Paul, of Cadiz, at fifteen days' date, the total amount in English money being 1999*l* 3*s*. These drafts were forwarded the same evening to Misa at Xeres. The custom in the purchase of drafts and bills on foreign countries is that they are to be paid for on the post day next after the contract. The post days being Tuesdays and Fridays, the purchase-money for the four drafts became payable in the usual course of business on Friday, Feb. 14. Glyn and Co. had for some time previous to Feb. 13 been pressing Lizardi to reduce the amount of his debt to them, and on that day he paid in to the credit of his drawing account the sum of 692*l* 5*s*, and in the afternoon handed to Mr. Currie, one of the partners in Glyn and Co.'s bank, a document impressed with a penny stamp, and in these words:

London, Feb. 14, 1873.

M. Misa, Esq., 41, Crutched Friars.

Please to pay to Messrs. Mills, Glyn and Co., or bearer, the sum of nineteen hundred and ninety-nine pounds three shillings, for bills remitted to you last post.

£1999 8*s*.

F. DE LIZARDI AND Co.

In the afternoon of Feb. 14, Glyn and Co. sent this document to Misa's office to inquire whether it would be paid. Pritchett, Misa's manager, answered that it would be paid, and was indignant at the question being asked. An hour afterwards he

a) Reported by G. H. MALDEN, Esq., Barrister-at-Law.

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sent a cheque for the amount to Glyn and Co., and received from them the document handed to them by Lizardi. Soon after sending the cheque, Pritchett was informed that Lizardi had stopped payment, and he thereupon instructed Messrs. Barnett, Hoare, and Co., upon whom the cheque was drawn, not to pay it, and upon being presented by Glyn and Co., it was accordingly refused payment. Lizardi shortly afterwards absconded, and was adjudicated a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets to very little indeed.

The four bills upon Paul to the order of Misa were indorsed by him. They became due on Feb. 27, and upon being presented to the drawer on that day were dishonoured. This action was then brought by Glyn, Mills, Currie and Co. against Misa upon the cheque for 1999*l.* 3*s.*

The cause was tried at the Sittings in London after Michaelmas Term 1873, before Kelly, C.B., who directed a verdict for the plaintiffs, leave being reserved for the defendant to move for a rule to show cause why the verdict should not be set aside, and a verdict entered for the defendant, or a nonsuit.

In Hilary Term 1874, the Court of Exchequer (Kelly, C.B., Pigott, and Cleasby, BB.) refused the rule, and their decision was affirmed by the Court of Exchequer Chamber (Keating, Lush, and Archibald, JJ., Lord Coleridge, C.J., dissenting).

From this judgment the present appeal was brought.

Watkin Williams, Q.C. and *Wood Hill* (Cohen, Q.C., with them) appeared for the appellant.

J. Brown, Q.C. and *Murray*, for the respondents.

The arguments appear sufficiently from the judgments of their Lordships.

LORD CHALMERSFORD.—My Lords, the question upon this appeal is, whether the respondents are entitled to recover from the appellant the amount of a cheque for 1999*l.* 3*s.*, drawn by him on his bankers, Messrs. Barnett, Hoare, and Co., in favour of Lizardi and Co., or bearer. The following are the material facts of the case: [His Lordship went through the facts, as set out above, and continued.] Upon these facts the Court of Exchequer held that Glyn and Co. were entitled to recover, and upon appeal the Judges in the Exchequer Chamber, with the exception of Lord Coleridge, C.J., agreed in that judgment. Upon the argument at your Lordships' bar, the appellant contended, first, that there was a failure of consideration between Lizardi and Misa; secondly, that Messrs. Glyn and Co. were not holders for value of the cheque sued on, but were merely collecting the money for Lizardi as his bankers. In support of the first proposition, it was argued that the true character of the contract between Lizardi and Misa was, that Lizardi should transmit a sum of 2000*l.* to Cadiz for Misa, and that Misa would pay Lizardi 1999*l.* 3*s.* fifteen days thence; that Lizardi not having sent the money, there was a total failure of consideration for Misa's cheque. It appears to me that this is an entire misapprehension of the contract, which was nothing else but a purchase of bills by Misa from Lizardi. The statement in the special case is, that Misa's agent effected a contract between Lizardi and Misa for the sale and delivery by Lizardi to Misa of drafts to the amount of about 2000*l.* sterling, at an agreed rate of ex-

change from London to Cadiz, to be at fifteen days' date. All these conditions were punctually complied with, and Misa received precisely what he bargained for, and there is nothing to show whether he continued to hold the bills or passed them to other parties. It was, however, alleged that the whole transaction was a fraud on the part of Lizardi from the beginning, and that when he drew the bills he knew that he had no effects in Paul's hands, and, therefore, that the bills would not be paid. Unless such original fraud on the part of Lizardi can be proved, the contract is binding. But there is no proof that Lizardi knew when he drew upon Paul that the bills could not be paid. In Paul's protest he does not say that he has no effects of Lizardi's in his hands, but that he has no realised effects. And it is not unlikely that the other reason assigned in the protest, viz., its being well known that Lizardi had suspended payment, induced Paul to refuse to pay the bills. Suppose Lizardi had applied to Misa for payment of the bills on the 14th Feb., and Misa had refused payment, I entertain no doubt that Lizardi might have sued him upon the contract, Misa's only remedy against Lizardi being upon the bills, which, supposing they had then been refused payment, he might have been able to make available by way of set-off against Lizardi's claim. I have no doubt that as between Misa and Lizardi there was a sufficient consideration for the cheque upon which the action is brought. It was conceded that if your Lordships are of that opinion it disposes of the entire case. But the Court of Exchequer Chamber decided in favour of the plaintiffs on a totally different ground. Lush, J., in delivering the judgment of that court, said (L. Rep. 10 Ex. 160), "We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question, therefore, is whether under the circumstances stated the plaintiffs are to be considered the holders of the cheque for value." And Lord Coleridge, C.J., expressed an opinion that they were not. The learned counsel for the appellant argued that Glyn and Co. were not holders of the cheque for value, because the document handed to them by Lizardi on Feb. 13th, dated the 14th, upon the delivery up of which the cheque was given, was either a void instrument under the Stamp Act, or was a mere order to Glyn and Co. to collect the money for Lizardi. The ground upon which it is alleged that the instrument was void is that under the existing Stamp Act (33 & 34 Vict. c. 97), bills and drafts payable on demand are liable only to one penny duty, but a higher duty is imposed on bills payable any time after date, and that this bill, given on Feb. 13th, payable on the 14th, was in fact payable at a future day, and therefore ought to have been impressed with the higher stamp. I am at a loss to see how the instrument in question, whether bill or draft, can be regarded as having been post dated. There was not the slightest object by post dating the instrument to secure any advantage of any kind to either party, but Lizardi being entitled to receive from Misa the sum of 1999*l.* 3*s.* on 14th Feb., and not before, having been pressed by Glyn and Co. for the reduction of his debt, and having in consequence

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of the pressure on the 13th paid to them certain cheques, gave them on the same day in addition this draft upon Misa, which he dated on the following day, being the earliest time at which it could be available. How can it be possibly said that this draft or order so given is not properly stamped? It may be said to be constructively a transaction of the following day. Supposing Misa could have impeached the document on this objection to the stamp, which is by no means clear, he never did so, but through his agents said it would be paid. There being, therefore, no objection made to its validity, the delivering it up to Misa constituted a sufficient consideration from Glyn and Co. for the cheque which they received in exchange for it. It was further argued that Glyn and Co. did not receive the order upon Misa for themselves, but merely to enable them to collect the amount of it for Lizardi, and therefore their parting with it for the cheque was no consideration moving from them. The answer to this argument lies in the statement in the special case that Lizardi, being largely indebted to Glyn and Co., and they having been for many days previously to 13th Feb. "urgently pressing him to reduce the amount of his indebtedness," he on 13th Feb gave them, with other cheques to the amount of 6925*l.* 5*s.* 8*d.*, this order on Misa, evidently to be applied in reduction of his debt. But supposing it was merely paid in by Lizardi to Glyn and Co., they would have had a lien upon it, and if it was available against Misa, the giving it up for the cheque was the parting by Glyn and Co. with a security which was valuable to them. The case in the Exchequer Chamber turned entirely upon the question whether the pre-existing debt from Lizardi to Glyn and Co. formed a sufficient consideration for the cheque on which the action was brought, Lord Coleridge, C. J., differing from the rest of the judges, being of opinion that it did not. It is unnecessary to enter into this question. The court decided the case upon the assumption that Lizardi's order was worthless, and that therefore the giving it up by Glyn and Co. could form no consideration for the cheque they received in exchange. This being removed out of the way, the pre-existing debt was the only consideration which could be a foundation for their claim. I have already expressed my opinion that Misa would have had no defence to an action brought by Lizardi upon the draft or order upon him, and that draft or order having been given by Lizardi to Glyn and Co. towards payment of his debt to them, the giving up that document was undoubtedly a detriment to Glyn and Co., which amounted in law to a sufficient consideration, moving from them for the cheque which was substituted for it. As already mentioned, it was admitted by the learned counsel for the appellant that if your Lordships were of opinion that there was consideration between Lizardi and Misa, it disposed of the whole case. I submit to your Lordships, therefore, that the judgment of the Court of Exchequer Chamber should be affirmed.

LORD HATHERLEY.—My Lords, I agree in the opinion which has been pronounced by my noble and learned friend. The case, although it has required considerable time for its full discussion, is reduced to really very short heads of argument. The first question which arises for consideration is, what was the position of Misa with reference

to Lizardi on Feb. 14, the day on which he gave his cheque to Glyn and Co., under the circumstances to be afterwards mentioned? Now, as regards Lizardi, Misa was in this position. He had bought of him bills upon Cadiz, for which he had engaged to pay 1999*l.* 3*s.* The terms of the contract were that Lizardi, having procured and handed to Misa bills payable at Cadiz for a certain amount (it was not the same amount, but an amount for which the sum of 1999*l.* 3*s.* was to be paid in cash), Misa would immediately, on or before the next post day, which I think was the 14th Feb., pay to him the sum of 1999*l.* 3*s.*, although the bills themselves would not be payable until, I think, eleven days afterwards, namely, the 25th Feb. On the 14th Feb., therefore, Lizardi was in a position to demand payment from Misa of the sum I have mentioned—1999*l.* 3*s.* We have no evidence before us of the condition of things at that time with regard to Lizardi's solvency or insolvency. All that appears is that Messrs. Glyn, to whom he was largely indebted, but to whom he had also given very large securities in appearance, though they were not all genuine or valuable, had their doubts or misgivings about his solvency, and were pressing him for payment. But the bills, having been procured, as I have said, had gone out to Cadiz, and had reached their destination. They had not been presented for payment at that time, because they were not to be due until the 25th Feb., but they were in the hands of Misa abroad, ready to be used according to the bargain he had entered into with Lizardi. That being the position of things between Misa and Lizardi, I cannot have any doubt whatever that at that time there was a full consideration between them. The subsequent events which made that consideration fail cannot be taken into account in estimating their position at that time, and the position of Lizardi towards a third person who would be ignorant of the duty that he owed to Misa, the defendant, and the possibility of Misa being in consequence of failure in that duty on his part entitled to say that as between him and Lizardi in the subsequent events which happened the consideration had failed. This being their position, we find on the one hand that as between Messrs. Glyn and Co., the plaintiffs, and Lizardi, Messrs. Glyn and Co. were so far in doubt as to his solvency at this date that they had begun to press him before the 12th Feb., through the medium of one of their partners, Mr. Currie, with reference to payment. Lizardi assured Mr. Currie that he was mistaken in his suspicions, and handed him a list of the securities deposited with the plaintiffs. Mr. Currie still not being satisfied with what Lizardi had said, continued to press him to reduce his debt. On 13th Feb. Lizardi, under this pressure, paid in to the credit of his drawing account at Messrs. Glyn's two cheques, making together 6925*l.*, and on that same day, the 13th, he handed this document, on which so much argument has taken place, to Mr. Currie. The document is partly written and partly printed, but the only observation which arises upon that is that the fact of some words being printed shows that the particular form of the transaction was not an uncommon one as between parties dealing in matters of this character. The only explanation we have of it is that we are told that Mr. Currie deposed at the trial that it was usual for Lizardi to

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sell bills on the Exchange, and then to draw an order like the present on the purchaser of the bills, and that that is the usual course of business when bills are sold. It was also deposed by Mr. Currie that such orders are sometimes accepted by writing "accepted" across them, that is by the person on whom they are drawn writing his name across the paper making it payable at his bankers. A good deal of argument has arisen as to whether this document is to be treated as a bill of exchange, or whether it is to be treated simply as an authority authorising Messrs. Glyn and Co. to collect this debt due to Lizardi from Misa. Now, if I be right in the conclusion I have come to that at this time there was a good debt constituted between Lizardi and Misa, and that Lizardi was then in a position to have demanded payment, it does not, I apprehend, become very material what the exact character of this document was. Supposing it to be necessary to hold it to be an authority, I do not see, regard being had to the lien which bankers have upon all documents which are placed in their hands by customers who are indebted to them in the course of their banking transactions, that it would make any very important difference whether it were held to be an authority or a bill of exchange, but agree with my noble and learned friend, that looking at the whole character of the transaction, we should err in holding this to be a post-dated instrument, that is to say, post-dated in such a manner as to defraud the revenue. It was an instrument payable after date. It was not payable on demand because it was delivered on 13th Feb., and it was not payable until the 14th. Not being payable on demand it was liable to a higher duty, it is said, than a penny stamp. I apprehend that it would be mistaking altogether the character of the instrument so to hold, because it appears that the whole character and nature of the transaction was known to Messrs. Glyn and Co., and they would therefore be perfectly well aware that this money could not be received either by them or by Lizardi or anyone else until 14th Feb., which was the day when, according to the contract with Misa, the money was payable, and on no earlier day whatever. All that can be said about the transaction is this: Lizardi, being hard pressed by Messrs. Glyn for securities, represents to them that he has a debt of 1999*l.* 3*s.* due to him from Misa, and he says I will do this in order that you may be quite safe: this debt is not payable until the 14th, and I cannot give you any right to receive it until that day, because it is not due till then; you know that as well I do, but in order to give you all possible security I will leave this document at your bank, so that when the money becomes due you may be in a position to go and demand payment of it. I apprehend that that is much more the character of the transaction than holding it to be a mere authority for the collection of the money. If it were necessary so to hold I should be prepared to hold that Messrs. Glyn had a right of lien, holding this document in their hands, until the time came when they would call on Misa to make the payment under Lizardi's contract. It was a document which they might hand over to Misa to have the words "accepted, &c.," written across it, or to have the payment made, according as they were disposed to do. In fact Messrs. Glyn took the course of going to Misa on the day it was dated, and asking him if it would be paid. Misa's agent, Pritchett, said

with some indignation that it would certainly be paid, and tendered then and there his cheque for the payment. That having been done, it seems to me to be of very little importance, as I said before, in what capacity this document was given. Pritchett recognised that on that day there was this debt due to Lizardi of 1999*l.* 3*s.* He saw that it was directed by Lizardi to be paid to Glyn's, instead of being paid to himself, and when the instrument was presented to him for Misa he said, It shall be paid, we are ready at this moment to give you a cheque for it; and if he had done so, I suppose no question could have arisen in this matter, which has caused so much litigation since then. But Messrs. Glyn's clerk declined to give up the document for the cheque, and very properly, because he had no authority so to do. He thereupon returned to the bank with the document, and in the course of the afternoon Misa's agent sent a cheque for 1999*l.* 3*s.* to the bank, and Glyn's were content to deliver up the document in exchange for the cheque, and so they became possessed of that cheque, and Pritchett, on behalf of Misa, obtained possession of the document signed by Lizardi. It appears to me, therefore, that as between Glyn's and Misa the court below were right in saying that there was a document of value to Glyn's which had been deposited with them on the 13th to be put in force in the mode in which alone it could be put in force on the 14th, and that the cheque was given in consideration of the delivery up of the said document. As I have said, if it were necessary I should be prepared to hold that in this case, according to the decision in the case of *Brandao v. Barnett* (6 M. & G. 680; 12 Cl. & F. 787), that the custom of bankers is now perfectly well established, and must be known to every mercantile person in the City of London, Misa, like others, is bound by his knowledge of that custom. Of course he must have been perfectly well aware that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker are subject on the banker's part to a lien in respect of any balance that may be due to him from his customer. When Misa's agent paid in this cheque due to Lizardi, he was aware that it was going into Glyn's bank; the very document he got in exchange for it informed him of that fact. In truth, Lizardi, being at that time in a position in which he himself could have demanded the money, executes this negotiable instrument with every intent, as Misa knew, of paying it into his bankers, and giving the bankers that lien upon it which the case I have referred to decided that they had upon all documents which came into their hands. I will advert to the ground upon which Lord Coleridge, C.J., rested his opinion. That opinion, of course, makes one pause in coming so confidently to a conclusion as one otherwise might have done, still I cannot say that I have any doubt in my own mind as to the correctness of the conclusion to which I have come. The case of *De la Charrette v. The Bank of England* (9 B. & C. 208) does not seem to me to have any bearing upon this case. There is no evidence that any question was there raised as to any right of lien as between the parties who were acting, the one as principal, and the other as agent. It appeared from the circumstances of that case that the party suing was suing simply as an agent of a person who was bound to show that he had given good and

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valuable consideration and although something is said in the case of its being simply a debt due, and nothing more, there is nothing said about there being a right of lien which authorised him to say, Whatever comes into my hands I am entitled to hold as against you in respect of a balance that is due to me. I think in the present case the circumstance of that lien is quite sufficient of itself, without any proof of additional acts, either done or forborne to be done on the part of Messrs. Glyn. On the other hand, looking fairly through the evidence in the case, and looking especially at the pressure which was being put by Glyn upon Lizardi for payment, I am not prepared to say that there was not a forbearing in respect of the delivery of the first instrument, because if that instrument had not been put into their safe custody on the 13th, they might have been then in the position to pursue their suspicions to the full result, to have analysed that list of securities as to which Mr. Currie had already expressed his misgivings, and to have taken proceedings upon the 13th to bring Lizardi to that state of avowed and open bankruptcy that he was afterwards obliged to confess himself to be in. They did nothing on the 13th, and I think that alone would be a sufficient forbearance. On the whole case I hold that Lizardi was in a condition to demand that payment, that that payment was made to him by a negotiable instrument, on the footing of the acknowledgment of a previous instrument which had been drawn for the recognition on Misa's part of his debt, and that he was entitled so to deposit that instrument with his bankers, as to entitle them to sue in their own names for payment of that instrument, which they have done, without being affected with any of the consequences which might subsequently occur on Feb. 25, from the dishonouring of the bills, and the failure of consideration. It appears to me that it would be a very serious thing indeed in its effect upon the numerous transactions carried on by means of cheques in the City of London if we were to hold that any bankers holding those enormous drafts which are drawn daily, and which we read of in the accounts of the transactions of the Clearing House, are to be exposed to an inquiry as to what equities may subsist between any one of their customers, upon all of whose documents delivered to them they have supposed themselves to have a lien, and third persons, so that they might find themselves affected with equities with regard to that customer, and consequently be unable to give that credit which their right of lien at present enables them to give, and thereby contributes so much to carrying forward the vast trade of this metropolis.

Lord O'HAGAN concurred.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Daves, Sons, and Bolph.*

Solicitors for the respondents, *Murray, Hutchins, and Co.*

Judicial Committee of the Privy Council.

Thursday, March 30.

(Present, the Rt. Hons. Sir J. W. COLVILLE, Sir R. J. PHILLIMORE, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

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Collision—Practice—Vice-Admiralty Courts—Preliminary Acts—Examination of witnesses—Rule of the road—Regulations for preventing collisions at Sea, Arts. 15, 16, 18.

The form of preliminary Acts now in use in the High Court of Justice in collision cases should be used in similar cases in the Vice-Admiralty Courts.

In collision causes in the Vice-Admiralty Courts witnesses should, as far as possible, be examined vivâ voce before the court, not upon written interrogatories before an officer of the court prior to the hearing.

A sailing vessel, meeting a steamer, is bound to keep her course, and it is not the rule of the road that she should port her helm on nearing the steamer, such a deviation from the rules being allowed only under circumstances of immediate danger.

THIS was an appeal from the decision of the Judge of the Vice-Admiralty Court of Canada, in a suit brought by the respondents against the appellant for damages sustained by them by reason of a collision between the *James Seed*, carrying a cargo of copper, of which the respondents were owners, with the *Norma*, of which the appellant is owner.

The collision in question occurred in the river St. Lawrence, between Bic and Quebec, and between 10 and 11 p.m. of the 11th Aug. 1874. The wind was S.W. or S.W. by W., a moderate breeze; the night was clear, and the tide was ebb. The *James Seed*, a three-masted schooner, of 156 tons, with a crew of eight hands and a pilot, was going down, and the *Norma*, a steamship, of 653 tons, with a crew of twenty hands and a pilot, was going up the river. Both vessels had their proper regulation lights. The parts of the two vessels which first came in collision were the port-bow of the *James Seed* and some part of the starboard-bow of the *Norma*. The *James Seed* sunk almost immediately, with the loss of five lives.

On these points both parties were agreed.

The remaining facts of the case as stated in the preliminary Act and libel filed on behalf of the respondents, were substantially as follows:

The *James Seed*, making about four knots an hour, was heading N.E. by E., when the bright and red lights of the *Norma* were observed from two to three miles off, about a point on the starboard-bow. The helm of the *James Seed* was put to port, and the lights were brought on the port-bow. The *James Seed* then steadied her helm and kept her course. After some time, the green light of *Norma* came in sight. Those on board the *James Seed* then hailed the *Norma* (which was then coming directly upon them), to port her helm, and put their own helm hard-a-port. The *Norma*, however, starboarded her helm, and without stopping or reversing her engines, came

(a) Reported by J. P. ASPINALL and F. W. RAINES, Esqrs., Barristers-at-Law.

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into collision with the *James Seed*, with such violence, as to do the damage already mentioned.

The case of the *Norma*, as stated in the responsive allegation, filed on behalf of the appellants, was as follows.

5. That at about half-past 10 o'clock at night, of the said 11th Aug., the *Norma*, then going at the rate of about seven knots per hour, and being a few miles from Bio, the look out man reported a light about two miles off, a little on the port bow, which was first supposed to be a white light, but which subsequently proved to be a green light of a vessel coming down the river, which said vessel was subsequently ascertained to be the *James Seed*.

7. That, immediately upon the said light being reported, the said pilot, Joseph Lavoie, perceiving the vessel coming down the river to be a sailing vessel, gave the order to put the helm hard-a-starboard, which order was obeyed, and the green light of the *James Seed*, was thereby brought about a point on the starboard-bow of the *Norma*, the *Norma*, as a steam vessel, giving way to the *James Seed*.

8. That the green light of the *James Seed* remained visible to the people of the *Norma* until a few minutes before the collision, when suddenly the *James Seed* put her helm hard-a-port, bringing herself right across the bows of the *Norma*, and disclosing her red light.

9. That the people on board of the *Norma* shouted to those on board of the *James Seed* to put her helm a-starboard, but the *James Seed* continued to pay off to starboard, keeping her helm hard-a-port.

10. That thereby a collision was rendered inevitable, the *Norma* striking the *James Seed* in her fore-rigging, the *James Seed* sinking immediately, and carrying with her the starboard anchor and sixty fathoms of chain of the *Norma*, and making an immense hole in the forward compartment of the *Norma*, which for some time threatened the safety of the ship.

11. That immediately that there appeared any danger of collision the engines of the *Norma* were stopped, and then reversed.

The cause came on for hearing before the judge of the Vice-Admiralty Court, assisted by nautical assessors, the evidence of several witnesses, taken before the registrar of the court previously, was read, and the preliminary Acts were opened. The preliminary Acts were those ordinarily in use in the Vice-Admiralty Courts, and did not contain all the questions and answers contained in the preliminary Acts in use in the High Court of Justice of England. The following are wanting: "VI. State and force of the tide;" "VIII. The lights, if any, carried by her;" "X. The lights, if any, of the other vessel which were first seen;" "XI. Whether any lights of the other vessel other than those first seen came into view before the collision." The learned judge submitted certain questions to the nautical assessors, which, with the answers thereto, were as follows:

1st. Whether after the vessels sighted each other they had time to take the necessary precautions to prevent the collision which followed? Answer. Yes.

2nd. Whether the steamer at any time after seeing the schooner's light should have ported her helm and whether she pursued a proper course in putting it to starboard when she did? Answer. The steamer on seeing the schooner's green light a little on her port bow should have stopped her engines to ascertain the exact position of the schooner and then acted accordingly.

3rd. Whether the schooner was to blame in porting her helm instead of keeping her course? Answer. The schooner in porting her helm followed the rule of the road and was not to blame.

4th. Whether the schooner by porting foiled the manœuvre of the starboard helm of the steamer or the steamer by starboarding defeated

that of the schooner's port helm? Answer. The steamer seeing that she was nearing the schooner so rapidly should have stopped and reversed full speed instead of starboarding her helm, which had the effect of showing her side lights to the schooner, and justified the latter in porting her helm.

5th. Whether the steamer was to blame for not having stopped her engines earlier than she did? Answer. Yes.

6th. Whether the collision was inevitable or was occasioned by the carelessness, mismanagement, or want of proper skill on the part of both vessels, or of either and which of them? Answer. The collision was occasioned by want of caution and experience on the part of the steamer, which could have avoided a collision by keeping to the northward or by stopping her engines in time, whereas the schooner in porting her helm, to shew her red light, was following the rule of the road, therefore we consider the *Norma* is alone to blame.

The learned judge then delivered judgment, which, after setting out the facts and the above questions and answers, was as follows:—

Stuart, J.—It is beyond doubt that after sighting each other both vessels continued their course until within about half a mile of each other, and I may add that it appears to me that if neither had deviated from her course then they would have gone clear, though they might have passed nearer than it was prudent to do, the responsibility of the collision must therefore rest on the vessel which altered her course at the eleventh hour. The pilot and man at the helm of the *Norma* establish that they both saw the *James Seed*'s green light two miles off, and the mate deposes that when the schooner's green light was seen on the *Norma* the people of the schooner must have seen the masthead and red lights of the steamer. This is proved to have been so by the pilot of the *James Seed*. The chief officer of the *Norma* says, "she (the schooner) would continue to see those lights until we starboarded and brought her on our starboard bow when she would lose our red and see our green light, and our green light must have remained visible from that time till the collision." Charles Dale, the man on the look-out on the *Norma* says, "Directly after the *Norma* began to answer her starboard helm the *James Seed*, which up to that time had shown her green light, then showed her red light." Thus the change in the lights which establishes the alteration of the course of these two vessels relatively to each other is attributed by the witnesses who were themselves executing the change in the course and observing its effect to the action of the *Norma*'s starboard helm, and serves to relieve the persons in charge of the said *James Seed* of any imputation of having contributed to this altered and very dangerous condition of things. It is made certain by the evidence that the schooner, upon seeing the lights of the *Norma*, took her course and pursued it without deviation until the steamer, then a short distance off, opened up her coloured lights, and was seen coming end on on the schooner, when, in pursuance of the rule, she ported her helm. It is equally certain from the evidence of the crew of the *Norma* that the steamer saw the schooner's green light at a distance of about two miles, and that she continued her course for a full half hour—

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so says the pilot—when she starboarded her helm and exhibited her coloured lights to the schooner. It does not appear to have been taken into calculation by the persons directing the course of the *Norma* that before the red light of the steamer was shut out and the green light substituted instead there would be an interval of time when both her coloured lights would appear to the persons on the schooner and show a condition involving the greatest danger of collision end on and making it a duty on the schooner to port her helm in compliance with the rule of the road. These, then, are all the circumstances influencing the relative positions of these two vessels immediately before the collision, which caused the schooner to sink on the spot, and the largest part of her crew to be drowned, to which the law is to be applied. The relative duties towards each other of these two vessels under the circumstances are to be found in the Regulations for Preventing Collisions at Sea.

Art. 15.—“If two ships, one of which is a sailing ship and the other a steamship are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.”

Art. 16.—“Every steamship when approaching another ship so as to involve risk of collision and shall slacken her speed, or if necessary stop reverse.”

It was held in the case of *The Ross* (2 Wm. Rob. 1) that the expression “giving way” in the Trinity House Regulations means not crossing a vessel’s bows, but going under her stern. The term used in the 15th article, “Shall keep out of the way,” appears to me to correspond in meaning with “giving way.” In that case a steam vessel having three lights and proceeding at the rate of ten knots an hour came into a collision with a sailing vessel having no light, and proceeding at the rate of four knots an hour. On discovering each other the sailing vessel ported her helm, and the steamship starboarded. The steamer was condemned in damages and costs. In the case of *The James Watt* (2 Wm. Rob. 270) a steam vessel discovered a sailing vessel approaching her, which from the direction and state of the wind she was aware must be sailing closehaunched, but from the darkness of the night was unable to make out upon what tack. It was held she should (in order to comply with the general rule which obliges a steamer to give way to a sailing vessel) have at once stopped her engines until she had ascertained the exact course of the other vessel, and should not by mere surmise put her helm one way or the other. The defence set up on behalf of the steamer that she had ported her helm was not deemed sufficient. The first of these decisions held the steamer answerable for the collision for putting her helm astarboard instead of a port. The second held the steamer answerable though she had ported her helm, because she had not stopped her engines. Both of these decisions militate against the *Norma*. With these decisions, and the opinion of the Assessors, in which I concur to the full, I should have no hesitation in coming to a conclusion, but I am confirmed in my views by a decision in the Privy Council in the case of *The Velasquez* (L. Rep. 1 P. C. Rep. 494). This last case in its important features is identical with the present one. The steamer *Velasquez* was sighted by the *Star of Ceylon* at a sufficient distance to

have avoided a collision, the steamer took no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid the collision, which, notwithstanding, took place. It was held that the steamer was alone to blame, as it was the duty of the steamer to keep out of the way of the sailing vessel provided she could do it either by starboarding or porting her helm, and that on the other hand it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by showing that it was necessary to do so to avoid immediate danger. The *Norma* kept her course though the danger of this proceeding was apparent to the apprentice pilot whose suggestions as to the propriety of porting her helm before she had got so near was disregarded by the pilot. The *Norma* then, as the *Velasquez*, is chargeable with approaching too close, and is answerable for a manœuvre which threatening a collision end on imposed it as a duty on the schooner to port her helm, and leaves the steamer with the whole burden of the occurrence. I cannot do better than reproduce the words of Lord Westbury in the case of *The City of Antwerp* (L. Rep. 2 P. C. 25), “It is undoubtedly true in cases of collision between a sailing ship and a steamer that although the sailing ship may be found to have been guilty of misconduct, or not to have observed the sailing regulations, yet the steamer will be held culpable if it appears that it was in her power to have avoided the collision. It cannot be too much insisted on that it is the duty of the steamer where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done consistently with her own safety to avoid the collision.” To this extent does the law make responsibility weigh upon steamers, and as they are independent of the wind and always under command, it seems humane and just it should be so. Applying these principles of law to the facts proved in these cases as the *Norma* saw the green light of the *James Seed* two miles off, when the combined speed at which they were approaching was twelve miles an hour, and a period of time of ten minutes only was afforded to take the precautions necessary to avoid collision, I am of opinion the *Norma* should then have slackened speed so as to be in a condition to stop or reverse her engines if upon the nearer approach of the vessels the safety of the sailing vessel required a resort to that expedient (*The James Watt*, *ubi sup.*). Instead of this the *Norma* proceeded at full speed down to the moment of collision. I am further of opinion that the attempt to cross the bows of the schooner at the last moment was unseamanlike and culpably hazardous, as the event has demonstrated, and lastly the *Norma* is answerable when so near the schooner as to involve risk of collision for having starboarded her helm when the rule required her to port. (*The Rose*, *The Velasquez*) (*ubi sup.*). For these acts of omission and commission the owner of the *Norma* is answerable to the promoters for the catastrophe. I decree against the owner of the *Norma*, and order the usual reference in both cases to the registrar and merchants to report on the damage.

From this judgment the owners of the *Norma* appealed, for the following, amongst other, reasons:

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1. Because the learned judge of the court below erroneously held that the steamer was bound to get out of the way of the *James Seed* by porting her helm, whereas she was entitled to do so either by porting, or starboarding, or keeping on as those on board her thought fit.

2. Because the steamer, by starboarding her helm, performed the duty imposed on her of keeping out of the way of the *James Seed*, and the evidence proved that there would not have been a collision if the *James Seed* had performed her duty by keeping her course.

3. Because the learned judge of the court below erroneously held that the *James Seed* was justified, according to a rule of the road, in porting and hard porting her helm, whereas there is not and was not any such rule.

4. Because the learned judge was wrong in holding that the steamer should have stopped or slackened speed at the time he holds in that behalf.

5. Because the evidence proved that the collision was not occasioned by any negligent or improper navigation on the part of the *Norma*.

Milward, Q.C. and E. C. Clarkson, for the appellants.

Brett, Q.C. and W. G. F. Phillimore, for the respondents.

The judgment of the court was delivered by

Sir R. J. PHILLIMORE.—This is an appeal from a decree of the judge of the Vice-Admiralty Court at Quebec, in a suit for damages, the consequence of a collision between two vessels, the *James Seed*, a sailing vessel, and the *Norma*, steamship. Before their Lordships approach the consideration of the merits of this case they desire to say a few words with respect to the pleadings and the mode of taking evidence in the court below. The "Preliminary Acts," the operation of which has been eminently conducive to the ascertainment of the truth in these cases, are in the same form as when first tried in the High Court of Admiralty. Since that time, sections 6, 8, 10, 11, which form a very important part of the present Preliminary Acts in the English Court of Admiralty, have been introduced, and their Lordships think that it would be expedient to introduce similar regulations into the practice of the Vice-Admiralty Courts; their Lordships must express a hope that in subsequent suits this defect will be remedied. The mode of taking the evidence before the Registrar alone, and the use of written interrogatories, would, in their Lordships' opinion, be advantageously exchanged for the practice of the *vivâ voce* examination of witnesses at the hearing before the judge who is to decide the case, in causes where it would be possible to obtain their attendance for that purpose without inconvenience or additional expense, a practice which has been for a long time prevalent in the English Court of Admiralty, and attended with very beneficial results. The judge of the court below pronounced the *Norma*—the steamship—to be alone to blame for the collision. From this judgment the owners of the *Norma* have appealed to this court. The collision occurred in the river St. Lawrence, between ten and eleven o'clock of the night of the 11th Aug. 1874, five or six miles from a place called Bic. The *James Seed*, a three-masted schooner of 156 tons, with a crew of eight hands, and a pilot, was going down, and the *Norma*, a steamship of 653 tons, with a crew of twenty hands and a pilot, was coming up the river; the two vessels were approaching each other, not exactly, but within about a point, on opposite courses. Both vessels had their proper regulation lights. The weather was fine and clear; it was a starlight night, and there was a moderate breeze from the south-west, under the influence of which

the schooner was approaching Bic—having previously taken in her foresail—at the rate of about four knots through the water. At a distance of about five miles from the Bicquette light, the pilot on board the schooner saw through his glass the masthead light, and the red light of the steamer about two miles off and about a point on his starboard bow. At the same distance the "look-out" on board the steamer reported a bright light ahead on her port bow. The schooner, under the pilot's orders, ported enough to bring the steamer's bright and red lights a little on her port bow; her helm was then steadied, and she kept her course until within half a mile of the steamer, when the three lights of that vessel came in sight; the schooner's helm was then ported and hard-ported, and the steamer was hailed to port; she did not do so, and struck with her stem and starboard bow the schooner's port bow so severe a blow that she sank directly, and five of her crew were unhappily drowned. To return to the steamer, the bright light which had been reported a little on her port bow proved, as the vessels approached each other, to be a green light; the steamer continued her course at a speed of seven knots an hour for some minutes, when, at a distance of about half a mile, her pilot gave the order to starboard and the collision took place in the way described. The contention of the respondents (the plaintiffs in the court below) was that the collision was caused by the starboarding and the continuance of the speed of the steamer. The contention on the part of the appellants (the defendants in the court below) was that the collision was caused by the porting of the schooner. The learned judge was assisted by nautical assessors, to whom he submitted various questions; their answer to which was, in substance, that the steamer should have stopped and reversed full speed instead of starboarding, and that the schooner followed what they called the rule of the road in porting her helm, and therefore was not to blame. The learned judge unfortunately adopted this latter premiss, and, as he supposed, supported it by reference to certain articles of the Regulations for preventing Collisions at Sea. He cited Article 15, which is: "If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to invoke risk of collision, the steam ship shall keep out of the way of the sailing ship;" and Article 16, which says that, "every steam ship, when approaching another ship so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse." The learned judge omitted to notice the 18th Article, which, so far as it concerns the present case, is, "where by the above rules one of two ships is to keep out of the way, the other shall keep her course." It is an entire mistake as to the existing law to suppose that it is the duty of a sailing vessel when meeting a steamer to port her helm; it is her duty to keep her course. And if the conclusion at which the learned judge arrived could only be supported by adopting the grounds upon which he appears mainly to have founded it, it would be the duty of their Lordships to recommend Her Majesty to reverse the sentence; but their Lordships are of opinion in this case that though the reasoning is partially incorrect, the conclusion is, on the whole, right. Their Lordships, after conference with their nautical assessors, are of

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opinion, on the one hand, that the first porting of her helm by the schooner was, at the least, having regard to the distance and the degree, an innocent manœuvre; and, on the other hand, that it is not proved that the schooner's red light was seen on board the steamer. But their Lordships are clearly of opinion that the steamer is to blame for having approached too close to the schooner before she altered her helm; that she did wrong in continuing up to so late a period the position of danger and embarrassment which exists when the green light on one vessel is opposed to the red light on another. The steamer came so close that she had not time to go off more than a point and a half under her starboard helm. The nautical assessors think that if she had starboarded a quarter of a mile off she would have cleared the schooner; and with regard to the second porting of the schooner almost in the moment of collision, they think that in the circumstances it was the best manœuvre she could have adopted. Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the court below, and to dismiss the appeal with costs.

*Appeal dismissed.*Solicitor for the appellant, *Thos. Cooper.*Solicitors for the respondent, *Waltons, Bubb, and Walton.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, Nov. 16.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Ex parte LEMAN; *Re* BARRAND. (a.)

Bill of sale by non-trader—Registration—First bill of sale not registered—Second bill of sale of same property registered—Bankruptcy of mortgagor—Rights of trustee—Bills of Sale Act 1854 (17 & 18 Vict. c. 36), s. 1.

A non-trader debtor executed a bill of sale of chattels, which was not registered, and afterwards executed a bill of sale of the same chattels to another person, and the second bill of sale was registered. The debtor subsequently filed a petition for liquidation of his affairs by arrangement:

Held (affirming the decision of the Chief Judge in Bankruptcy) that the holder of the second bill of sale was entitled to such of the chattels as had not been seized before the liquidation by the holder of the first bill of sale.

This was an appeal from a decision of Bacon, C.J., reversing a decision of the Judge of the Nottingham County Courts.

The hearing before the Chief Judge is reported *sub nom. Ex parte Cochrane, Re Barrand*, in 34 L. T. Rep. N. S. 950, where the facts and judgment are fully set out.

The facts were briefly as follows:

On the 27th March 1875, Robert Barrand, a farmer at Bradmore, in the county of Nottingham, who was not a trader, executed a bill of sale to Abraham Collins of his farming stock, furniture,

and other chattels, to secure the payment of 130*l*. This bill of sale was never registered.

On the 24th June 1875, Barrand executed a second bill of sale of the same property to Alexander S. Cochrane to secure 200*l*. This bill of sale was duly registered.

On the 26th Feb. 1876 Collins seized some of the chattels comprised in his bill of sale, and sold them, but did not realise enough to satisfy his debt.

Later on the same day Barrand filed a petition for liquidation of his affairs by arrangement.

The trustee appointed under the liquidation petition took possession of the rest of the chattels and sold them.

Cochrane, to whom 150*l*. remained due upon his bill of sale, claimed to be paid this debt out of the money which the trustee had realised by the sale.

The County Court judge refused his application, but it was granted on appeal by the Chief Judge in Bankruptcy.

From the latter decision the trustee in the liquidation appealed.

De Gez, Q.C. and Finlay Knight, for the appellant.—The first section of the Bills of Sale Act 1854 (17 & 18 Vict. c. 36), provides that every bill of sale, unless registered within twenty-one days, shall be null and void as against all assignees of the estate and effects of the person whose goods are comprised in the bill of sale under the laws relating to bankruptcy or insolvency, and as against execution creditors. That renders the first bill of sale void as against the trustee, but not void as against the holder of the subsequent registered bill of sale. The Act deprives the unregistered bill of sale holder of his title as against the trustee, but it does not give the holder of the second bill of sale any right to rank above the first.

Winslow, Q.C. and Henry Kisch, for the respondent, were not called upon.

JAMES, L.J.—We have nothing to do in this case with any question between the holders of the two bills of sale. The only parties to this litigation are the trustee in the liquidation, and someone to whom the debtor, whom he represents, has assigned the goods by a duly registered bill of sale. By that deed the goods in question have become the absolute property of the respondent, and there is nothing in the Act to take away his right. I am, therefore, of opinion that the decision of the Chief Judge is quite right. Indeed, I should have thought that the case was not arguable, but for the decision of the County Court judge.

BAGGALLAY, J.A.—I am of the same opinion.

BRAMWELL, J.A.—The argument of the trustee seems to be that the title of the respondent would be perfectly good as against him if there was not someone else who had no title as against him. That is what it comes to.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Taylor, Hoare, and Co.*, agents for *E. H. Fraser*, Nottingham.

Solicitor for the respondent, *J. Seymour Kisch.*

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Saturday, Nov. 4.

CROM v. SAMUELS. (a)

Practice—Judicature Acts 1875, sect. 50—Order LIV. r. 6—Order LXI. r. 5, 6—Appeal from chambers, time for.

Orders made in vacation by a judge at chambers must be appealed from within eight days from the date of the making of such orders; and if no divisional court sits for hearing of such appeals within such eight days, there can be no appeal unless the time for appealing is enlarged by the judge who made the order, or by a court or a judge under Order LVII. r. 6.

Lanyon now moved to set aside an order made by Huddleston, B., at chambers, acting as one of the vacation judges, on the 29th of Aug. last.

Murphy, Q.C. objected that the motion was too late.

Lanyon.—Sect. 50 of the Judicature Act 1875, is as follows: "Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any divisional court, or by the judge sitting in court, according to the course and practice of the division of the High Court to which the particular cause or matter, in which such order is made, may be assigned," giving a right of appeal in all, except certain specified cases, of which this is not one. The rules were intended to, and must be construed to, carry out this section. The rules applicable are rule 6 of Order LIV., and rules 5 and 6 of Order LXI. These are as follows. Order LIV., rule 6. "In the Queen's Bench, Common Pleas, and Exchequer Division, every appeal to the court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against." Order LXI., rule 6. "The vacation judges may sit either separately or together as a divisional court, as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever division the same may be assigned. No order made by a vacation judge shall be reversed or varied except by a divisional court or the court of appeal, or a judge thereof, or the judge who made the order. Any other judge of the High Court may sit in vacation for any vacation judge." Order LXI., rule 5. "Two of the judges of the High Court shall be selected in the commencement of each long vacation for the hearing, at London or Middlesex, of all such applications as may require to be immediately or promptly heard. . . ." The rules, therefore, allow the vacation judges to hold divisional courts, but do not require them to do so, and there was no divisional court held at which the present appeal could have been heard during the vacation. The Judicature Act 1873, sect. 23, requires provision to be made for all applications which require to be "immediately or promptly" heard; but no provision has been made for ordinary appeals from chambers such as the present, it being of no real moment whether the appeal were heard at once, or not for a couple of months. The way in which the rules must be construed in order to carry out the Act, and give

an absolute right of appeal, is by taking days to mean available days—that is, days on which the divisional court, to which the appeal is, sits. This is the mode in which the Court of Appeal construed Order XXXIX., rule 1, in *Hallams v. Hills* (24 W. R. 956). [DENMAN, J.—Order LVII., rule 6, prevents any injustice arising from a literal construction of Order LIV., rule 6, being adopted.] The appeal given by the statute is a right, and is one which existed before the Judicature Acts came into operation; those Acts confirm the appeal, and therefore the rules should not be construed to take away the right. [The court then consulted, and suggested that the time for appealing should, under Order LVII., rule 6, be extended, certain terms being imposed on the appellant.]

Lanyon declined the terms offered, stating that there were reasons which rendered it impossible for him to accept the proposed conditions, and asked for the judgment of the court.

GROVE, J.—Mr. Murphy's objection must prevail. The application is too late, unless we act under the power given us by Order LVII. r. 6, which is as follows: "A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed." The terms, however, which we should impose as a condition of extending the time are such that Mr. Lanyon, on behalf of his client, thinks it right to decline them. The words of the rule are perfectly plain. The appeal must be within eight days, and this is not within eight days, consequently it is too late. The words of the rule which the court had to construe in *Hallams v. Hills* (24 W. R. 956) are not the same as those of the present rule; the words there as to motions for new trials are, "such motion shall be made within four days after the trial, if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial." Nothing is said in the rule which we have now to construe as to the court being then sitting; the words are plain and unqualified. The result is that if the appeal from a judge at chambers is of a nature to require a prompt hearing, the vacation judges will form a Divisional Court and hear it; but if not, there is no appeal, unless it appears to the court or a judge that it is right there should be an appeal, and the time is extended under Order LVII. r. 6. It may or may not be that all appeals from the decision of a judge at chambers may be considered as requiring to be immediately or promptly heard. It is not necessary for us to consider that point now. It is sufficient to say that in the present case there is now no appeal as a matter of right, the eight days having elapsed.

DENMAN, J.—This is an appeal from the decision of a judge, made many weeks ago, during the long vacation. Order LIV., rule 6, is peremptory and unambiguous, and requires appeals from chambers to be brought within eight days. I see no ground for construing the rule in the elastic manner contended for by Mr. Lanyon. *Hallams v. Hills* (*sup.*), is no authority whatever as to the construction of the present rule. It is not neces-

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sary for us to decide what course the present appellant should have pursued, if dissatisfied with the order made in vacation. The words of the rule are plain, and no hardship arises from a plain construction of them. Order LVII., rule 6, prevents that. I think no useful purpose would be served if the order of the learned judge were set aside, and I am confirmed in that by the fact that an offer to set it aside on certain terms is refused.

Solicitor for appellant, *J. S. Saloman.*

Solicitors for respondent, *Summerlin and Heritage.*

Saturday, Nov. 4.

CASEY v. ARNOTT. (a).

Service of writ of summons—Service out of jurisdiction—Practice—Judicature Act 1875—Order XI., rules 1, 3.

Where the cause of action is a slander published in Ireland of a personal chattel situate in England, leave will not be given under Order XI., rules 1 and 3, to serve a writ of summons in Ireland. Such a slander is not an "act or thing" "affecting" property situate within the jurisdiction, within the meaning of those words in Order XI., rule 1.

French now moved for leave to serve a writ of summons upon Sir J. Arnott, under the circumstances set out in the following affidavit of the intending plaintiff:

I am the owner of the steamship *Bittern*, which vessel I purchased from the City of Cork Steam Packet Company, in the month of May last, for the sum of £2000. The said vessel was subsequently sent round from Cork and delivered by the said company to me in London.

The said vessel, which was bought by me for trading purposes, is now lying in the Victoria Docks, within the jurisdiction of this honourable court.

I have seen a copy of the *Cork Examiner*, for the 26th Aug. 1876, in which is reported what purports to be a speech of Sir John Arnott, the chairman of the said City of Cork Steam Packet Company, made at a meeting of the shareholders of the said company, and in which he is reported as having made the following statement affecting my property, the *Bittern*.

"We have also sold the *Bittern* for £2000. She was completely worn out from stem to stern, and as we dare not put her to sea again, we thought the sooner we got rid of her the better."

It is not the fact that at the time I bought the *Bittern* she was in the condition alleged by Sir John Arnott. On the contrary, I say she was in a good condition, and in proof of this I say that after the said ship had been delivered to me in London, she was examined by the Board of Trade surveyors, and received a passengers' certificate, which does not expire until January next.

The said statement has since appeared in other newspapers, and I have sustained considerable damage thereby, and have lost the benefit of an offer that had been made to me to purchase the vessel for £5000.

In October of this year the *Bittern* had left London for St. Malo, and I am informed by the captain, and believe the same to be true, that while lying off Dungeness the crew handed to him a piece of paper cut out from the *Gravesend and Dartford Reporter*, containing the said statement, and refused to proceed further in the said ship, which was consequently obliged to return. The defendant resides at Cork, out of the jurisdiction of this honourable court.

Lindley, J., at chambers, declined to grant the application, but referred the matter to the court. The order upon which the question turned is Order XI., which is as follows: "Rule 1.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever the whole or any part of the subject matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action was made or entered within the jurisdiction; and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction. Rule 3. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made." He contended that the present case fell within the words "act, deed, or thing affecting such property," i.e. property situate within the jurisdiction. The property affected was the ship, which was within the jurisdiction. Such a slander was an act affecting property, since it damaged the value of the property in whatever hands it might be, and not an act affecting the owner in his personal capacity or character. The policy of the order, too, was that where the injury was, there the remedy should be. The character of the vessel was required to be cleared in England, and this could best be done by an action in England.

GROVE, J.—Without saying where the line is to be drawn, as to what cases fall within and what cases without the application of Order XI., rule 1, I am able to say that the present case does not come fairly within the meaning of that order. I think the rule intends that the property within the jurisdiction should be physically or materially affected in some way by the act or thing complained of. There must be in some way a direct affecting of the property. Here the cause of action alleged is an opinion expressed, falsely it is said, as to the condition of a steamship. Now the ship is not affected by the opinion, it is rather the minds of persons who may hear of the opinion that are affected. Then, are the words spoken, expressing an opinion respecting the property, fairly called an act relating to the property? I think not. The order must be read as a whole, and, so reading it, I think this application must be refused. I would further say that, if this is a case within the Order, and if we have discretion as to giving or withholding leave to serve the writ, I think that, in the exercise of that discretion, the application should be refused.

DENMAN, J.—I think the opinion which Lindley, J. appears to have formed at chambers, namely, that service of this writ ought not to be allowed in Ireland, was correct. The words of Order XI., r. 1, upon which this application depends, are as follows: [He reads the rule.] Mr. French says this application is within the words of the rule, and no doubt, if you pick out words, you can, in

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one sense, show that there are words which would authorise us to grant this application. In one sense the slander does affect or may affect property within the jurisdiction; it may affect its value; but there are other words which make it pretty clear, looking at the whole scope of the rule, that the words are not to be taken in any such sense. The words "and whenever the contract" and "such action," show that the whole clause deals substantially with contracts as to property. An action for a condemnatory opinion of a ship is not one of the things meant to be dealt with by the rule. I am fortified in this view by the supplementary order, Order XI., rule 1a (supplementary rules made 26th June 1876), which was made in consequence of complaints of writs being issued too readily into Ireland and Scotland, and which deals, it is true, only with contracts; but the words of that order are such as to show the intention of the framers of the rules, and to aid us in putting a construction upon the rules.

Solicitors, *Argles and Rawlins*.

EXCHEQUER DIVISION.

Monday, April 3.

(Before COCKBURN, C.J., and POLLOCK, B.)

LAMB v. BRUCE; DUGGAN v. THE SAME; COOPER v. THE SAME. (a)

Bill of sale—Affidavit filed on registration—Erroneous statement in of date of execution—Clerical error—Residence and occupation of attesting witness—Witness described as a "clerk"—Sufficiency of—17 & 18 Vict. c. 36, s. 1.

The affidavit filed on registering a bill of sale, which latter was executed and bore date on the 17th Feb. 1876, stated that the bill of sale "was given on the day on which it bore date," and further stated that it was executed and bore date on the "17th Feb. 1806." It then proceeded to state the residence and occupation of the attesting witness as follows, "a clerk at No. 43, Lombard-street," and it gave also his domestic residence at another address.

Objections having been taken to the validity of the bill of sale by reason of the affidavit containing an erroneous statement of the date of the bill of sale, and an insufficient description of the occupation of the attesting witness as a "clerk:"

Held by the court (Cockburn, C.J., and Pollock, B.) first, that "1806" was an obvious and palpable clerical error for "1876," the means of correcting which were afforded in the affidavits, which stated that the bill of sale was given on the day it bore date, so that no creditor could be misled thereby; and that on the principle of "Utile per inutile non vitiatur" the bill of sale was not invalidated by such clerical error. Secondly, that the description of the occupation of the attesting witness as a "clerk," being true, and his residence being also correctly given, was a sufficient description of such "occupation."

In this case three actions had been brought by the three above-named plaintiffs, Lamb, Duggan, and Cooper, respectively, against the defendant Bruce, and judgments having been recovered in each of them against the defendant, executions had been issued thereon, under which the sheriff had seized

the goods of the defendant. Thereupon a claim was made to the goods by the Lombard Deposit Bank, grounded upon a bill of sale to them of the goods by the debtor, the defendant, bearing date the 17th Feb. 1876. Two other claims were also at the same time made by other persons to the said goods. Under these circumstances the sheriff took out a summons at Judges' Chambers, calling upon the several claimants and the execution creditors to interplead; and upon the hearing of that summons, two several objections were raised and taken to the validity of the bill of sale, on the grounds, first, that in the affidavit of registry the bill of sale was stated to have been executed, and to bear date on the 17th Feb. 1806 instead of 1876; and, secondly, that the attesting witness to the bill of sale was described as a "clerk." The learned judge (Archibald, J.) before whom the summons was heard at chambers, entertained an opinion rather in favour of the objection and adverse to the bill of sale; but, in compliance with the request of the claimants thereunder, he adjourned the summons into court for its decision thereon.

Whether the date of the bill of sale as contained in the affidavit was stated in figures or in words, did not distinctly appear.

Bremner appeared for the sheriff, and stated the case to the court.

L. Glyn, for the Lombard Deposit Bank, the claimants under the bill of sale, submitted, as to the first objection, that the omission in the affidavit of the word or figure "seventy," was obviously a clerical error only, and in nowise nullified or vitiated the document, and that there was in the affidavit sufficient and ample reference to the bill of sale to prevent anybody being misled or deceived. With regard to the second objection, that also must fail. The occupation of the witness was both truly and sufficiently stated as a "clerk, at No. 43, Lombard-street," whilst his domestic residence, at another address, was also stated, so that there could be no possible doubt or difficulty in ascertaining who and what he was, and where he was to be found. He cited and referred to the following cases and authorities:

Attenborough v. Thompson, 2 H. & N. 559; 27 L. J. 23, Ex.;
Sladden v. Sargeant and another, 1 Fos. & Fin. 322;
Briggs v. Boss, 17 L. T. Rep. N. S. 599; L. Rep. 3 Q. B. 268; 37 L. J. 101, Q. B.;
McCus v. James and others (C. P. Ireland), 19 W. R. 158;
Grant v. Shaw, 27 L. T. Rep. N. S. 602; 41 L. J. 905, Q. B.; L. Rep. 9 Q. B. 700;
Hollingsworth v. White and others, 6 L. T. Rep. N. S. 604;
Elliott v. Freeman, in the Common Pleas, 7 L. T. Rep. N. S. 715;
Gardner v. Shaw, in the Queen's Bench, 34 L. T. Rep. N. S. 319; 19 W. R. 753;
The Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1.

Cock, for Brown, another claimant under a subsequent bill of sale, contended, with respect to the first objection, that the mistake in the affidavit as to the date of the bill of sale was fatal to the validity of the instrument, and in support of his contention to that effect he cited and relied on the cases of

Hollingsworth v. White and others (ubi sup.);
Holmes v. The London and South-Western Railway Company, 13 Q. B. 211; 18 L. J. 87, Q. B.; 6 D. & L. 536; 13 Jur. 81.

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v. *England* (8 E. & B. 541; 27 L. J. 124, Q. B.)] Then, as to the second objection, he submitted that the attesting witness to the bill of sale was insufficiently described, and that the instrument was rendered invalid by such insufficient description. With respect to this point he cited

Hutton v. English, 7 E. & B. 94; 26 L. J. 161, Q. B.; *Larchin v. The North-Western Deposit Bank*, in the Exchequer Chamber, on appeal from the Court of Exchequer, 33 L. T. Rep. N. S. 124; L. Rep. 10 Ex. 64; 44 L. J. 71, Ex.

W. G. Harrison, for the plaintiff and execution creditor Lamb, reiterated the arguments already urged against the validity of the bill of sale, and submitted that, to hold that document to be sufficient and valid in the face of the objection that appeared against it on the face of the instrument itself and also of the affidavit, would be running counter to the object and policy of the Bills of Sale Act, which was enacted for the express purpose of preventing frauds upon creditors by their debtors disposing of their goods by these documents in a clandestine and dishonest manner, which he contended had been done in the present case. He argued also that the bill of sale itself could not be called in aid or referred to in order to supplement or correct any defect or omission in the affidavit.

COCKBURN, C.J.—Mr. Harrison having contended on behalf of his client, the plaintiff Lamb, one of the first three execution creditors, that as between him and the Lombard Deposit Bank, the claimants under the bill of sale of the 17th Feb., that bill of sale is fraudulent, there must of course be an issue to try and decide that question, unless we should decide the present question against the claimants on the ground of the improper and insufficient registration of the bill of sale, in which case an issue would be unnecessary. I am not, however prepared to say that such is the case. Two objections have been taken to the validity of the bill of sale, and I am of opinion that both of them fail. With regard to the first objection, which has reference to the residence and occupation of the attesting witness, I quite agree with Mr. Harrison in his statement that the Act requires that the "residence and occupation" of the attesting witness should be stated, not only in the bill of sale itself but also, in the affidavit, and that if there be any defect or omission in the affidavit in this respect it cannot be supplied or made good by referring to the bill of sale, in which the matter in question may be properly and sufficiently stated. Without, however, expressing any decided opinion on the point, I will say that I am not at all sure that, if there had been an express reference to the bill of sale in the affidavit, the requirements of the Act would not have been satisfied. I will not, however, say how that is, nor is it necessary that we should decide that point now. In the case now before us, the affidavit contains a statement of the date of the bill of sale, not by reference to the bill of sale but in express terms, and the question is whether that statement in those terms is sufficient to satisfy the statute. The statute says that there shall be filed an affidavit of the time of the giving of the bill of sale, and of the description of the residence and occupation of every attesting witness thereto. The object of the statute in requiring that is, I quite agree with Mr. Harrison, to enable creditors of the person executing the bill

of sale to satisfy themselves that the transaction is an honest and *bonâ fide* one. There are numerous *bonâ fide* transactions connected with bills of sale which the statute was not meant to put an end to. It was meant only to operate so as to prevent frauds upon creditors. What was really intended by it was that there should be attached to every bill of sale documentary evidence of the existence, not only of the parties to the deed, but also of the attesting witnesses to its execution, of such a nature as that creditors who found their claims upon the debtor were likely to be defeated by the bill of sale might be enabled to ascertain that the particular transaction in question was one that had really taken place, and that the circumstances under which the bill of sale had been executed were such as to vouch for its honesty and validity. The material and main point is the "residence" of the witness—his "occupation" is of secondary importance. The principal object is to find a person who can say "I was a witness to the execution of that deed by so-and-so." To find that man, and to get at him, no matter whether he is a "clerk" or anything else, is what is wanted, and what enables him to be got at better than anything else is his "residence." I do not decide this case upon the authority of any of the previous cases, either *Briggs v. Bass*, or any other of those which have been cited and referred to by the learned counsel in the course of the argument. I take the present case upon its own intrinsic merits. Here is a person who is an attesting witness, whose residence is mentioned, and who is stated to be, and who is, a "clerk." Had he been said to have been a clerk to a barrister in the Temple or in Lincoln's-inn, it would have afforded no better or fuller information. If the witness is described as being something which he is not, or as residing somewhere where he does not reside, and an inquiring creditor is thus misled and put off, that of course would not do. But upon looking at this affidavit, there is no untruthful statement in it. It would, in my opinion, be carrying too far what was only intended to be a protection to innocent creditors, were we to require something to be added to the description which, if it had been added, would have given not the slightest benefit or advantage to the creditor. In my judgment, then, the description here given of the attesting witness is sufficient. But then comes the other question as to the erroneous date. Now without doubt the date of the bill of sale is an essential part of the statement in the affidavit. But if, placing oneself in the position of a creditor seeking information with respect to a bill of sale, one sees a plain, obvious, and palpable mistake, which one has the means of correcting, and that too in the affidavit itself, which expressly states that the bill of sale was executed on the day on which it bears date, then no one can be misled by that mistake. It is quite obvious here that the "seven" has been left out. There is a statement made that the bill of sale was executed on the day on which it bears date, and then a date is added which is obviously an impossible one. The creditor has nothing to do but to refer to the bill of sale itself, and all misapprehension and mistake would be at once corrected and set right. It is just an instance of the "inutile" by which the "utile non vitatur." I do not think that the first statement with regard

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[Prob.]

to the date of the document is vitiated by the person having gone further and stated something which need not have been stated.

POLLOCK, B.—I am entirely of the same opinion. The statute requires that the affidavit on registration shall set forth the time when the bill of sale was given, and a description of the residence and occupation of the person giving it, and also of the attesting witness to its execution. Now in the present case it would, without doubt, have been quite sufficient if the affidavit had merely stated that the bill of sale was given on the day on which it bears date, and that the affidavit here does state. But then it goes on further, and states that it was on a certain day in the year "One thousand eight hundred and six." Now it is most essential to take into consideration the nature and character of all such errors that are said to be "clerical errors." We have no occasion in this case to have recourse to extrinsic circumstances to see that the error here is purely a clerical and not a substantial one. It appears to me that the ground on which my Lord put it, "*Utile per inutile non vitiatur*," is the true one, and that it is not at all such an error as would mislead or deceive an inquiring creditor. It seems to me that the statute has in this case been complied with, so far as the statement of the date of the bill of sale is concerned. With regard to the remaining question, whether or not the "residence and occupation" of the attesting witness is sufficiently described, it is not, I think, at all desirable that on this occasion we should review the various cases which have been previously decided on the point; and no good would in my opinion be obtained by our doing so. With respect to the witness's residence there is no doubt that the statement in the affidavit is quite correct. As to the "occupation" there is no doubt that the man is described as following an "occupation," which makes it perhaps more difficult to discover him than that if he had been described as following an "occupation" that is pursued by a fewer number of persons; and no doubt the term "clerk," taken by itself, is somewhat wide and vague. There are a great many occupations that vary in degree as affording means of finding out the person who bears the description of following one of them. But when a person states truthfully that he follows a particular "occupation," it seems to me that the mere fact that a very large number of other persons follow the same "occupation" is quite immaterial. On both grounds, therefore, I am of opinion that the description in the affidavit is correct, and the affidavit sufficient.

Case to be remitted to chambers, with an intimation of the court's opinion that the affidavit is sufficient.

Solicitor for the sheriff, *W. Maynard*.

Solicitor for the Lombard Deposit Bank, *E. Lee*.

Solicitor for the claimant Brown, *A. O. Underwood*.

Solicitor for the plaintiff Lamb, *Scott Fox*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Tuesday, May 2.

IN THE GOODS OF JOHN ENTICHNAP. (a)

Probate of copy will—Persons interested in intestacy—Completion of title.

The copy of a will may be admitted to probate in order to aid the completion of the title of a testator's representative in the Court of Chancery, but the consent of those persons, if any, who may be interested in the event of an intestacy is required before a grant of probate can be made.

JOHN ENTICHNAP, the testator, made a will on 9th Nov. 1791, and therein appointed his only son John sole executor. The testator died in October 1796, but the will has never been proved. The son, John Entichnap, made a will 16th Jan. 1808, and died on 8th Feb. 1808, and after his death his will was duly proved by the executors named therein. The property was broken up, and passed into the hands of various persons out of the direct line of descent. In 1875 letters of administration *de bonis non cum testamento annexo* were granted to William Entichnap, the great grandson and legal representative of John Entichnap the younger, who died in 1808, of the said John Entichnap the younger's unadministered estate under the following circumstances: The father of John Entichnap the elder had instituted in the end of the last century a Chancery suit, which is still in progress, and in the course of that suit it was found to be necessary that there should be a personal representative. It was now further necessary that, in order to complete the legal title of the said William Entichnap in the Court of Chancery, the will of John Entichnap the elder should be proved. Search was made for the said will of Nov. 1791, and it cannot be found, but the solicitor for William Entichnap, whilst searching for it among the papers of one Thomas Sadler, the present owner and occupier of the house in which John Entichnap the elder had resided, found a copy of the will. Another copy was also found in the possession of one Samuel Hopewell, the present owner of some of the realty of the testator.

Inderwick, Q.C., now moved the court to decree probate of the copy of the will found among the papers of Thomas Sadler, in order that William Entichnap might, as legal representative of John Entichnap the elder, be enabled to complete his title in the Court of Chancery to some personalty which had been realised in the suit instituted by the father of John Entichnap the elder.

The PRESIDENT.—I have no information before me which will inform me whether there are or are not any persons other than William Entichnap who have an interest in this case. If I refuse this application, there will be an intestacy in the estate of John Entichnap the elder, and other persons may take an interest under that intestacy. Therefore I must have an affidavit stating whether there are or are not such other persons interested in the event of there being an intestacy, and who, if there are such, consent or refuse their consent to making the decree prayed for. With such an affidavit before me I shall have no difficulty in arriving at a decision.

Solicitors for the plaintiff, *Rogerson and Ford*.

PROB.] JAMES v. SHRIMPTON AND OTHERS—RIDGE v. RIDGE AND RIDGE—THE ST. OLAF.

[ADM.]

Tuesday, May 2 and 23.

JAMES v. SHRIMPTON AND OTHERS. (a)

Will—Revocation—Revival—Codicil.

A will was made before marriage, and was revoked by a marriage, but revived and ratified by a codicil, which also made provision for the wife, executed after marriage. The wife predeceased the testator, who on her death destroyed the codicil.

Held, that the testator did not by the destruction of the codicil after his wife's death revoke the will.

JOHN JAMES, the testator, made a will in October 1871, and by it distributed his property among his children and grandchildren. In July 1872, he married again, and the will of 1871 was thereby revoked by operation of law; but immediately after his marriage he executed a codicil, by which in express terms he "revived, ratified, and confirmed" the will of 1871, and made provision for his wife. His wife predeceased him, and upon his death in 1875, only the will of 1871 was found, and it was presumed that the codicil had been destroyed by him upon the death of his wife, when the only provisions in the codicil which were not also in the will had ceased to be of use.

May 2.—*Spinks* Q. C. and *C. Middleton*, for the plaintiffs, moved for probate of the will of 1871, *Searle* for defendants, consenting.

May 23.—THE PRESIDENT.—I have taken time to consider this case, which was moved before me as a friendly suit on May 2. The question is whether or not the destruction of the codicil of 1872, upon which alone the revival of the will of 1871 depended, left the will inoperative. I am of opinion that the testator did not intend, by revoking or destroying the codicil, to thereby revoke the will, but that the foundation of the codicil being gone by his wife's death, his disposition by the will was to remain. It is plain that his idea was that the will, being revived by the codicil after marriage, was not affected by the destruction of the codicil. I am asked to grant probate of the will and codicil, and I do so believing that that will give effect to the testator's intention. The court will give no more effect to the act of the destruction of the codicil than it would do if the testator had destroyed the paper under a mistake as to the instrument which he was destroying. It was done under a misconception as to the effect of the act, and not *animo revocandi*, and I allow probate of both will and codicil.

Solicitors for plaintiffs, *Jenner and Dyke*, for *George Charles Richards*.

Solicitors for the defendants *Deacon, Son, and Rogers*.

RIDGE v. RIDGE AND RIDGE. (a)

Practice—Place of trial.

By Order XXXVI., rule 1, the statement of claim must contain a paragraph stating the place where the plaintiff proposes the trial of his cause shall take place. Except under special circumstances the court will not allow causes to be tried out of Middlesex unless the application is made in the statement of claim in pursuance of this order.

THIS was a probate suit to revoke the probate of an alleged will of James Ridge, who died in the Cathedral Close, Exeter, on the 21st Oct. 1863,

led by H. B. DEANE, Esq., Barrister-at-Law.

aged eighty-four. The statement of claim was filed in Feb. 1876. The will was dated April, 1863.

Bayford, for the plaintiff, now moved that the cause be sent down to Exeter, to be tried there at the assizes, before a judge and jury, on the ground that the witnesses on both sides lived in or near Exeter, and the expenses of trial would be materially less than if the cause were to be tried in Middlesex.

Indorwick, Q.C., for the defendants, denied the fact of the witnesses living in or near Exeter, and asked that the cause should be tried in Middlesex. He referred to Order XXXVI., rule 1, which is: "There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex he shall, in his statement of claim, name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. Any order of a judge as to such place of trial may be discharged or varied by a Divisional Court of the High Court."

THE PRESIDENT.—The practice, as laid down in the orders, must be observed, and a judge will not use the powers conferred upon him without good cause shown. The statement of claim was filed in February, and it is not till May that this motion is made to me. It occurs to me, therefore, that this is an afterthought of the plaintiff, and inasmuch as the defendants object to this cause being tried at Exeter, the rules prescribed by Order XXXVI., rule 1, must be complied with, and I refuse to make the order prayed for; therefore the cause will be tried in Middlesex.

Solicitors for the plaintiff, *Dobinson, Geare, and Son*, for *Geare, Tozer, and Geare*.

Solicitor for defendants, *W. H. Marshall*.

ADMIRALTY BUSINESS.

Friday, May 12.

THE ST. OLAF. (a)

Master—Dismissal—Ship's certificate of registry and papers—Refusal to deliver up—Lien—Merchant Shipping Act, 1854, sect. 50—Jurisdiction. The High Court of Justice (Admiralty Division) has power, upon the application of the owners of a ship, to order a master who has been dismissed from their employment to deliver up the certificate of registry and other papers and property belonging to the ship where he refuses to surrender them. Semble, a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners.

THIS was a motion made in an action of co-ownership instituted on behalf of James Bremner, John Bruce, John Cormack, and William Harper, part owners of the schooner *St. Olaf*, against James Cormack, part owner and also late master of the schooner, in order to procure a settlement of accounts of the earnings of the said vessel. The schooner had been purchased by the plaintiffs and

(a) Reported by JAMES P. ASPINALL and F. W. RAYNER, Esqrs., Barristers-at-Law.

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defendant, and was worked by them under a written agreement, signed by all the part owners, by which James Bremner was managing owner, with power to appoint and dismiss the master. The defendant had been appointed master, and had sailed the schooner in several voyages. On the return of the schooner in April 1876, from a voyage from Tercera Bremner discharged defendant from his employment as master without notice, and took possession of the schooner. The alleged ground for such discharge was that the master had improperly given some of the cargo as food for the crew, the master stating that conduct was made necessary by the condition of the cargo and the delay of the voyage. The defendant left the schooner, but retained possession of her certificate and register and of the keys and papers belonging to her, alleging that he was wrongfully dismissed and that he was entitled to retain possession of these things.

The cause was commenced on or about May 10th 1876, and after the defendant had been served with the writ, and before any further proceedings were taken in the cause, the plaintiff moved the court for an order that the defendant might be ordered forthwith to deliver possession of the certificate and register of the schooner *St. Olaf*, of Wick, and the keys and all papers belonging to the said vessel to Mr. William Marshall, the plaintiffs' agent, and that he may be restrained from doing or suffering any matter or thing whereby the above named James Bremner may be prevented or hindered from performing or exercising his rights and duties as managing owner and ship's husband of the said vessel.

W. G. F. Phillimore, for the plaintiffs, in support of the motion.—This court has power to and will interfere to give possession of the certificate of registry. In *The Frances* (2 Dods. 420) Lord Stowell, after saying that justices have power by statute in certain cases to order the delivery of certificates, says: "But these statutes have nothing to do with the Admiralty jurisdiction upon such matters. If the Admiralty had no jurisdiction but what it derives from these statutes, it has no jurisdiction at all upon such subjects, for they do not refer to the jurisdiction of that court—they merely give new powers in certain cases to justices of peace. The jurisdiction of the Admiralty (if it exists) is of older date and of larger extent. We know that it is not uncommon for parties, after applications to justices, without effect, to resort to this court for its monition. This court would certainly not have hesitated to go the length of granting its monition, to show cause why the register should not be restored." By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 50, it is expressly enacted that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever" by any person, and that justices or "any court capable of taking cognisance of such matter" may summon the person detaining the certificate before it and examine him in relation to the detention, and if there was no reasonable cause may inflict a penalty. This is a court capable of taking cognisance of such matter, and the master having no lien upon the certificate (*Gibson v. Ingo*, 6 Hare, 112) has no reasonable cause for detaining it.

E. C. Clarkson, for the defendant.—The

managing owner had no power to dismiss under the circumstances of the case. [Sir R. PHILLIMORE.—The agreement between the owners expressly says he shall have power]. But it must be implied that such power can only be exercised upon due notice (*Green v. Wright*, L. Rep. 1 C. P. Div. 591). [Sir R. PHILLIMORE.—If the master has been wrongfully dismissed his remedy is to bring an action against the managing owner for damages. The power to dismiss has been exercised, and the remedy is not to detain the ship's papers.] Then, as we have a counterclaim for wages and damages, we ought to have security for the amount of our claims in this action to save the expense of arresting the ship.

W. G. F. Phillimore, in reply, undertook to give security for any damages which might accrue from the making of the order prayed.

Sir R. PHILLIMORE.—I am of opinion that I have authority to make the order asked for, and I shall do so. I direct the defendant forthwith to deliver to William Marshall the certificate and register, and all keys belonging to the *St. Olaf*, upon the plaintiffs undertaking to be answerable for any damage occasioned by such delivery. Costs of the motion to be costs in the cause.

Solicitors for the plaintiffs, *Harper, Broad, and Batcock*.

Solicitors for the defendant, *Lowless and Co*.

Tuesday, July 25.

THE SCEPTRE. (a)

Forfeiture—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 103—Concealing British character—Assuming foreign character.

Where a British subject, the owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners procures the closing of the registry, and sails her under a foreign certificate of registry and under a foreign flag, whilst he continues to own her and to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, and prevent her seizure as unseaworthy, he commits an offence against the provisions of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 103, by reason of which his ship is liable to, and will be condemned to forfeiture to Her Majesty.

THIS was an action instituted by Her Majesty's Procurator General on behalf of Henry Hallett, collector of customs, at Hartlepool, against the *Sceptre*, and her owner intervening, to obtain the forfeiture of the *Sceptre* to Her Majesty, for the commission of offences by her owner against the provisions of the 103rd section of the Merchant Shipping Act 1854, which, so far as material, is as follows:

Sect. 103. The offences hereinafter mentioned shall be punishable as follows (that is to say): If the master or owner of any British ship does or permits to be done, any matter or thing, or carries or permits to be carried any papers or documents, with intent to conceal the British character of such ship from any person entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such person as lastly hereinbefore mentioned, such ship shall be forfeited to her Majesty, and the master, if he

(a) Reported by JAMES P. ASTHALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

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commits or is privy to the commission of the offence, shall be guilty of a misdemeanour. . . . And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any court having Admiralty jurisdiction in her Majesty's dominions, and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the, if any, forfeited ship or share as it may think right.

The plaintiffs statement of claim setting out the offences charged was as follows:

1. The plaintiff was on and before the 10th Nov. 1874, and has ever since been and still is a British Officer of Customs, within the intent and meaning of the 103rd sect. of "The Merchant Shipping Act 1854."

2. Before and on the said 10th Nov., the ship or vessel *Sceptre*, proceeded against in this action was a British ship, registered at the Custom House of Sunderland, as a British ship, in the name of the defendant, James Saunders, as sole owner, and she then belonged to the defendant as sole owner. The said defendant is a natural born British subject.

3. On or about the 9th Nov., the defendant as such owner wrote and sent to the collector of customs, at the port of Sunderland, being the registrar of British ships at that port, and a person entitled by British law to inquire into the character of the said vessel, a letter informing the said collector that the said vessel was sold to foreigners, and inclosed and sent in the said letter to the said collector the certificate of registry of the said ship, for the purpose of the register of the said ship being cancelled by the said collector, and requested the said collector to forward to him, the defendant, a certified copy of the register of the said ship.

4. The said collector received the said letter on the 10th Nov., and acting upon the statements and representations contained therein, made an endorsement upon the register of the said vessel as follows, namely: "Certificate cancelled, register closed 10th Nov. 1874. Vessel sold to foreigners," and drew a line across the said register.

5. The said vessel was not on or before the 10th Nov. 1874, sold to any foreigner or foreigners, but she was on that day and she afterwards continued to be owned by the defendant as sole owner, and she then was and she subsequently continued to be a British ship within the true intent and meaning of the 103rd section of the "The Merchant Shipping Act 1854."

6. On or about the 12th Jan. 1875, the defendant being still the sole owner of the said ship, produced and exhibited to one William Robert Arkless, the Superintendent of Customs and Mercantile Marine, at Seaham, a person entitled by British law to inquire into the character of the said ship, a document purporting to be a certificate of ownership of the said ship, and dated on or about the 28th Nov. 1874, by which document it was stated and represented that one Henry Thomas Watson, of Antwerp, Belgian citizen, having purchased the said ship, had by bill of sale become the owner of the said ship, and that the said ship was then Belgian property.

7. The said statements and representations in the said document lastly mentioned were respectively wholly untrue. The said ship, on the said 28th Nov. 1874, continued to be and was the property of the said James Saunders as sole owner thereof, and a British ship within the true intent and meaning of the said 103rd section.

8. On the 5th Feb. 1875, one James Farguson, the then master of the said ship, by and with permission of the defendant as sole owner of the said ship, applied at the Custom House, at Seaham, in the port of Sunderland, to one William Farrow, the officer of customs then on duty in that behalf, for a transire or clearance coastwise for the said ship, and the said master then and thereby, and with the permission of the defendant, declared to the said William Farrow the name of the nation to which the said master claimed that the said ship belonged as being the Belgian nation, and that her port of registry was the port of Antwerp, in the Kingdom of Belgium, and the said

William Farrow then inscribed such port as the port of registry of the said ship on a clearance or transire, which he then granted, and the said master, by and with the permission of the defendant, then and there signed upon the said clearance or transire a declaration whereby he the said master certified that all the requirements of the said Act had been fully complied with.

9. The nationality of the said ship was not upon the said 5th Feb. 1875 Belgian, but the said ship then was and continued to be the sole property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said 103rd section, and the said declarations respectively made and signed by the said master as in the last paragraph stated were wholly false.

10. On or about the 21st Aug. 1875, the defendant being then the sole owner of the said ship, applied as master thereof to the said William Robert Arkless, still being such superintendent of customs and mercantile marine as aforesaid, at the Custom House, at Seaham aforesaid, for a clearance or transire of the said ship, and stated the name of the said ship to be the *Cotopaxi*, of Aroa, and declared to the said William Robert Arkless the name of the nation to which he, the defendant, claimed that the ship belonged to be Uruguay, and the said William Robert Arkless thereupon inscribed the name of such nation upon a coasting clearance or transire which he then granted, and the defendant then and there signed a declaration upon the said clearance or transire whereby he certified that all the requirements of the said Act had been fully complied with.

11. The name of the said ship was not on the said 21st Aug. 1875, the *Cotopaxi*, of Aroa, and the nationality of the said ship was not upon that day Uruguayan, but the said ship then was, and continued to be, the property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said section, and the said declarations so made and signed respectively by the defendant were wholly false.

12. The said ship subsequently to the 10th Nov. 1874, and whilst she still continued to be the property of the defendant and a British ship within the true intent and meaning of the said 103rd section, was sailed by the defendant or by and with his permission under a foreign flag, to wit under the Belgian flag.

13. The several matters and things hereinbefore alleged to have been done or permitted to be done by the defendant, or some or one of such matters and things, were or was matters or things, or a matter or thing done by the defendant as owner of the said British ship *Sceptre*, with intent to conceal the British character of such ship from the said collector of customs at Sunderland, and from the said William Robert Arkless, and from the said William Farrow, and from others the collectors and officers of customs at divers British ports and from the officials of the Board of trade defined by the said Act, or from some or one of such persons all such persons being persons entitled by British law to inquire into such character, or with intent to assume a foreign character, or with intent to deceive such persons as aforesaid, or some or one of them, and thereby the said ship became and is forfeited to Her Majesty.

14. The said document or certificate in the 6th paragraph of this statement of claim, mentioned further, stated, and represented that the said document or certificate would remain in force for not exceeding one year from the date thereof, to wit, from the 28th Nov. 1874, and was issued for the purpose of proving the nationality of the said ship until her arrival in Belgium, and such document was carried by the defendant or by the master of the said ship, by and with the permission of the defendant as owner of the said ship, as a certificate of the nationality of the said ship. Such document or certificate was not according to the law of Belgium, a good or valid certificate of the nationality of the said ship, and the said ship was not on the 12th Jan. 1875 a Belgian ship or entitled to a certificate of nationality as a Belgian ship, but she then continued to be and was the property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said section. Such document was carried by the defendant as sole owner of the said ship or by the master of the said ship by and with the permission of the defendant as sole owner of the said ship, with intent to conceal the British character of such from the said William Robert Arkless, and others, the collectors and officers of customs

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at divers British ports, and the officials of the Board of Trade defined as aforesaid, or from some or one of such persons, all such persons being persons entitled by British law to inquire into the same, or with intent to assume a foreign character, or with intent to deceive such persons or some or one of them, and thereby the said ship became as is forfeited to Her Majesty.

15. The plaintiff as a British officer of customs has seized and detained the said ship as having become subject to forfeiture to Her Majesty as aforesaid, and has brought her for adjudication before this court pursuant to the said section.

The plaintiff claims—

1. A declaration and judgment that the said ship or vessel *Sceptre* has become and is forfeited to Her Majesty.

2. A sale of the said ship *Sceptre* by the marshal of this court.

3. An award to the plaintiff of such portion of the proceeds of the sale of the said ship as the court may think right.

4. The condemnation of the defendant in the costs of this action.

5. Such further and other relief as the nature of the case may require.

The defendant, James Saunders, delivered an answer denying the statement of claim; but at the hearing the defendant himself was called as a witness for the plaintiff, and admitted that the allegations of the statement of claim were substantially accurate. He stated that he was, prior to 10th Nov. 1874, the sole owner of the *Sceptre*, which was then registered as a British ship; that on or about that date he was informed by some shipbrokers that they could procure the registration of his ship in Belgium on the payment of certain fees, and that by this means he would be enabled to avoid the then recent legislation relating to unseaworthy ships. He accordingly represented to the collector of customs at Sunderland, where the ship had been registered, that the ship was sold to foreigners, and requested the collector to send him a copy of the register of the ship. The shipbrokers before-mentioned procured for him the provisional certificate mentioned in the statement of claim, paragraphs 6 and 14, which represented the ship as being a Belgian ship, and she was sailed under the Belgian flag, but she never ceased to be the sole property of the defendant, and he had, after the closing of her British registry, worked her himself, and had received the freights and profits. The action was undefended at the hearing.

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *E. C. Clarkson*, for the plaintiff.

Sir R. PHILLIMORE.—The facts stated in the statement of claim being admitted by the defendant, I must pronounce in this case that the owner of the ship was intending to conceal the British character of the ship from the person entitled to inquire into it, and that the vessel assumed a foreign character, with intent to deceive the officer of customs, and is therefore liable to forfeiture under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 103), and therefore pronounce for the forfeiture of the vessel.

Proctor for the plaintiff, the *Queen's Proctor*.

Solicitors for the defendant, *Oliver and Botterill*.

Tuesday, Nov. 7, 1876.

THE SFACTORIA. (a)

Practice—Default in pleading—Signing judgment—Proceeding in rem—Supreme Court Rules: Order XXIX., rule 2.

Order XXIX., rule 2, of the Supreme Court Rules, as to signing judgment in default of pleading, does not apply to proceedings in rem.

Where in an action in rem for a liquidated sum for necessities supplied, the defendant makes default in delivering his statement of defence, the plaintiff cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit.

THIS was an action of necessities instituted on behalf of John Abbot and Francis Parry Adey, ship chandlers at Cardiff, *in rem*, against the Greek ship *Sfactoria*. The necessities supplied were ship's stores, and were supplied by the order of the master of the ship.

The plaintiff, in the statement of claim, alleged that the goods were supplied on three several occasions, and that the amounts due for such supplies were 412*l.* 16*s.* 9*d.*, 61*l.*, and 84*l.* 17*s.*, making together 551*l.* 13*s.* 9*d.*, and that the goods were supplied upon the credit of the ship and not of the master.

The owners of the ship duly appeared in the action, and the statement of claim was served upon them by special leave during the vacation.

The defendants, after obtaining several extensions of time for the purpose, made default in delivering their defence. The plaintiffs now brought the matter before the court on motion "for an order that, the defendants having failed to deliver their statement of defence within the time limited, the plaintiff be at liberty to sign final judgment for 551*l.* 13*s.* 9*d.*, together with interest, as claimed in the statement of claim, and costs of suit, and for an order that a commission do issue for the sale and appraisement of the *Sfactoria*, and that the proceeds thereof be brought into the registry of the court."

E. C. Clarkson, for the plaintiff, in support of the motion.—Here the plaintiff's claim is for a liquidated demand, and, consequently, under Order XXIX., rule 2, of the Supreme Court Rules, the defendant having made default in pleading, the plaintiff becomes entitled to sign final judgment; that is to say, if the rule applies to proceedings *in rem*. It is true there may be grave objections to judgment being signed in such a manner in these cases; as, for instance, a friend of the plaintiffs might collusively appear in the action and make default in pleading, and judgment go against a ship which had never been liable. As the decree would go against all the world, it is perhaps desirable that some proof of the validity of the claim should be given. This might be done either by giving final judgment subject to a reference, or by ordering the action to be set down for hearing on proof by affidavit, which the court would have power to do under Order XXXVII., rule 1, of the Supreme Court Rules. At the same time, we are within the words of the rule before quoted.

Sir R. PHILLIMORE.—I do not think that Order XXIX., rule 2, was ever intended to apply to proceedings *in rem*. To so apply it would be

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[ARCHES.]

dangerous, as the court might condemn and sell the wrong ship. There ought to be some inquiry. I shall order the case to stand over for hearing on the next motion day, when proof of the plaintiff's claim can be given on affidavit. The court, according to the old practice of the Court of Admiralty, has power to order evidence to be taken on affidavit, independently of Order XXXVII., rule 1.

Solicitors for the plaintiffs, *Ingledeu, Ince and Greening.*

ARCHES COURT OF CANTERBURY.

Jan. 4, 5, and 6, and Feb. 3 and 26.

(Before the Right Hon. Lord PENZANCE, Dean of Arches.

CLIFTON v. RIDSDALE. (a)

Illegal Communion—Number of communicants—Ceremonial observance—Crucifix—Unauthorised decorations—Appeal no stay—37 & 38 Vict. c. 85.

It is not lawful for a minister to consecrate or receive the Sacrament in his church when there is only one communicant besides himself.

On the top and in the centre of a screen, stretching across a church at the entrance to the chancel, was placed a figure of Our Saviour on the Cross, in full relief, and about eighteen inches long, facing the congregation. A row of candles at distances of about a foot apart ran along the top of the screen, and were continued up the central portion, which was raised, the last candles coming close up to the crucifix on either side:

Held, in a proceeding under the Public Worship Regulation Act 1874, that, as it was not proved that the candles were used for other than lighting purposes, their position and the manner in which they were used, did not constitute a ceremonial observance, and were not, therefore, illegal; but that the figure, being in danger of becoming the object of superstitious reverence, must be removed from the cross.

Attached to the walls of the same church were fifteen groups of figures in coloured relief, purporting to represent scenes of Our Lord's Passion, and such as are commonly used in Roman Catholic churches, where prayers are said before them, and they are known as the "stations of the Cross." No faculty having been obtained to authorise their erection:

Held, that upon this ground they must be removed; and, further, that being in danger of being used for the purposes for which they have been used among Roman Catholics, they were decorations forbidden by law.

An application to the Court of Arches to suspend the execution of a monition, issued under the Public Worship Regulation Act 1874, pending an appeal to the Queen in Council, will only be granted on special grounds; and where the decision appealed from follows a decision of the Supreme Court of Appeal, or where obedience to the monition, pending the appeal, cannot be painful to the consciences of those against whom it is directed, the application will be rejected.

In cases under this Act the court will hear two counsel on each side.

Construction and jurisdiction of the court explained.

THIS was a proceeding under the Public Worship Regulation Act 1874, in which the complainants were three resident parishioners of the parish of St. Peter's, Folkestone, who were members of the Church of England, and the respondent was the Rev. Charles Joseph Ridsdale, perpetual curate of the same parish.

A requisition from the Archbishop of Canterbury to the judge of this court to hear and determine the matters complained of, the parties having failed to state their willingness to submit to the directions of the Archbishop touching those matters, had been received in the registry of the court from the registrar of the diocese of Canterbury.

The following is the material portion of the representation put forward by the complainants:

1. The Rev. Charles Joseph Ridsdale, the incumbent or perpetual curate of the said district chapelry (over which he has the exclusive cure of souls), on Sunday, the 4th July 1875, in his church or chapel of St. Peter, being the church or chapel of the said district chapelry, at the early service commencing at 7.30 a.m., and again at the mid-day service commencing at 10.30 a.m., and also on Sunday, the 11th July 1875, at the like mid-day service, unlawfully used lighted candles on the Communion Table at which the Communion was at the said times respectively being celebrated, or on a ledge immediately over the same, during the celebration by him of the Holy Communion, and when such lighted candles were not wanted for the purpose of giving light.

2. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion, unlawfully wore certain unlawful ecclesiastical vestments other than or besides and instead of those appointed and allowed by law, to wit, a vestment known as an alb, and a vestment known as a chasuble.

3. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in the said church in the Communion Service, unlawfully mixed water with the sacramental wine used in the Communion, and also then administered or caused to be administered wine mixed with water to the communicants at the Lord's Supper.

4. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion to the communicants, unlawfully used in such service and administration wafer bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is used to be eaten.

5. At the said mid-day services, commencing at 10.30 a.m., on the said 4th July and on the said 11th July, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, unlawfully stood, while saying the prayer of consecration in the said service, at the middle of the west side of the Communion Table (such Communion Table then standing against the east wall, with its shorter sides towards the north and south), in such wise that, during the whole time of his saying the said prayer, he was between the people and the Communion Table, with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

6. At the said mid-day services, on the said 4th

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July 1875, and the said 11th July 1875, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, and saying the prayer of consecration in the said service, did not continue in a standing position, but twice unlawfully knelt or bent the knee during the reading thereof.

7. At the said mid-day service, commencing at 10.30 a.m., on the said 11th July 1875, immediately after the conclusion of the Prayer of Consecration in the Communion Service, the said Rev. C. J. Ridsdale unlawfully caused to be sung in his said church the words, or hymn, or prayer, commonly known as "The Agnus," that is to say, "O Lamb of God, that takest away the sins of the world, have mercy upon us."

8. At the said mid-day service, commencing at 10.30 a.m., on the said 4th July 1875, and at the like service on Sunday, the 1st Aug. 1875, the said Rev. C. J. Ridsdale, when officiating in his said church, unlawfully celebrated the Lord's Supper in the course of divine service, and himself then consecrated and received the elements when only one person communicated with him.

9. At the said mid-day service, commencing at 10.30 a.m., on the said 4th July 1875, the said Rev. C. J. Ridsdale, in his said church, after the conclusion of morning prayer, and immediately before the commencement of the Communion Service, and as connected with such Communion Service, and in the presence of the congregation then assembled in the said church for such service, unlawfully formed and accompanied a procession consisting of the choir and of two acolytes in short surplices and red cassocks, and four banners and a processional cross, were carried in such procession, and it proceeded from the chancel down the north aisle and up the nave back to the chancel again, the choir singing a hymn while walking in the procession, and the said Rev. C. J. Ridsdale, while taking part in such procession, wore a chasuble, and had a cap called a biretta upon his head, and on the return of the procession to the chancel, the Communion Service at once commenced.

10. On the occasion of the evening service on the evening of Sunday, the 4th July, 1875, and immediately after an offertory, which took place at the conclusion of the sermon, and without any break or interval, and as connected with such service, and in the presence of the congregation assembled for such service, the said Rev. C. J. Ridsdale, in his said church, unlawfully caused a like procession to that before mentioned, as having taken place at the morning service, to be formed, and accompanied the same round the church, in like manner singing, and at one period of such procession all those who took part in it fell upon their knees and remained kneeling for some time, and after their return to the chancel the general thanksgiving was intoned, and the congregation were then dismissed.

11. The said Rev. C. J. Ridsdale, without lawful authority, and unlawfully, and since the consecration of his said church, that is to say, in the year 1872, set up and placed upon the top of the screen separating the chancel of the said church from the body or nave thereof, and still unlawfully retains there, a crucifix and twenty-four metal candlesticks with candles, and at the ordinary evening service on Sunday, the 4th July, 1875, the said candles were lighted on either side of

such crucifix, and so continued during such service, although the other lights in the church were amply sufficient to light the church, and the said candles were not wanted for that purpose.

12. The said Rev. C. J. Ridsdale, without lawful authority, and unlawfully, set up and placed in his said church, since the consecration thereof, that is to say, in the year 1871, and still unlawfully retains therein, certain representations of figures in coloured relief of plastic material, purporting to represent scenes of our Lord's Passion, attached to the walls of the said church, and forming what are commonly called stations of the cross and passion, such as are commonly used in Roman Catholic churches, and not in churches of the Church of England, and some of the said representations relate to legendary and superstitious scenes not part of the gospel history, and not accepted or recognised as authentic by the Church of England, and the said representations as a whole tend to encourage ideas and devotions of an unauthorised and superstitious kind, and are unlawful.

13. The said acts, matters, and things hereinbefore mentioned are respectively alterations in, or additions to, the fabric, ornaments, or furniture of the said church, made without lawful authority, decorations forbidden by law, unlawful ornaments of the minister of the said church, failures on the part of the incumbent to observe, and cause to be observed, the directions contained in the Book of Common Prayer, relating to the performance in such church of the services, rites, and ceremonies ordered by the said book, or unlawful additions to and alterations of such services, rites, and ceremonies.

There was no prayer at the close of the representation; but it was intimated by the court that a representation under the Public Worship Regulation Act, 1874, should conclude with a prayer, as in other cases.

The answer of the respondent commenced by admitting the charge in the 6th article of the representation, and that such kneeling during the prayer of consecration was unlawful, but stating that it had been discontinued. It proceeded to require the complainants to prove every charge made in the representation; and to deny the illegality of the alb and chasuble. With regard to the 8th article of the representation, the answer stated that there were on the days mentioned present in the church a convenient number to, and every opportunity was given to them to, communicate with the priest. With regard to the crucifix, it was alleged to be part of a screen for which a faculty had been granted by the Commissary Court of Canterbury, and erected at the same time as the rest of the screen; and further, that the parishioners were necessary parties to any suit in which any order might be made for the removal of any part of the said screen. It was submitted that the paintings called the stations of the cross were not unlawful; that the allegations in the 12th article of the representation, commenting upon those paintings, were irrelevant, immaterial, calculated to prejudice, and improperly made against the respondent; that the parishioners were necessary parties to any suit for their removal; and that the court should grant a faculty to confirm their erection. The answer concluded with a prayer that the respondent might be dismissed from all further obser-

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vance of justice in the matter of the said representation.

A. J. Stephens, Q.C. and *B. Shaw*, for the complainants.

Fitzjames Stephen, Q.C., *A. Charles*, *Jeune*, and *W. G. F. Phillimore*, for the respondent.—

For the complainants witnesses were examined to prove the charges made in the representation. For the respondent, the deputy registrar of the diocese of Canterbury proved the granting of the faculty mentioned in the respondent's answer; and the respondent himself was examined. At the close of the respondent's case his counsel stated that, having regard to the decisions of the Judicial Committee of the Privy Council in

Hebbert v. Purchas, L. Rep. 3 P. C. 605; and *Martin v. Mackonochie*, L. Rep. 2 P. C. 365; 21 L. T. Rep. N. S. 512;

it was not proposed that any argument should be offered by them in this court, except with reference to the charges contained in the 8th, 11th, and 12th articles of the representation.

A. J. Stephens, Q.C. for the complainants.—It was illegal for the celebrant in the Communion Service to consecrate the elements and receive the Communion unless he *bonâ fide* believed that at least three persons, as to whom he had reason for his belief, would communicate at the same service: (*Parnell v. Boughton*, 31 L. T. Rep. N. S. 594; L. Rep. 6 P. C. 46.) The second and third rubrics after the Communion Service contain the whole law on the subject. The object of these rubrics was the prevention of a solitary Communion. Before commencing to read the second of the two portions into which the Communion Service is divided, the respondent was bound to have ascertained that a sufficient number of persons were present and about to communicate with him: (*Wynn v. Davies*, 1 Curt. Rep. 69, 63; *Priestley v. Lamb*, 6 Ves. 421.) [LORD PENZANCE.—How is the minister to ascertain this?] The rubric before the exhortation in the Communion Service requires that those about to communicate shall be conveniently placed to receive the Communion; and, therefore, the minister should require persons intending to communicate to separate themselves then from the rest of the congregation. This could be done either through the pulpit or the churchwardens. With regard to the crucifix and the lighted candles on the screen, the parishioners can have no interest in articles which are illegal. There is abundant evidence that the candles were not required for the purpose of giving light. The faculty relied on by the respondent does not specify with sufficient particularity what screen it was intended should be erected. All crucifixes in churches of the Church of England are illegal. The Homilies are directed against their use, and the judgment of the Judicial Committee of the Privy Council in *Phillpotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), does not sanction them. In *Westerton v. Liddell* (Moore's Sp. Rep.), a distinction is drawn between crosses and crucifixes. Mr. Justice Keating, in *Boyd v. Phillpotts* (L. Rep. 4 A. & E. 297), says, "It is clearly to be gathered from *Westerton v. Liddell*, that the Judicial Committee thought a crucifix would be illegal." At the Hampton Court Conference, in 1603, James I. referred to the material crosses which existed before the Reformation as demolished. A crucifix is within the prohibition

of 3 & 4 Edw. 6, c. 10, a statute held by the Privy Council in *Phillpotts v. Boyd* (*ubi sup.*), to be still in force. Using lighted candles near and about the crucifix is an unauthorised ceremonial addition to the services prescribed by the Book of Common Prayer. The pictures described in the 12th article of the representation were put up without a faculty, and are obviously placed in the church for no other than superstitious purposes. [He proposed to refer to two Roman Catholic books of devotion, entitled *The Key of Heaven*, and *The Crown of Jesus*, but *Fitzjames Stephen*, Q.C., objected that no foundation for using them had been laid, and that at any rate a witness should be called to prove that they were works of authority. Lord Penzance having, under the circumstances, given permission for a witness then to be called, one of the clergy attached to the Roman Catholic Church of St. Peter's, Hatton Garden, was examined, and stated that each of the two books in question contained fourteen pictures known to the members of the Roman Catholic Church as the Stations of the Cross and Passion, and prayers to be repeated before each picture; that the drawings produced of the pictures in the respondent's church were similar to those in the books, and that the books in question were devotional works approved by the authorities of the Roman Catholic Church. They were then put in evidence, and passages from them cited for the purpose of showing that the Stations of the Cross were in the Roman Catholic Church turned to uses which the Church of England would consider illegal and superstitious.] Five of these pictures are clearly illegal, as they do not even represent any historical incidents in our Lord's life. The 23rd of the Inquisitions of Queen Elizabeth orders the destruction of all pictures and paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition (Cardwell's Documentary Annals, vol. 1, pp. 221, 222); and when it is remembered that the stations were first introduced into churches in order that prayers might be said before each in turn, instead of at the actual spots intended to be represented by them, it is evident that they are monuments of pilgrimages. One of them is also a monument of a feigned miracle. He also referred to

Martin v. Mackonochie, L. Rep. 2 A. & E. 200, 116; 2 P. C. 365; 3 P. C. 409; 21 L. T. Rep. N. S. 512; *The Easter Reredos* case, revised report by Burch, Exeter, 1874; Wallot's Sacred Archaeology, voce Rered; The Catholic Layman, vol. 5; Fulke's Defence of the Translation of the Bible, Parker edition.

LORD PENZANCE intimated that in cases coming before him under the Public Worship Regulation Act 1874, he would hear two counsel on each side, and one in reply.

Shaw, on the same side, cited *Delegal v. Highley*, 3 Bing. N. C. 950; *Keeling's Liturgies Compared*; *Scott v. Withman*, 3 Stark, 108; *Elphinstone v. Purchas*, L. Rep. 3 A. & E. 66.

Fitzjames Stephen, Q.C. for the respondent.—The respondent had a *bonâ fide* belief that several members of his congregation would receive the Communion at the midday service on the 4th July last. All the congregation present in the church are exhorted to partake of the Communion by the preparatory exhortations which form part of

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the Communion Service, and it has been held that the rubric requiring previous notice to be given by those who propose to attend is merely directory (*Parnell v. Boughton*, 31 L. T. Rep. N. S. 594; L. Rep. 6 P. C. 46), and that the minister cannot refuse to administer the Communion on the ground of no such notice having been given: (*Stewart v. Crommelin*, a judgment in the Consistorial and Metropolitan Court of Armagh, by the Rev. Alexander Irvine. Hodges and Smith, Dublin; Rivingtons, London, 1852.) The rubric directing that there shall be no communion unless three persons communicate with the priest, is only to insure a *bond fide* administration of the communion. No blame can attach to the minister if the spirit of the rubrics is complied with. The respondent exercised his discretion *bond fide*, and the fact that one person did communicate with him shows that that discretion was not quite unfounded. If, as is the custom in the respondent's church, the congregation remain to the end of the communion service, the officiating minister, unless he takes some unauthorised means of ascertaining the fact, thus incurring grave responsibility, cannot, at the commencement of the second portion of the service, be certain of the number of persons about to communicate with him. With respect to the candles on the chancel-screen, only two of them were placed so as to be close to the crucifix, and it has not been proved that any of them were ever lighted except at the evening service. The crucifix in this case is an architectural portion of the screen on which it stands, and is not an abused image. It has not been abused, and it is not likely to be abused, to superstitious uses. *Westerton v. Liddell* (Moore's Sp. Rep.) really decided nothing more than that crosses, as architectural ornaments, were lawful. It follows, from the decision in *Phillipotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), that a crucifix in stone, set up as an architectural decoration in a parish church, is no more unlawful than a crucifix painted on glass, such as that in St. Margaret's, Westminster, which still remains (*Pierson v. Gell*: Return of Causes before the Delegates, p. 85, No. 171); and that crosses and crucifixes set up for the purpose of decoration are alike not illegal, unless it is shown that they are in some way or other liable to abuse. The proclamations and the injunctions of Edward VI. and Elizabeth, with respect to the destruction of abused crosses and images, were merely executive acts directed to an evil then existing; and the statute 3 & 4 Edw. 6, c. 10, is entirely spent. What has been said with respect to the crucifix applies with equal force to the series of pictures called Stations of the Cross. They have not been, and are not likely to be, abused. It is no evidence of their unlawfulness that similar pictures are usually to be found in Roman Catholic churches.

A. Charles, on the same side, cited the 29th injunction of Edward VI., Cardwell's Documentary Annals, p. 17; Liturgies of Edward VI., p. 85, Parker Society, 1844; *Campbell v. Spottiswoode* (3 B. & S. 789); *Hebbert v. Purchas* (L. Rep. 3 P. C. 605); Wilson's Ornaments of Churches.

A. J. Stephens, Q.C., replied.

Cur. adv. vult.

Feb. 3.—Lord PENZANCE.—Some misconception, I fear, exists as to the functions, powers, and duties of this court. Some, also, with regard to

the source of its jurisdiction. It is not well that this should be so; for those who, however unadvisedly, question the authority or jurisdiction of the court, can hardly be expected to yield to its decrees that readiness of obedience in which the true force of all tribunals resides. I think it, therefore, not out of place that before proceeding to the details of the case before me, I should try to set in their true light some matters that have been by some unwittingly but grievously distorted, and in the interests of the many who conscientiously desire to yield obedience to an authority which they perceive to be lawful, to remove the misconceptions set on foot by the very few who may have no desire to submit to any authority at all. It has been said, and I fear widely accepted, that this court is a new court; that its authority is independent of the church; that the Bishops' Courts, which ought properly to entertain such questions as those now before me, have been by Parliament suppressed, and that a lay tribunal has been set up in their place, to sit in judgment not only upon ritual, but on soundness of doctrine and the mysteries of religion. If these things were true, they might afford ground for criticism upon the statute, though they could not affect the duty of obeying it. I hope, however, that those who may be inclined to act upon their truth will be at the pains of reading the statute for themselves. They will then perceive that every one of these four propositions is absolutely incorrect in fact. In the first place, the Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85), did not, from one end to the other of it, create any new court, or indeed any court whatever. By the 7th section it is enacted that a person with certain legal qualifications should be nominated and appointed by the two archbishops, with Her Majesty's approval, to be a "Judge of the Provincial Courts of Canterbury and York." "The provincial courts" here spoken of are of course the existing provincial courts, namely, what is commonly called the Court of Arches, in the southern province, and the Chancery Court in the province of York. At the time the statute passed there were very learned judges presiding in each of these courts, though they have both since then retired, and the enactment which thus created a new judge to be a judge in both of them, without defining his relation to the existing judges, may be fairly criticised on that score, but is not open to the opposite charge of having created a new court. This explanation removes also the objection that the courts upon which the powers given by the statute are conferred, are courts independent of the church, unless, indeed, those who make this objection are willing to contend that the provincial courts of the two archbishops deserve that designation. The next objection, as to the suppression of diocesan courts, is equally incorrect in point of fact. These courts are not named or referred to, directly or indirectly, in the statute; their rights, their powers, and their jurisdiction remain to them, since the Act passed, as they existed before it was passed, untouched and unrestricted. What has really been done by the statute is to confer on the provincial courts (with a more speedy and less costly procedure than heretofore) the right to entertain questions of ritual concurrently with but not to the exclusion of the diocesan courts. This jurisdiction is no more than the provincial courts exercised before the statute

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upon letters of request from the bishop—they may exercise it now without those letters of request; but the necessity for the bishop's assent which is thus withdrawn in one direction, is restored in another, for by sect. 9 of the Act, no suit can be carried into this court if "the bishop shall be of opinion that proceedings should not be taken." The provincial courts, therefore, have substantially gained no new jurisdiction by the statute. But if they had, the question I am considering is, not what addition has been made to the powers of the provincial courts, but whether the diocesan courts have been suppressed to make way for another tribunal, and what I have here advanced (which anyone may verify for himself on reading the statute) will, I hope, serve to show that their suppression by this statute is purely imaginary, and contrary to the fact. There may, I dare say, be some to whom the arming of the provincial courts, as courts of concurrent jurisdiction, with a more expeditious and efficient procedure, will appear to be the same thing in substance as suppressing the diocesan courts. To others, on the contrary, it may appear that the rendering a court less likely to be resorted to than before, by bringing another and more effective court into competition with it, is hardly the same thing as suppressing or abolishing it. I have no desire to entertain the question which of these two views is the more correct. Provided that the matter be truly stated and understood according to the fact, and not according to conclusions drawn from the fact, every one can judge for himself, and my end will have been attained. I am no further concerned with the remaining suggestion, that a lay tribunal has been set up to deal with doctrine as well as ritual, than to affirm that in all matters of doctrine this court has now precisely the same jurisdiction, and no more than it had before the statute was passed; nothing has been added, and nothing taken away. There are some, I believe, who contend that all questions touching the clergy in their ministrations ought to be referred only to a synod or some other tribunal composed of ecclesiastics. With such a proposition, I have nothing here to do, and I will dismiss the subject with the remark that those who assert it must needs go further, and either point out where in the judicature of this country such a tribunal is to be found, or contend that the Church of the State has no laws to govern it, or, what is the same thing, no laws capable of being enforced. I now address myself to the merits of the present case. It is a proceeding taken under the Public Worship Regulation Act 1874 (37 & 38 Vict., c. 85). Three parishioners of the parish of St. Peter's, Folkestone, have transmitted to the Archbishop of Canterbury a representation under that statute complaining of certain proceedings and matters, which they allege to be unlawful in the conduct of the respondent on the 4th and 11th July 1875. On the 1st Nov. 1875, and after the duties of judge under the statute had become merged in the office of official principal (or Dean of Arches) of the Provincial Court of Canterbury, this representation was transmitted to me, and, consequently, the proceedings before me, by virtue of the 7th section of the Act, became at once a proceeding in the Court of Arches. The representation complains of many things done by the respondent, which, at the hearing of the case, he did not deny, nor did he deny that these things

were unlawful in the present state of the law, as enunciated by the Judicial Committee of the Privy Council, reserving to himself the right to question that state of the law, so far as he may be allowed to do so by that tribunal, should he appeal to it in the present case. I will shortly enumerate these offences: 1. The use of lighted candles on the Communion Table, or on a ledge immediately over it, at the time of the celebration of the Holy Communion, when those candles were not required for giving light. 2. The mixing of water with wine for the service of the Holy Communion. 3. The use of wafer bread, instead of bread such as is usually eaten, in the administration of the Holy Communion. 4. Standing at the middle of the west side of the Communion Table with his back to the people, so that the people could not see him break the bread during the Prayer of Consecration. 5. Kneeling during the Prayer of Consecration—a practice, however, which he says he has since discontinued. 6. Causing the hymn or prayer commonly known as the *Agnus Dei* to be sung during the Communion service, immediately after the Prayer of Consecration. 7. Forming and accompanying a procession, consisting of the choir and two acolytes in short surplices and red cassocks, four banners, a brass instrument, and a processional cross being carried in it, the choir singing a hymn, and the respondent walking in it, with a cap called a biretta on his head; such procession taking place after the service of morning prayer and immediately before the Communion. 8. Forming and accompanying a like procession on another occasion, when, at one period of it, all those who took part in it fell on their knees and remained kneeling for some time. The fact of these eight charges having been admitted by or on behalf of the respondent, and the unlawfulness of his conduct on these occasions being unquestioned before me, and, in my opinion, unquestionable, my duty on the present occasion will be confined to admonishing him not to offend again in the same way. There is one other charge, upon which in like manner no defence has been offered, which requires, I think, some further notice. I allude to the charge of celebrating the Holy Communion in the vestments known by the names of "chasuble" and "alb." The question of vestments is one which stands in a peculiar position, in respect of the judicial decisions of which it has been the subject. Dr. Lushington, Sir John Dodson, and Sir Robert Phillimore have all held what are called the Edwardian vestments to be lawful. By the Court of Appeal in *Liddell v. Westerton* (Moore's Sp. Rep.), consisting of some of the ablest judges of our time, Lord Cranworth, Lord Wensleydale, Lord Kingsdown, Sir John Patteson, and Mr. Justice Maule, with the late and present Archbishops of Canterbury, it was affirmed in the following words: That "the same dresses and the same utensils or articles which were used under the first Prayer Book of Edward VI. may still be used." In the case of *Martin v. Mackonochie* (L. Rep. 2 P. C. 365; 24 L. T. Rep. N.S. 204) it was declared generally that the court "entirely concurred" in the construction of the ornaments rubric in the previous case, and particularly that "the term ornaments in the rubric means those articles the use of which in the services and ministrations of the church is prescribed by the first Prayer Book of Edward VI." In *Liddell v. Westerton* (Moore's Sp. Rep.), it is right to observe that the court, in the

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remarks above quoted, was commenting upon this rubric for the particular purpose, and the particular purpose only, of showing that it applied to articles and things which were "used" in the service as distinguished from ornaments which were not "used," but "set up in churches as ornaments in the sense of decorations." The terms, therefore, in which their construction of the ornaments rubric was declared, constituted a judicial dictum (very valuable, no doubt, considering the high authority of the judges from whom it emanated), but still a judicial dictum only. But in the later case of *Martin v. Mackonochie* (*ubi sup.*), the question arose directly whether the lighting of a candle could be justified as the "use" of an ornament permitted by this same "ornaments rubric," upon which the question of vestments turns. It thus became necessary to construe the language of that rubric, and the court having, as above stated, declared their adherence to the construction given to the rubric in the former case, went on to say that this construction went far to decide the case in hand, and concluded thus: "But the rubric, speaking in 1661, more than 100 years subsequently, has, for reasons which it is not the province of a judicial tribunal to criticise, defined the class of ornaments to be retained by a reference, not to what was in use de facto, or to what was lawful in 1549, but to what was in the church, by authority of Parliament, in that year; and in the parliamentary authority which this committee has held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found to be included." The argument of the court, therefore, ran thus: The ornaments which may be lawfully used are defined by the rubric of the present Prayer Book; the meaning of that rubric is, that such "ornaments" may be used as are prescribed by the first Prayer Book of Edward VI.; the use of a lighted candle is not found to be prescribed by the first book of Edward VI.; therefore it is not lawful. I can only regard this case, then, as a decision directly based upon the proposition that the rubric of the present Prayer Book defined the "ornaments" which should be lawful in future as those which had been prescribed by the first Prayer Book of Edward VI. No doubt the category of lawful ornaments to be found in the first book of Edward VI. was appealed to in that case to prohibit a lighted candle as not being within it; it must be invoked by those who uphold the Edwardian vestments as a justification for the use of all vestments which are within it; but it is difficult to conceive that this distinction warrants a different conclusion as to the rubric's meaning. If the directions of the book of Edward VI. are to be taken as the test of what may be lawfully used under the present Prayer Book, for the purpose of excluding matters and things which are not within them, it may be well urged that they are also the test of legality for the purpose of justifying the use of the things which are within them, and expressly enjoined by them. When fully considered, therefore, this case affords not a mere judicial dictum, but a direct authority, as to the true meaning of the rubric, judicially announced as the *ratio decidendi* of the court, and acted upon as the basis of its ultimate decision. With this decision the subsequent one of *Hebbert v. Purchas* (L. Rep. 3 P. C. 605) con-

derning the vestments which are among the "ornaments" prescribed by the first book of Edward VI., appears to be directly in conflict; but then it must be borne in mind that the case of *Martin v. Mackonochie* (L. Rep. 2 P. C. 365; 24 L. T. Rep. N. S. 204) dealt with things used in the church service, such as a candle, while the case of *Hebbert v. Purchas* (*ubi sup.*) dealt with the dresses of the ministers, as to which dresses the canons of A. D. 1603 had given certain directions, and it was to these canons, as I understand the latter case, that the court ascribed the authority to qualify the subsequent statute and rubric in respect of dresses or vestments. The only passage which throws any light on the aspect in which the previous decision was regarded by the court is the following: "In *Martin v. Mackonochie* (*ubi sup.*) the committee stated anew the substance of the judgment in *Westerton v. Liddell* (Moore's Sp. Rep.) upon this point, but did not take up any new ground." Save in these words no reference whatever to the case of *Martin v. Mackonochie* (*ubi sup.*) is made in the judgment in *Hebbert v. Purchas* (*ubi sup.*). So brief a notice and summary a dismissal seem rather to favour the conclusion that the case was considered unimportant to the matter in hand than that it was meant to be overruled. It may be, therefore, that this conflict of authorities is rather apparent than real, but whether it be the one or the other, my course in this court is clear. I cannot doubt that of two judgments delivered in the Appellate Court, which are in any degree inconsistent, I am bound in pronouncing the decision of the inferior court to obey and carry out that which was addressed directly to the matter in issue here, and which also was the last pronounced. As this result was inevitable the learned counsel have done well, I think, not to argue the question, and as the question has not been argued, I forbear to express my own opinion on the subject. I must, therefore, hold that Mr. Ridsdale has offended against the law in celebrating the Communion in a chasuble and in an alb, and admonish him to refrain from doing so in future. If this decision is wrong it must be corrected by the Appellate Court. I proceed now to deal with the remaining charges, and I will take, first, the charge which relates to the celebration on the 4th July 1875, at the service of the Holy Communion, commencing at 10.30 a.m., when only one person beside the respondent received it. The fact is not denied. The only answer given is that the great bulk of the congregation remained in the church, that there were 200 to 250 people present, and that the respondent had reason to believe, and did believe, that a sufficient number of them would communicate with him. I will examine the correctness of this last assertion presently, but, in the first place, it is desirable to turn to the rubric itself, which is said to have been contravened. It is in these words: "And there shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion. And if there be not above twenty persons in the parish of discretion to receive the Communion, yet there shall be no Communion except four (or three at the least) communicate with the priest." It cannot, I think, be said that the words of this rubric admit of any but one interpretation. There is to be no communion unless as many as three persons are present and communicate with the priest. It was not even in argument con-

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tended that the rubric meant anything else. It does not say there shall be no communion "unless the priest believes," or "unless he has reasonable ground to believe" that there will be as many as three communicants, but expressly that there shall be no communion "except three at the least" do in fact "communicate with the priest." But it was urged on Mr. Ridsdale's behalf, that his infraction of this rubric was not a wilful or voluntary one, and that on a principle which pervades the administration of all laws he ought not to be held responsible for what he could not prevent. I must observe that this defence was rather that of his counsel in argument than that which he had urged himself in his "answers." All that he there says is, that a convenient number of persons were present who might have communicated, and that every opportunity was given to them to do so, studiously omitting to say either that he honestly thought the requisite number would communicate, or that he had no means of knowing whether they would or not. I cannot regard this as otherwise than a very significant and possibly intentional omission. Still the question remains whether there was on this occasion, or would be on other occasions, any real impossibility of conforming to the rubric, a proposition which it devolves upon the respondent to establish. This impossibility is said to reside in the fact that the priest must, according to the several rubrics regulating the administration of the sacrament, consecrate the elements, and receive them himself before he has any means of knowing whether there will be as many as three persons coming forward to receive them after him. But is this the fact? Neither by any evidence that he has given, nor by any conclusions to be extracted from the rubrics of the Communion Service, does it seem to me to be established that a priest, really desirous of conforming to the rubric, is practically unable to discover whether the celebration he is about to enter upon will be a lawful one or not. On a perusal of the several rubrics as they occur in the Communion Service, it certainly seems to be assumed throughout that the number of those who are about to communicate will be known (or, at least, approximately so) to the priest, and if others are present (the propriety of which is, I believe, a controverted point, but one with which this court has nothing now to do), discriminated in some manner from them. Thus at the very beginning of the Order for the Administration of the Communion, it is said, "So many as intend to be partakers of the Holy Communion, shall signify their names to the curate at least some time the day before." Then at a later period of the service, "The priest shall then place on the table so much bread and wine as he shall think sufficient;" and again, "At the time of the celebration of the Communion, the communicants being conveniently placed for the receiving of the Holy Sacrament;" and again, "Then the priest shall say to them that come to receive the Holy Communion;" and again, "Then shall this general confession be made in the name of all them that are minded to receive the Holy Communion." Those, therefore, who intend to receive the Holy Sacrament, are invited to give notice of their intention, a quantity of bread and wine is to be placed on the Communion Table, which is to be estimated in reference to the probable number of them; they are to be conveniently placed "for the receiving of the Holy

Sacrament;" and they are to be addressed in the character of communicants by the minister, all of which provisions seem to imply that the minister has some means of distinguishing them. But no precise direction appears to be given as to the details of the manner in which any separation, discrimination, or distinction between those who do and those who do not communicate, is to be brought about. A reference to the rubrics of the previous Prayer Books may throw some light on the general intention of the Legislature on this head. In the first Prayer Book of Edward VI., at the end of the offertory, stands the rubric, following: Then so many as shall be partakers of the Holy Communion, shall tarry still in the quire, or in some convenient place nigh the quire, the men on the one side, and the women on the other side. All other (that mind not to receive the said Holy Communion) shall depart out of the quire, except the ministers and clerks: (The Liturgies of Edward VI., Parker Society edit., 1844, p. 35.) In the second Book of Edward VI., this rubric desiring the communicants to remain in the quire was omitted, perhaps because the congregation was no longer invited to come into the quire, and deposit their alms in the box which used to stand near the altar, or perhaps because a rubric was then for the first time introduced, directing that the table at the time of the Communion should stand in the body of the church, except in those churches where morning and evening prayer were read in the chancel. But at this same time a further alteration was made by adding the following very strong expressions to the form of exhortation which was to be said "at certain times:" "And whereas ye offend God so sore in refusing this holy banquet, I admonish, exhort, and beseech you, that unto this unkindness, ye will not add any more. Which thing ye shall do, if ye stand by as gazers and lookers on them that do communicate, and be no partakers of the same yourselves. For what thing can this be accounted else, than a further contempt and unkindness unto God. . . . Wherefore, rather than ye should so, depart you hence, and give place to them that be godly disposed. . . .—(Ib. pp. 272, 273)."—This exhortation is looked upon by some, I believe, as addressed only to those who were not in the habit of communicating at all. By others, on the contrary, it is regarded as an invitation to all who are not about to communicate on the particular occasion, to leave the church, and thus separate themselves from the communicants. But, whatever may have been the intention of it, it is not unlikely that it gave rise to a custom, more or less general, for the non-communicants to withdraw. On this matter I will quote a passage from a judgment delivered in the Metropolitan Court of Armagh in the year 1852. The case was cited by Dr. Stephens, and I am indebted to him for a copy of the judgment. Speaking of this exhortation, the rev. judge of that court said: "This striking address, repeated in all the churches of the kingdom during a period of nearly 100 years, very effectually brought about and established the custom of the non-communicants withdrawing—a custom that continues to this day, although this part of the exhortation was omitted in the Prayer Book of 1662." He then adverts to the fact that the rubric above quoted, as to the communicants "being conveniently placed," was for the first

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time inserted in the present Prayer Book, and goes on thus: "When, therefore, the non-communicants have withdrawn, and the communicants have placed themselves conveniently for receiving the sacrament, that is in a part of the church near the Lord's table, it would seem to be easy for the officiating minister to make a tolerably accurate estimate of the numbers for whom he is to provide a sufficient quantity of bread and wine, even though they have not signified their names previously." The only other matter which sheds any light on this subject is the language of the 25th article of religion, which speaks of the sacrament as not to be carried about or "gazed upon." Upon this review of the history of these rubrical directions, the conclusions at which I arrive are, that the Legislature, in both Prayer Books of Edward VI., as well as the book of 1662, contemplated that there would be some method of discriminating between those who intended to partake of the Holy Communion, and those who did not; that under the first book of Edward VI., the means of doing so were specifically prescribed; that under the second book of Edward VI. and the present book, no such specific means are prescribed (except they be found in the direction that the communicants should be "conveniently placed"), and that the custom, however general, of the non-communicants retiring from the church is not specifically enjoined by any positive direction of the existing rubrics. Nor am I aware that the minister has any means at his command to enforce compliance with this custom, supposing it to be desirable to do so, upon which matter it is not my duty here to express an opinion. But admitting this to be so, it was still urged by the complainants that the minister has, practically, other means within his reach of ascertaining whether a sufficient number are about to communicate, did he choose to avail himself of them. It was not asserted, nor can it be assumed, that the members of the respondent's congregation would do otherwise than assist him in avoiding the celebration of the sacrament in a manner contrary to the express letter of the law; and it was therefore contended that the respondent had only to make known to his congregation the difficulty in which they placed him by the practice of non-communicants remaining in the church when the celebration of the holy sacrament was about to begin, without any separation being effected between them and the communicants, for the difficulty to pass away. To this it was replied, that a clergyman has no means of doing so without violating the rubrical directions, and the judgment in *Westerton v. Liddell* (Moore's Sp. Rep.), was relied upon to show that the details of the Communion Service could not be added to or varied by any announcement on the part of the minister without infringing the law. Various means were suggested, however, by which it might be done, and either through the churchwardens or through the pulpit or otherwise, it was said that the minister might make known his desire that if noncommunicants chose to remain in the church, the communicants should conveniently place themselves apart from the rest, so as to enable him to recognise them. The most formal method of proceeding in this direction, perhaps, would be for the clergyman to apply to his ordinary, and with his leave to read out during the service a notice describing what those who intended to communicate should do to declare

themselves, and thus comply with the rubric, immediately preceding the offertory, on the subject of notices to be given in church. I do not dwell further on this, or pause to decide what the respondent might best have done, because he has in fact done nothing and attempted nothing, and, further, because I am not even satisfied that he had any reasonable cause to expect that the celebration of the 4th July would be other than what it actually was. It appears, on the respondent's own evidence, that what happened on the 4th July had happened on several previous occasions; that he had taken no steps to prevent the recurrence of it, and that on leaving his cure in the hands of two other clergymen when he went abroad in August, he gave them no warning or directions, so that the same thing happened again in his absence. The possible difficulties of a position can hardly, therefore, be listened to in exculpation of one who had not been at the pains of ascertaining whether they are real difficulties or not. But now I turn to the question whether the respondent had reasonable ground to believe, or did even in fact believe, that there would be a sufficient number of communicants on the 4th July. It is impossible, I think, to read his own evidence on this head, and not perceive that he entered upon the celebration of the holy sacrament on that day without, as he states it himself on re-examination, "any positive expectation one way or the other." It is true that there were many present as to whom he did not know that they might not communicate, and as to some, he says he thought they might, but he had no belief that they would. Whatever may be said, as to whether reasonable grounds for believing that the proper number would communicate existed or not, it is clear, I think, that the respondent must establish that he did in fact believe that they would do so, before he could possibly be in a position to set up any exculpation based on the imperfect state of his own knowledge. This he failed to do. The rubric has, in my opinion, been violated, and without excuse. It will, therefore, be my duty to admonish the respondent to obey the rubric in future. The next question for the decision of the court concerns the lawfulness of the crucifix, and of the paintings called the stations of the cross, which have been set up in St. Peter's Church. The solution of these questions depends not on any single contested passage of a statute or a rubric to be construed by the court, but on the general result of the various acts of the Sovereign and the Legislature, which go to make up that momentous change in the state religion, and the ecclesiastical laws of the realm, which is known as the Reformation. The field, therefore, over which such an enquiry is capable of being pursued, is an almost unbounded one, but it does not, I think, devolve upon this court so to pursue it. For the ground has been already travelled by the appellate tribunal, in the two cases of *Westerton v. Liddell* (Moore's Sp. Rep.), and *Phillipotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), in which all that historical research and able argument could do to elucidate the legal propositions deducible from any inquiry of the kind, was fully and effectually done. I will state, in a few sentences, the points decided in these cases so far as they affect the present inquiry. In the case of *Westerton v. Liddell*, the court had to pronounce

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upon the legality of a cross set up in Mr. Liddell's church. And it was decided that although before the Reformation the symbol of the cross had no doubt been put to superstitious uses, "yet that crosses when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case, "was to be considered a mere architectural ornament." The court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix," the former of which they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced." I must infer, therefore, that in the opinion of the court, as declared in this case of *Westerton v. Liddell*, the use of the cross was only to be justified when it played the part of a mere architectural ornament, and that the views and arguments upon which that justification was based did not afford the same justification to crucifixes. In *Phillpotts v. Boyd*, the court, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the purpose of decoration only," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been or is likely to be paid to any of the figures upon it." These two cases, considered together, afford to this court a sufficient guide for the principles which it is now bound to apply. All that remains is to apply them. In doing so it is necessary first to have a clear idea of what is meant by "superstitious reverence being paid," and then to ascertain whether such "reverence" is likely to be, or in danger of being, "paid" to the particular objects here complained of, or whether, on the contrary, it is established that those objects are for architectural ornament only. It will be observed that the contrast set up by the court in these cases, is between superstitious reverence on the one hand, and architectural decorations on the other; and, I cannot but think that the court considered that all figures in sculpture or painting must needs fall within one category or the other, so that if the objects and figures here in question were intended to be, or were likely to become anything more, or other than mere architectural decorations, they would be illegal as objects of "superstitious reverence." This view would at once simplify the definition of "superstitious reverence," and reduce the inquiry to the question whether the limits of mere architectural decorations have been exceeded or not. But, passing this by, and considering the matter in a more general light, I conceive that the words "superstitious reverence" or "idolatrous practices," together with the more general term "abuse," all which expressions are used indifferently by the court in *Phillpotts v. Boyd* are intended by the court to mean the same thing as "worship" and "adoration," which are found in the 22nd Article of Religion. This appears from the following passage in the judgment

in that case: "As the Reformation proceeded, and the Articles of Religion came to receive statutory authority, the doctrine of the Church on this subject was plainly set forth. The 22nd Article of Religion declares that 'the Romish doctrine concerning purgatory, pardons, worshipping and adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God.' In other words, it condemns only the abuse of images." What, then, was this Romish doctrine? The actual worship of the graven image in place of the Deity it represents, has never, so far as I am aware, been inculcated by the Romish church. It certainly forms no part of the teachings of that church, if I may rely on the testimony produced in this case from the lips of the witness Dominic Criscitelli. The "Romish doctrine" "concerning worshipping and adoration of images," spoken of in the 22nd Article of Religion, as "a fond thing, vainly invented," must therefore be intended in that article to mean the devotion and prayer which the Roman church to this day enjoins its adherents to offer, not to images themselves, but to God, before crucifixes, images, or paintings, and the like. And it was this doctrine, together with the practices which had been found to result from it, which it was a main object of the Reformation to denounce and put away utterly from the reformed church. That I may in no wise mistake or misapprehend the doctrine of the Romish church on this matter, I will refer to the following passage from the decrees of the Council of Trent: "... Imagines porro Christi, deiparæ Virginis, et aliorum sanctorum, in templis præsertim habendas et retinendas, eisque debitum honorem, et venerationem impertiendam; non quod credatur inesse aliqua in iis divinitas, vel virtus, propter quam sint colendæ; vel quod ab eis sit aliquid petendum; vel quod fiducia in imaginibus sit agenda, veluti olim fiebat a gentibus, quæ in idolis spem suam collocabant; sed quoniam am honos, qui eis exhibetur, refertur ad prototypa quos illæ representant; ita ut per imagines quas oculamus, et coram quibus caput aperimus, et procumbimus, Christum adoremus; et sanctos quorum illos similitudinem gerunt, veneremur.—Sess. 25.—De Invocatione, veneratione et reliquiis sanctorum et sacris imaginibus. (Canones et decreta sacrosancti . . . Concilii Tridentini . . . Opera et Studio Jusepi Le Plat Sessio xxv, p. 280, Antwerp, 1779.) It was not, therefore, intended in the above decision of the Court of Appeal by the use of the words "superstitious reverence," "adoration," or "worship," to convey only the limited idea of a figure or object itself worshipped like a Pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of adoration, worship, or reverence paid to the Deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question is made to take a place or play a part, in the devotions which are paid to the Deity before it. It is in this sense then that I propose now to

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inquire whether it can fairly and reasonably be said that the figures complained of are likely to be or are in danger of being objects of "worship" or "superstitious reverence." There is no dispute as to what these figures are or where they are placed. There is a screen of open ironwork, some nine feet high, stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the cross, in full relief, and about eighteen inches long—this is the crucifix complained of. The screen, of course, from its position directly faces the congregation, and the sculpture or moulded figure of our Lord is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light. These candles were proved to have been lighted for the evening service on the 4th July 1875; it hardly seems that they were necessary for the purpose of lighting the church at the beginning of the service on that occasion: but, on the other hand, it appears that the gas was necessarily turned on before the service concluded, and I cannot say that it is made out to my satisfaction that the candles were not then wanted for lighting purposes. I may at once then dispose of the charge, which, though not distinctly made in the representation, was urged in argument that the position of the candles in relation to the crucifix and the manner in which they were used together constituted a ceremonial observance, and as such were not warranted by law. I hold that this charge is not made out, and I pass to the more serious consideration whether a crucifix so placed and lighted is in danger of being an object of "superstitious reverence." The best forecast of the future in most cases, but especially in those wherein the failings of mankind are concerned, is to be obtained from the experience of the past. And it was to the past that the court in *Phillipotts v. Boyd* emphatically appealed in justification of the Exeter reredos. In speaking of "painted representations of portions of sacred history, to be found in many of our churches," the court relied upon the circumstances that these paintings "had been proved by long experience to be capable of remaining there without giving occasion to any idolatrous or superstitious practices." Would an appeal to the experience of the past, in the case of crucifixes, bring out the same result?—or rather, it should perhaps be asked, would not the result be the very opposite? It is precisely here that, to my mind, the great difficulty presents itself in the proposal now made to sanction the restoration of so well-known an object as the crucifix to that place in our churches to which for 300 years it has been a stranger. The crucifix, as set up in our churches, has a special history of its own. Before the Reformation the "rood" was ordinarily to be found in parish churches in this country. It presented the carved, sculptured, moulded, or painted figure of Jesus Christ on the cross, and was, in fact, a "crucifix, with images at the base." (Perry's *Lawful Church Ornaments*, p. 247.) This figure was erected on a structure called the rood loft, which appears to

have traversed the church at the entrance to the chancel; in fact, it occupied as nearly as may be the position which the iron screen in the present case does. There is in existence the most precise and unquestionable evidence on this matter, and it is to be found in the records of the Lincolnshire parishes, printed in Mr. Peacock's book on Church Furniture, and dated A.D. 1565-6. So universal does the existence of the rood in some form, either sculptured or painted, seem to have been, that in these returns of the churchwardens of upwards of 150 parishes, there is mention of the rood as having been defaced or pulled down in at least 140. It will also be found that in Bonner's Articles, put forth during the reign of Queen Mary, in the year A.D. 1554, inquiry is made "whether there be a crucifix, a rood loft, as in times past has been accustomed; and if not, where the crucifix or rood loft is become, and by whose negligence the thing want." Again, in Cardinal Pole's Articles, A.D. 1557, "... whether they have a rood in their church of decent stature, with Mary and John ..." After this period, the historical evidence abounds that in the reign of Elizabeth these roods and rood lofts were destroyed far and wide as monuments of idolatry and superstition, but I am not at present concerned with that circumstance, save so far as it serves to show that they had existed, and were of general if not universal occurrence. Not only so, but in the year 1560, a discussion appears to have arisen as to the propriety of setting the roods or crucifixes up again in parish churches. In the Zurich Letters, first series, p. 67, is a letter by Bishop Jewel, dated the 4th Feb. 1560, in which he says: "This controversy about the crucifix is now at its height. ... A disputation upon the subject will take place to-morrow. ... For matters are come to that pass, that either the crosses of silver and tin, which we have everywhere broken in pieces, must be restored, or our bishoprics relinquished." In the same series, at pages 73-74, dated the 1st April, in the same year, is a letter of Bishop Sandys, in which is the following passage: "We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by all the people. Some of us thought far otherwise, and more especially as all images of every kind were, at our last visitation, not only taken down, but also burnt, and that too by public authority; and because the ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others. ... God ... delivered the Church of England from stumbling-blocks of this kind." From all this it is plain that the crucifix formed an ordinary feature in the parish church before the Reformation; and it cannot be doubted that it did so, not as a mere architectural adornment, but as an object of reverence and adoration. If any proof was required of this proposition, it may be found in the fact that the worship of it was enjoined in the Sarum Use, the missal most largely accepted and used in England before the Reformation. This was especially the case on Palm Sunday. In the order of service for that day, given in the Sarum Missal, a very elaborate service ended with the adoration of the "rood"

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by the celebrant and choir, before passing into the chancel. Such is, most briefly, the part played by the "rood" or crucifix in English churches in the past. If set up again in them now, what part is it likely to play in the future? It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of abuse? But when the court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church, and for the particular purpose of "adoration"—when the court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that, now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry." If this apprehension is a just and reasonable one, then there exists that likelihood and danger of "superstitious reverence" which the Privy Council, in *Phillipotts v. Boyd*, pronounced to be fatal to the lawfulness of all images and figures set up in a church. Before concluding that it is so, let me pass in review the arguments urged in favour of the opposite side of the question. I will place, first among them the consideration, forcibly pressed on the court, that the times we live in are not as the times before or at the period of the Reformation; that images and figures which gave occasion then for "unhealthy minds" to abuse, "we, in our more extended knowledge, may be permitted to use with safety." That there is a wide difference in the state of knowledge, and still more in the degree of its general diffusion, between the 19th and the 16th centuries will not be denied; but is it equally certain that superstition has waned in proportion as the light of intellectual culture has advanced, and that the ground gained by the one has been lost by the other? Is it really so absurd, as it was argued to be, to imagine that in the present day the worship of lifeless images and figures, not as idols, perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded, but I question whether intellectual culture can be relied upon as a safeguard against it; for, if so, what is to be said of the Romish church and of those able and distinguished men who, in our own day, have not hesitated to join it and accept its doctrines. What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms, as inculcated in the devotional books of the Roman Catholic creed. This is the "fond thing vainly invented" of the 22nd Article of Religion; and the mere fact of the existence of such a doctrine in that church, among whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can

the same be said of the weak and ignorant? The parish church is for all—not for a class—and if the crucifix, placed as it is in this instance, is lawful for St. Peter's Church, it is lawful for every parish church in the country, and may be provided for every congregation—strong-minded or weak—instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to our Lord comes to be habitually paid immediately before a sculptured figure of his body on the cross, which arrests the eye and occupies the imagination while the mind is in attitude of prayer, it may be easy to some, and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer, and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts and exciting religious fervour, which can hardly be rejected by those who most feel the want of it, and to whom all abstract thought is a difficult exercise. When there cease to be any such, the peril may cease also; but, until then, it is impossible, I think, to accept the alleged robust temper of the present times as a safeguard against so obvious a temptation. Another argument urged for the respondent was this, that crosses had been as much abused and worshipped before the Reformation as crucifixes, and are therefore as much in danger of abuse now, and yet crosses were by the court, in *Westerton v. Liddell* (Moore's Sp. Rep.), held not to be unlawful as ornaments. I will only say on this head of argument that the court in that case were of a different opinion; that for reasons which they considered sufficient, they distinguished crucifixes from crosses in this respect, and that if they had been unable to do so, there is nothing to show that, in their judgment, either crosses or crucifixes would have been lawful ornaments. A further objection was then taken that if the delineation of the crucifixion in sculpture may not be lawfully set up in a church, the same thing must be equally true of a picture in a painted window, exhibiting a similar figure. It is not to be doubted that, in many churches (and in the notable instance of St. Margaret's Church, at Westminster, where the window is of great age), representations of the crucifixion in painted glass or paintings are to be found, and I am not prepared to offer any definition which should draw a sharp line of distinction between such decorations and a crucifix. Indeed, I doubt whether any narrower or more exact definition of what is lawful and what unlawful, can, for practical purposes, be framed, than that which is set forth in the case of *Phillipotts v. Boyd*. But, adhering to that decision, and each case standing on its own circumstances, it is, I think, to be presumed that the Court of Appeal would not hesitate to adjudge even painted windows, or paintings portraying the same subject, to be unlawful if it was satisfied from the mode in which the subject was treated, the place which they occupied, or other incidents in the surrounding circumstances, that they were in real danger of adoration, worship, or superstitious reverence. So long as they are free from this charge, and fulfil no other function but that of fitly decorating the church, they are free from objection—the moment that, from any cause,

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whether residing in the objects themselves, or arising among those who worship in the church, the danger of their adoration is made manifest. I conceive that they cease to be innocent, and fall under the charge of illegality. Up to this point I have considered only the reasons which lead to a conclusion that this crucifix is likely to invite "superstitious reverence." I will now say a few words on the alternative proposition that it is intended only, and is likely to serve only, as an architectural decoration. Viewing the matter in this light, the remark naturally arises that this particular figure of the crucifix, while it may be justly said to stand highest among the representatives of gospel history in its fitness for the purposes of adoration or worship, must surely be admitted to occupy a very inferior place among the subjects adapted for the display of mere architectural beauty. In association with other figures, and as embodying the scene of the crucifixion, it has no doubt been the subject of artistic treatment; but by itself, as it appears here in this church, standing alone without incidents or adjuncts, it is a subject which, however, artistically treated, might be so well spared in the mere decoration of churches, that it is not easy to conceive that it should be selected solely for that purpose. Upon the whole, then, I must declare that the crucifix surmounting the screen, in this case, has not been shown, to my satisfaction, to have been set up as an architectural decoration only, and that there does exist a danger and a likelihood that it may be the object of "adoration" and "superstitious reverence." This conclusion makes it unnecessary to consider whether its erection was originally covered by the faculty which was obtained for the iron screen; and the court must now order it to be removed; but a removal of the figure, leaving the cross standing, will be a compliance with this order. It remains to deal with the "stations of the cross." They are described in the representation as "figures in coloured relief of a plastic material, attached to the walls of the church, purporting to represent scenes of our Lord's Passion, and such as are commonly used in Roman Catholic churches." It was not denied that this general description of them is a correct one. More particularly they are a set of fourteen separate groups, affecting to delineate the sufferings of our Lord, commencing with His judgment and condemnation, and ending with His crucifixion and burial. The first objection taken to them I must hold to be a fatal one, namely, that they constitute "an addition to the fabric ornaments or furniture of the church" within the meaning of the statute, and have been set up in the church by the respondent "without lawful authority," no faculty having been either granted or applied for to justify their erection. The law which requires that those who wish to fix or set up any new decoration in a church must apply to the proper authorities for a faculty before they do so, is very salutary and ought to be upheld. It serves as a safeguard against the introduction of many objectionable things into the church, which apathy or want of vigilance on the part of the parishioners might, in many instances, facilitate, and it maintains the principle, which is a wholesome one, that the structure and ornament of the church is not to be meddled with except upon due consideration and lawful authority. It is upon this ground, therefore, that I shall order their removal. But

the representation further alleges that they are "decorations forbidden by law," and as they now stand I think they are. It is needless to enter into the history of this set of pictures. Whatever origin they or some of them had, it is clear that the three falls of Christ under the cross, and the legend of S. Véronique, have no warrant in gospel history. It is also clearly established by the two devotional books put in evidence, *The Crown of Jesus*, published under the authority of Cardinal Wiseman and four Roman Catholic archbishops in Ireland; and the *Key of Heaven*, by S. Alphonsus Liguari; that these fourteen representations are to the present day authorized objects of adoration in that church. In the *Crown of Jesus*, p. 421, the following instruction appears: "Devotion to the passion of our Lord is a singular special means of grace. The great means of impressing the devotion profoundly on the soul is the holy mass, the holy rosary, and the stations of the cross. You should endeavour to make the stations of the cross every week. The church encourages this practice by the greatest indulgences. Every time that in a state of grace you go round the stations of the cross, kneeling before each (or if the crowd be great simply turning and kneeling towards each), and with a truly contrite heart meditate on each stage of our Lord's Passion, as represented in the *Via Crucis*, you have it in your power, even without Communion, and without any additional special prayers, to obtain several plenary indulgences for yourself, as also for the poor souls in purgatory. . . . In making the following stations, the same indulgences are gained as if they were made at Jerusalem on the very spot where our Saviour suffered." Then there follow a set of prayers for each station, with direction at what part of them the worshipper is to kneel. These extracts sufficiently show the character and objects of the pictures in question, as used among Roman Catholics; the respondent puts them up in a church of the Church of England, and asks the court to say that they are architectural decorations only, and of a lawful character. I think they are neither. Some of them, if they stood alone dissociated from the rest, such, for instance, as the Judgment of Pilate, may be unobjectionable in themselves, whilst others, such as the three falls of Christ under the cross, and the fable of S. Véronique, whether they stand alone or not, may be held objectionable in themselves; but the entire set, viewed as a whole and in their relation to their well-known history, must be regarded, I think, as likely (if not intended) to be used for the purposes for which they always have been used, and not for the mere purpose of decorating the church. I shall, therefore, as I have above said, order their removal, leaving it open to the respondent, if he shall desire it, to apply for a faculty to authorise the introduction into his church of such of them as may turn out to be free from objection. It will be observed that in dealing with the question of lawfulness, both as regards these stations of the cross and crucifix, I have hitherto excluded from view all conclusions to be drawn from the manner in which the respondent has been in the habit of conducting the services of his church. At the same time it is obvious enough that the probability of both the crucifix and the stations of the cross being turned to superstitious uses, is largely augmented

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by the fact that they have been set up by a clergyman who celebrates the Holy Communion with a mixed chalice and wafer bread, and with a "biretta" on his head, accompanies a procession round his church with banners, crosses, and acolytes in red cassocks, in apparent imitation of the Church of Rome. But the structure or ornament of a church is more or less a thing of permanence, while the ministrations of a particular clergyman are more or less temporary, and if sound objections exist, as I think they do in this case, to the objects complained of, in themselves, those objections constitute the best, because the most permanent basis for their condemnation and removal. I will only add that I have endeavoured in the above conclusions rightly to interpret and apply the decisions of the Appellate Court on this grave subject, in their spirit as well as their letter. I say grave subject, for no one can doubt that the slightest return to the use of graven images or pictures as an aid to prayer or a spur to devotion, would be justly regarded as a surrender of principles, vindicated at high cost in the Reformation, and dear to the people of this country. On the other hand it would be a matter of no small concern if any needless restriction or prudery of apprehension should serve to check the generous piety of those who have laboured to restore what the hand of time had defaced; to undo the work of Puritan excess, to repair the ravages of neglect, and enhance the outward beauty of the house of God. It is between these alternative evils that the decisions of the Appellate Court appear to me to be designed to occupy a safe position. It may be that, in some cases, the line of severance between the "mere decoration" which is free from harm and the "superstitious reverence" which is full of peril, may be difficult to draw or uncertain to maintain. I do not think it is so in this case, but if I deceive myself in that belief there remains the obvious reflection that a false step in one direction is likely to be fraught with evils far greater than any that can ensue from an error committed in the other. If sculptured figures or pictures are once set up in our churches, and sustained by the law, to which (whether from the natural tendencies and weaknesses of the human mind on this subject, or from the teachings of books, or the promptings of individuals), adoration or superstitious reverence should, contrary to expectation, come to be paid, an irreparable step towards idolatry may prove to have been taken; for the outward object once sanctioned, the inward devotion is beyond the reach of laws. In the opposite direction I can discern no evil comparable to this. The range of decoration and artistic design is practically without a limit, and, in the profusion of choice, the loss by prohibition of any special figures or objects can at no time be more than faintly felt, and can at all times be easily repaired. As the judgment of the court is on all the charges in favour of the complainants, the respondent must pay the costs of these proceedings.

From so much of the decree as related to the eastward position of the celebrant at the Holy Communion, the distinctive vestments worn by the respondent at the said service, bread to be used thereat, and the illegality of the crucifix, the respondent appealed to the Queen in Council.

Feb. 26.—*W. G. F. Phillimore* moved the Dean of Arches to suspend the execution of the monition in respect of the above four points, pending the

appeal, and referred to sect. 9 of the Public Worship Regulation Act 1874, and r. 24 of the Order in Council relating to that Act.

Shaw opposed the motion on behalf of the complainants, and referred to *Walford v. Walford* (L. Rep. 3 Ch. 812; 19 L. T. Rep. N. S., 233).

Lord PARZANCA.—I must say I think it would be a great misfortune if I were bound by any view of the justice of this case to accede to this application. One of the evils that existed before the late Act was the grievance that, when the Court of Arches had decided the thing to be lawful or unlawful, appeal was had to the Queen in Council, and the immediate effect of that appeal was to stay the hand of the inferior court, so that the decisions of the court never could have any effect until a great length of time had elapsed, and until very great expense had been incurred. Reference has been had to what happens in other courts. It is now, as Mr. Shaw has very properly said, under the Judicature Act, the universal practice in all the courts, that the court appealed from should be able to hold its hand over the circumstances under which the appeal should go on, and that it should have the discretion to suspend the operation of its own judgment or decree in proper cases, but that where such circumstances do not exist as to render it a proper case for that suspension, the rule should be that the decree of the inferior court should go forward. That was the practice in the Probate Court under the Probate Act, it was the practice of the courts of equity, and in some cases it was the practice of the courts of law, but now, by the Judicature Acts, it is the practice of all the courts in Westminster Hall. To that extent the analogy of other courts is a thing to look to. But the circumstances under which other courts think it right to stay the execution of the decree of the inferior court will be of very little assistance to this court, owing to the very different nature of the matters involved. Therefore I do not hold with the proposition that because courts of equity lay down the rule—if they do lay it down—that irreparable injury must be done before they will stay the decree, that this court should take the same principle as its guide. I think that the principle, and the only principle, if it can be called a principle, which is to be adopted is that the court in each case should consider the whole of the circumstances, the amount of actual injury, the amount of grievance to people's feelings, the circumstances under which the alleged offence has been committed, the state of the law in previous cases, and a variety of other circumstances, in fact every circumstance that could bear upon the matter—that the court should take all that into its consideration, and then, if special grounds are shown to exist, that it should hold its hand until the Superior Court has had cognisance of the case. That I believe, is the only principle which can be laid down for the exercise of the power confided to this court by the late Act of Parliament. Then the question is, whether in this case any special grounds have been shown. The respondent in the present case has been in the habit of conducting the services of his church in direct contravention of the law as settled by the Supreme Tribunal in the last case that came before it. I do not know whether I may assume, from his appealing only in respect to certain points, that he is prepared to yield obedience to the law upon

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those points as to which he has not appealed; I hope I may; but in the cases in which he has appealed he now asks upon no special grounds—except that he still maintains that these matters are not illegal, which is a proposition that everybody maintains in such cases—that he should be allowed to continue the services in a way which the Supreme Court of Appeal has declared to be illegal, until he can have the opportunity, if the court permits him that opportunity, of questioning again in that court its own decision and inducing it to revoke the conclusion at which it previously arrived. Now, that seems to me a very unreasonable thing to ask. I think he should obey the law as it stands. I think he should perform the services of the church as the Supreme Court of Appeal has declared they ought to be performed, and then he will come with clean hands at least to the Superior Court, saying, I have been obedient to the law up to the present time, and I ask you to allow me to open the question again which you have previously decided, and to endeavour to persuade you if I can that you on a former occasion came to a wrong decision. That applies to three of the four points in respect of which alone there is an appeal. The fourth point is as to a decision of this court of a novel character relating to a point which has not been decided before. Now, upon that matter, I will say this, that I think this court, like all inferior courts, ought not by any means to assume that its own judgment will ultimately be affirmed, and, therefore, if any decision is given in this court upon which an order issues which may be very painful to the consciences of those against whom it is directed, I can conceive cases in which it would be very proper indeed that that order should be withheld, or its operation suspended until the Superior Court has had an opportunity of declaring whether it was justified or not; but in this case I can conceive no difficulty of that kind, because the order here is to take off from the crucifix the figure which, as has been very properly pointed out by counsel, was proved in the case not to be a part of the same structure as the cross, but to have been distinct from it, and screwed upon the cross; it therefore can be detached without the slightest difficulty, it also can be detached and removed without doing injury to the religious feelings, scruples, or consciences of anybody, because we must always recollect that the respondent maintains that this figure is a mere architectural decoration, and if it is only a decoration of the church, the loss of that decoration for the period during which this case is under appeal, is not a matter that really could wound the most sensitive conscience. Viewing this figure, therefore, in the light in which the respondent views it, it seems to me that there is no pretence for applying to the court on any special ground as to the injury that would be done to people's feelings, or to the structure of the Church, by the removal of the figure, until the Court of Appeal shall have determined, if it does determine, that it may lawfully be put up again. Therefore, going through the items of the respondent's appeal, looking at the circumstances in which they stand, looking particularly to the state of the law as it now is settled by the supreme tribunal in these matters, and not throwing aside or being unaware of the strong feeling that exists

upon many of these subjects, I still think it plain that the respondent ought to obey the law as he now finds it, and that, until he can succeed in reversing it he ought to be content to conduct the services of the church in accordance with the judgment that the Privy Council have already delivered. The power confided to this court under the section of the Act to which allusion has been made (37 & 38 Vict. c. 85, s. 9), is one that ought to be sparingly applied—it is one that ought to be applied only where very special circumstances exist, and as, in my opinion, no such circumstances exist in this case, I must reject the application. The application is rejected with costs.

Proctors for the complainants, *Moore and Currey*.

Proctor for the respondent, *Brooks*.

House of Lords.

June 15 and 20.

(Before the LORD CHANCELLOR (Cairns), Lords CHELMSFORD, PENZANCE, and O'HAGAN.)

PEARSON v. THE COMMERCIAL ASSURANCE COMPANY. (a)

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Ship—Fire policy—Construction—Localization of policy.

A ship belonging to the appellant was insured against fire with the respondents by a time policy. In the policy the ship was described as "lying in the Victoria Docks, London, with liberty to go into dry dock." The ship went into dry dock, and after leaving the dry dock was moored for some time in the river in order that certain repairs might be done which were usually done in the river, but might have been done, though at a greater cost, in the Victoria Docks. While so moored the ship was completely destroyed by fire. Held (affirming the judgment of the court below), that the loss was not covered by the policy.

THE plaintiff had effected a policy of insurance against fire with the defendants on the steamship *Indian Empire* for three months from May 14th, 1862. The ship was described in the policy as "lying in the Victoria Docks, London, with liberty to go into dry dock, and light the boiler fire" once or twice during the currency of the policy." The *Indian Empire* was a paddle steamer of very large size, of 2000 tons, 249ft. long, and 60ft. beam, and it was found that the only dry dock in the Thames capable of receiving a ship of that size was Lungley's dry dock at Deptford, two miles higher up the river than the Victoria Docks, and to enter this dock it was necessary to remove the lower part of the paddle wheels. This was done in the Victoria Docks, and the ship was towed up to Lungley's Dock, and after the repairs there were finished, she was towed down the river again to a point 600yds. or 700yds. from the entrance to the Victoria Docks, and moored there, in order that the halves of the paddle wheels might be replaced. While so moored she was burnt. The present action was brought on the policy. It was proved that it was usual to replace the paddles in such cases outside the docks, but

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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that it might have been done inside at a much greater expense. The utmost despatch was used in replacing the paddles and the work was not quite finished when the fire happened. Evidence was given at the trial that great precautions were in force within the Victoria Docks to prevent accidents by fire.

The cause was tried before Erle, C.J., at the sittings in London after Trinity Term 1863, when the jury found a verdict for the plaintiff for the full amount claimed, 10,000*l*.

This verdict was set aside by the Court of Common Pleas (Erle, C.J., Williams, and Keating, JJ.) as reported in 33 L. J. 85, C. P.; 9 L. T. Rep. N.S. 442, on the ground that on the true construction of the policy the ship was not covered at the time of the loss; and in June 1873 this decision was affirmed by the Court of Exchequer Chamber (Kelly, C.B., Martin and Cleasby, BB., Blackburn, Quain, and Archibald, JJ.) as reported in L. Rep. 8 C. P. 548, and 29 L. T. Rep. N.S. 279.

From this judgment error was brought to the House of Lords.

Watkin Williams, Q.C. and *Lanyon*, for the plaintiff in error, argued that the ship was covered by the policy up to the 14th Aug., and that the "liberty" given by the policy must be taken to mean liberty to do what was usual under the circumstances, not only what was strictly necessary, and that underwriters are bound to know the circumstances of the trade to which their policy relates. They cited

Noble v. Kennaway, Doug. 492;
Bouillon v. Lupton, 15 C. B., N. S., 118; 33 L. J. 37, C. P.;
Pelly v. Royal Exchange Association Company, 1 Burr. 341;
Bond v. Gonsales, 2 Salk. 445;
Vallance v. Dewar, 1 Camp. 503;
Mason v. Atkins, 3 Camp. 200;
Lindsay v. Janson, 4 H. & N. 699;
Newman v. Casalet, Park on Ins. 900;
Long v. Allen, Ibid. 797;
Salvador v. Hopkins, 3 Burr. 1707;

And the following American authorities:

Webb v. National Fire Insurance Company, 2 Sand. N. Y. 497;
Fitchburg Railway Company v. Charlestown Insurance Company, 7 Gray, Mass. 64;
and also the Works of Arnould and Phillips on Insurance.

Cohen, Q.C., *J. C. Mathew* (*Benjamin*, Q.C. with them), for the defendants in error, maintained that this was a localised fire policy, and that the analogy of voyage policies was false. The risk must be clearly present to the minds of both parties: (See *Rodocanachi v. Elliott*, L. Rep. 8 C. P. 649; 9 C. P. 518; 28 L. T. Rep. N. S. 840; 31 *ib.*, 239.) The policy only covered what was necessary for the transit to and from the dry dock. Usage may be resorted to for the purpose of explaining the terms of a policy, but not in express disregard of them; the risk must not be altered.

Watkin Williams, Q.C., in reply.

June 20.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, the insurance in this case was an insurance against fire, effected by the appellants with the respondents on a large paddle-steamer called the *Indian Empire*, which so long ago as the year 1862 the appellant was proceeding to have repaired in the port of London. The policy is a time policy for

three months, from 14th May 1862 till 14th Aug. 1862. The insurance, however, does not protect the ship wherever it might be, or wherever it might be in the port of London. The ship is confined and localised for the purpose of the risk by these words, "lying in the Victoria Docks, London, with liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The ship is, therefore, covered by the policy during the three months so long as it is lying in the Victoria docks, and so long as it is in a dry dock, or at all events in a dry dock in the port of London. Nothing is expressly said as to the insurance attaching while the ship goes from the Victoria Dock into dry dock, but the court below have held, and as it appears to me rightly held, that the liberty to go into dry dock necessarily carries with it the protection of the insurance while the ship should be in transit from the Victoria Docks to the dry dock and back again. I think, further, there can be no doubt that in the transit to and from the dry dock the ship would be at liberty to do anything and everything usual under the circumstances for the accomplishment of the end in view, namely, the transit to and from the dry dock. Any delay usual under the circumstances, any deviation usually or conveniently made from the straight line, provided the delay and deviation are connected with, and tend to the attainment of the end in view, would in my opinion be justifiable under the words of the policy which I have read. A delay or deviation of this kind would fairly come within the words of Lord Mansfield in the case of *Pelly v. The Royal Exchange Assurance* (*ubi sup.*) "It is absurd to suppose that when the end is assured the usual means of attaining it are meant to be excluded." If on the other hand a delay in the transit to or from the dry docks were to occur, not as part of the usual and ordinary means or mode of effecting the transit, but for some collateral object or purpose, then, in my opinion, however usual and convenient a delay for the purpose of attaining that collateral object might be, the ship would not, during the delay, be covered by the policy. It is unnecessary to speculate whether the risk would or would not be greater when the ship was in the river than when it was in the dock. There is, as it seems to me, evidence that the risk would be greater in the former case than in the latter, but it is sufficient to say that the respondents have defined the risk which they were willing to undertake, and that risk cannot be enlarged beyond the ordinary meaning of the words upon any theory that the difference of risk is immaterial. Applying these observations to the facts of the present case, your lordships find that the dock called "Lunkey's Dry Dock" was the only dry dock in the Thames which could take in the *Indian Empire*, and that even into this dock the ship could not be received without taking off the lower half of the paddle-wheels. Accordingly the lower halves of the paddle-wheels were taken off in the Victoria Docks, and having thus been made ready for the dry dock, it was towed two miles up the Thames from the Victoria Docks to Lunkey's Dry Dock, and the repairs were proceeded with, and, so far as they were to be done in the dry dock, were completed there. The ship was then taken out of the dry dock, and it being intended to take her back to

the Victoria Docks, there was nothing to prevent her being taken back there at once, and the halves of the paddle-wheels might have been replaced, just as they had been removed, in that dock. In place, however, of being towed back to the Victoria Docks, it was towed still further up the river, and moored there; the paddle-wheels were brought from the Victoria Docks in a barge, and the work of replacing them was proceeded with in the river. While this was being done the repairs to the masts, rigging, and capstans of the ship, and other carpenters and joiners' work, were continued at the same time, and at the end of ten days, before the paddles were completely replaced, the ship was burnt. It is found by the case that it is usual after a ship whose paddles have been removed is taken out of dry dock to moor it in the river, for the purpose of replacing the paddles. And it is also found that though the paddles could have been replaced equally well in the Victoria Docks, it would have cost four times as much as if done in the river, I am clearly of opinion that the delay which was thus occasioned was a delay for a purpose altogether collateral. When the ship left the dry dock the course, if it was wished to maintain the insurance, was to bring her back to the Victoria Docks; and I assume that anything done in the usual course towards the attainment of this end would be within the insurance. But that which was done did not in any way contribute to that end. It may have been usual, and because it was economical it may have been convenient, but it did not in any way facilitate or conduce to the transit of the ship to the docks from which it had come. It was the unanimous opinion of the Courts of Common Pleas and Exchequer Chamber that the respondents, in the events which have happened, were not liable under this policy for the loss which occurred. I think there is no ground whatever for differing from their judgment, and I propose to your lordships that this appeal should be dismissed with costs.

LORD CHILMSFORD.—My Lords, from the moment this case was fully opened it seemed to me impossible to doubt the propriety of the judgment in which no fewer than ten judges agreed. I can see no ground for the statement which was made to us on the part of the appellant, that the true point of the case was never submitted to the court. Everything which was urged in argument before us appears to me to have been brought under the consideration both of the Court of Common Pleas and of the Exchequer Chamber. The question turns entirely on the construction of the policy, which is a localised time policy against fire upon the steamship *Indian Empire*, lying in the Victoria Docks, London, with "liberty to go into any dry dock." The place to which the insurance principally applies is the Victoria Docks. This place the vessel is to be at liberty to leave only for the purpose of going into a dry dock for repairs. That object being satisfied, the policy seems to require that it should return without delay to its original situation, and be again "lying in the Victoria Docks." Of course the policy impliedly covers the permitted transit to and from one dock to the other. But if the parties contemplated, as it is clear they did, that during the currency of the policy the vessel would be usually lying in the Victoria Docks, when the intended repairs in the dry dock were completed

it was the duty of the assured to return without delay to the Victoria Docks. Instead of doing so the ship was towed to a part of the river about 600yds. or 700yds. from the Victoria Docks, and there moored for ten days, during which time it was while so moored totally destroyed by fire. The loss, therefore, did not occur in the actual passing from the dry dock to the Victoria Docks. But it is said for the appellant that according to the usual course of proceeding in the repair of steam vessels of the size of the one in question, the mooring in the Thames for the purpose of replacing the half of her paddle-wheels must be regarded either as a necessary incident to the transit from the dry dock, or must be taken to have been intended to be included in the policy. But it seems to me that the precise terms of the policy afford no ground for such an argument. An insurance against fire necessarily has regard to the locality of the subject-matter of the policy, the risk being probably different according to the place where the subject of the insurance happens to be. In the present case it appears that there was greater risk where the loss happened than there would have been in the Victoria Docks, to which place the policy principally applied. The parties cannot be said to have contracted with reference to the usual practice of large paddlesteamers going into dry dock to remove a portion of their paddle-wheels, because it is stated in the special case that neither party knew that the vessel was of a width too great to admit of its entering the dock adjoining the Victoria Docks, where it would be expected it would go under the liberty to go into dry dock. And therefore the argument of the appellant must go the length of asserting that as it was an implied term of the policy that if it should be necessary to remove a portion of the paddle-wheels for the purpose of enabling the vessel to enter the dry dock, its return to the Victoria Docks might be delayed during the mooring in the Thames for any time that was required to complete the work of replacing the wheels. But I agree with what was said by Blackburn, J., in the Exchequer Chamber, that if the parties wished to cover the risk of the ship while so moored, they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken this risk it is impossible to say; as they were not aware that it would arise, there was of course no provision applicable to it. It would be a strong implication to raise against the underwriters, that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have to be resorted to on the part of the assured. More especially is this the case when it appears that the whole work upon the paddle wheels might have been done in the Victoria Docks. In fact the halves of the wheels were taken off in the Victoria Docks, and it is stated in the special case that the work of replacing them might have been equally well done in those docks, but that it would have cost four times as much as if done in the river; a very good reason for the assured running the risk of performing the work beyond the limits of the policy, but no reason at all for imposing upon the underwriters, by implication, an undertaking

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to accept a risk different and more extensive than that to which they expressly agreed to be liable. The policy only attached while the vessel was in the Victoria Docks or the dry dock, or was passing directly to and from one dock to the other. It therefore did not extend to the time the ship was moored in the Thames, and the underwriters are not liable for the loss which then occurred. I am therefore of opinion that the judgment appealed from is right, and must be affirmed.

LORD PENZANCE.—My Lords, the protection intended to be given by this policy was limited expressly not only to a period of three months, but to a particular place, the Victoria Docks, in which the vessel was to lie. When lost it was not lying in that place, but was moored in the river, and the only question is whether, at the time of the loss, being moored in the river was a circumstance within the special liberty which had been reserved to the owner in the policy under the words "with liberty to go into dry dock." The Court of Common Pleas held, as it seems to me very properly, that this liberty was not confined to any particular dry dock, and that the plaintiff might take the vessel to any convenient dry dock without losing the protection of the policy. The vessel therefore was justified within the limits of the liberty in proceeding to Lungley's Dry Dock, two miles away from the Victoria Docks, in which it was to lie, but it is contended that these limits were exceeded in the course taken with the vessel on its returning from the dry dock. In construing the meaning and extent of this liberty, I think great latitude should be allowed. To state at length in writing all that the vessel might be intended to be allowed to do in going to the dry dock, in lying there while being repaired, and then returning, the length of time to be occupied, and all that was to be done in various alternative events, would be the work of a lawyer, and a work that could not be comprised in any but a very lengthy document. The convenience of mercantile transactions makes this impossible in many cases, and in this mercantile contract of insurance especially, it is always the custom to express the mutual bargain in short and conventional terms. In construing such terms it is always to be borne in mind that the object of insurance is indemnity from the risks attending some commercial adventure or operation which the owner of the subject of insurance is engaged upon; and it is well understood by both parties that the desire and object of the assured is that the policy should extend to all such risks of the character insured against, as may arise by the adventure or operation being carried out in the usual and ordinary manner. The assured therefore is not intended to be bound to make his mode of carrying out the adventure conform to the words of the policy rigidly construed and confined to what is absolutely necessary, but the general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing the adventure. This, as I understand it, is the principle pervading the cases on voyage policies which have been cited; they are all instances of a policy being extended to cover proceedings which were usual and ordinary in the course of performing the voyage assured, though the exact words of the policy did not extend to them, or were even adverse to them. To the extent, therefore, of the principle involved in these cases, I think they are

applicable to the present case, although I do not think that this "liberty to go into dry dock" can be said to have all the incidents of a voyage policy. It follows from this that the vessel in proceeding to Lungley's Dry Dock, in being repaired there, and in returning to the Victoria Docks, would be protected so long as it was engaged in doing not merely what was necessary, but what was ordinary and usual for these purposes. If, for instance, it was usual, though not necessary, to take off part of the paddle wheels, as is admitted to have been the case here before entering the dry dock; and further, if, in order to do that, it had been usual for the vessel to lie a certain time in the river outside the dock while it was being done, I should have thought that the vessel would have been protected in doing so, because it was taking the usual course for the purpose of going into dock and being repaired. But when the repairs were completed, or so far completed as they were intended to be in the dry dock, and the vessel was brought out of that dock again, all that remained to be done within the liberty contained in the policy was to return to the Victoria Docks. And here, again, if it had been usual to wait a tide in the river, or perform the passage in any particular way, thereby encountering a delay which was usual but not necessary, and the vessel had done so, I should still have thought that it would have been protected. But what the vessel really did was to abandon for the time, returning to the Victoria Docks, and remaining for some days in the river for the purpose of a certain repair, namely, the putting on of the half paddle wheels which had been taken off, a purpose which had no connection with returning to the Victoria Docks, and was in no way even ancillary to getting there. It is admitted that it is usual for shipowners to have this species of work done in the river instead of in a dock, because it is cheaper; but it cannot be said that a delay for that purpose was within the usual course of vessels moving from one dock to the other. It appears to me, therefore, that the delay in the river, during which the vessel was burnt, was created for a purpose apart from, and independent of, the liberty to go into dry dock, to be repaired there, and then to return, which had been conceded to the assured in the policy, and that the protection of the policy was consequently lost.

LORD O'HAGAN.—My Lords, I am of the same opinion. The question is one of construction, and we must endeavour to ascertain from its terms the intentions of the parties to the policy of insurance upon this steamship, the *Indian Empire*. The facts are undisputed, and the words of the policy, if they are literally taken, import merely a contract to insure the ship for a period of three months against loss by fire whilst lying in the Victoria Docks, and whilst going into dry dock, according to the liberty specifically granted for that purpose. This is all that the words expressly convey, but I quite concur with the counsel for the appellant that they imply a liberty to return from the dry dock, and are an undertaking to insure during the transit back again. The real matter for decision is whether the ship when burnt was returning to the Victoria Docks, within the implied meaning of the policy, and according to the true contract of the parties. Now it is found in the case that the vessel, having been taken out of the dry dock, was "towed up the river to the

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Government buoy off Deptford, about six or seven hundred yards off the Victoria Docks, and altogether out of the course from Lungley's Dock to the Victoria Docks, and there moored, for the purpose of having the lower parts of the paddle wheels replaced." So that we find the vessel removed to the place at which it was destroyed by a course altogether different from that to the Victoria Docks, and for a purpose wholly alien from that of returning thither. I feel it impossible to hold that in such circumstances it was covered by a policy which, even assuming that the doubt of one of the ablest judges of England (Blackburn, J.), whether the vessel was insured while passing from the dry dock to the Victoria Docks, should be, as I think it should be, disregarded, only assured the vessel during that passage. It had made, as I have said, a totally different passage, with a totally different object. I do not think the policy was ever designed to insure the ship in a condition of facts which it does not profess to contemplate, and which the parties to it could not have foreseen. It is said that such contracts should be construed liberally, and for the interests of commerce; this view has not improperly been entertained in certain cases. But it can never justify indifference to the real purpose of a policy, or warrant the recognition of an obligation which was not directly, or by reasonable implication, imposed by its terms, when those terms are fairly interpreted according to their natural and ordinary meaning. Here the parties were vigilant to specify the risks they undertook, by providing for "liberty to go into dry dock, and light the boiler fires once or twice during the currency of the policy;" and we, in my opinion, are not free to add another material condition to their contract, and say that this carefully limited liberty could authorise the taking of the vessel wholly out of the course of passage to the dry dock and back again, with the manifest increase of danger of her destruction. The case, by setting forth the precautions taken in the Victoria Docks to prevent or extinguish fires, shows the nature of this increase very clearly. Watchmen at all hours, policemen and other persons trained to the use of fire engines, and carpenters ready to scuttle ships on fire, with an ample supply of water, diminished the risks of fire in the Victoria Docks; while in the river those appliances were wanting, and in the particular case of the *Indian Empire* nearly an hour elapsed between the breaking out of the fire and the arrival of one of the three floating engines placed at considerable distances from each other, and alone available to control the conflagration, which probably from that delay resulted in the loss of the ship. Without discussing the question of the admissibility of evidence on the one side or the other, these facts are persuasive to show that the effect of the policy, according to the view of the appellant, must have been to burden the respondents with a liability for risks far more serious than those for which they would have had to answer on their own construction of it; and it is to my mind quite plain that when it was framed such larger risks were not in contemplation of either insurer or insured. Neither of them knew that the width of the *Indian Empire* was too great to allow it to go into the graving dock, which was close to the Victoria Docks, and both of them had in view the prompt passage to the "Thames Graving Dock," by pontoons and hydraulic pres-

sure, which, if they could have been applied, would have obviated the necessity of taking off the lower half of the paddle wheels, and removing the ship to "Lungley's Dry Dock," and would have prevented the unfortunate transfer up the river to the place at which it was burned. They expected a prompt, quick, and safe exercise of the privilege of going into dry dock, and we may assume that the premium was arranged accordingly. Can we say that if the size of the vessel, and the effect of that in inducing removal first to a distant dry dock, and then to an unguarded portion of the river, far from the Victoria Docks had been known, a heavier rate would not more properly have protected the insurer? He might not have accepted the risk at all, or he might have accepted it on terms more favourable to himself, and more onerous to the assured. And on this point we should remember that the vessel might have been brought back immediately and directly to the Victoria Docks, and refitted there with an avoidance of the greater perils to which I have adverted; but that the appellant deviated from this proper course, took the ship to a place of danger, and delayed it long upon the river, not from any necessity or difficulty in doing otherwise, but simply to save himself the fourfold expence which would have been incurred by an immediate return to the safer Victoria Docks. If he chose to act in this way, and solely for his own apparent advantage, it does not seem unreasonable that the resulting loss should fall on him, rather than on the insurers, who never contracted to sustain it under such circumstances. The authorities on the subject of usage have been already sufficiently discussed. They do not appear to me to apply to the circumstances before us. The analogy of voyage policies is not a true one, and we must deal with this case according to the contract of the parties. It may be right and reasonable that a usage known to exist, which affects directly the progress of a voyage, or the dealing with a mercantile venture, should be held to be contemplated by insurers, and to regulate more or less their liabilities; but it must be a usage not collateral to, and unconnected with the voyage which is the subject of insurance. Here the custom of merchants to save money by refitting a ship in the river rather than in the docks had nothing to do with the specific contract of the insurer to cover a vessel in the Victoria Docks, in the dry dock, and in the passage from one to the other; he did not cover it in a place different from any of these, to which it had been taken by the insured's own option, and for his own interest. I think, therefore, that the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Tatham, Oblein, and Nash.*

Solicitors for the respondents, *Hollams, Son, and Coward.*

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TAYLOR v. TAYLOR.

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Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Tuesday, July 25.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

TAYLOR v. TAYLOR (a).

Settled estates—Lease—Tenant for life—Remainderman and trustee—Concurrence—Leases and Sales of Settled Estates Acts (19 & 20 Vict. c. 120, ss. 2, 16; 37 & 38 Vict. c. 33, s. 3).

A testator devised and bequeathed certain real and leasehold estates to trustees upon trust to receive the rents thereof, and, after defraying thereout all ground rent, taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay, to pay the net rents to his wife during her life, and after her death he gave the ultimate residue of his estate, after payment of certain legacies, to one of the trustees absolutely.

A petition was presented by the widow under the Leases and Sales of Settled Estates Acts, praying that leases of the real and leasehold estates comprised in the will might be granted, and was opposed by the trustee entitled in remainder :

Held (affirming the decision of Jessel, M.R.), that the application could not be granted without the concurrence of the remaindermen.

Quære, whether the widow was a "person entitled to the possession or to the receipt of the rents and profits" within the meaning of the 16th section of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120)?

THIS was an appeal from a decision of the Master of the Rolls refusing a petition presented by Marianne Taylor under the following circumstances :

By his will, dated the 18th May 1866, James Molyneux Taylor, after giving certain legacies, &c., gave, devised, and bequeathed all the real, residue, and remainder of his real and personal estate unto and to the use of William Hoy and Jeremiah Keily, their heirs, executors, administrators, and assigns, upon trust to receive, perceive, and take the annual and other rents, interest, and income of his said residuary real, and personal estate, and after defraying thereout all ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay, and to pay, apply, and dispose of the net annual rents, interest, and income then left to and for the use of his wife, Marianne Taylor, during her life for her separate use, without power of anticipation, and after her decease to grant and assign or otherwise convey and assure his said residuary, real, and personal estate unto and to the use of such person or persons, for such estates or estate, interests or interest, and purposes or purpose as he might by any codicil or codicils to that his will thereafter nominate, limit, and direct. The will contained no power to grant leases. Its provisions will be found more fully stated in 33 L. T. Rep. N. S. 87, where the same will came before the Master of the Rolls on another point.

By a codicil, dated the 24th April 1869, the testator appointed James Cuddon as a trustee in place of William Hoy, and, after giving certain further pecuniary legacies, he gave the ultimate residue of his real and personal estate to Jeremiah Keily absolutely, but in case he should die in the lifetime of the testator's wife, he gave such residue to his said wife absolutely.

The testator died in April 1870.

The widow and James Cuddon presented a petition under the Leases and Sales of Settled Estates Acts praying that an order might be made vesting in James Cuddon power to grant leases of the real and leasehold estates comprised in the residuary gift.

The application was opposed by Jeremiah Keily, and was refused by the Master of the Rolls, before whom it was heard in Nov. 1875.

In delivering his judgment Jessel, M.R. said. The questions which I have to decide are, first, whether Mrs. Taylor is a person entitled to present this petition under the Leases and Sales of Settled Estates Acts; and, secondly, even were she so entitled, is Mr. Keily a person with whose concurrence I ought to dispense. The last is a question which arises under the Act of 1874, and both are questions which do not affect Mrs. Taylor alone, but are likely to affect other persons in similar positions. Now the first question depends on the wording of the 2nd and 16th sections of the original Act (19 & 20 Vict. c. 120). The 2nd section of that Act gives a power to the Court of Chancery (which power is now vested in the High Court of Judicature), if it shall deem proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, to authorise leases. That is the material effect of that section. Then the 16th section says: "Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life, or any greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by this Act." And the 17th section provides that, subject to the exception contained in the next section, every application must be made with the concurrence of certain persons. It appears to me that the 16th section, though in form merely enabling, is, in fact, the only enabling part which entitles the court to set the Act in motion. When a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. For instance the 16th section says that the proceeding is to be by petition. It is enabling, I know, in form, that the application may be by petition; but no other process can be adopted. That has been decided on a great variety of Acts, where the application has been directed to be by petition, and it has been laid down that that being the mode pointed out by the Act which conferred the jurisdiction, the court must exercise the jurisdiction (as the 2nd section of this Act says in terms, though it was not necessary) according to the provisions of the Act. In the same way, when the statute says who is the person to petition, it means that the person or persons so described, and no others, shall be entitled to petition, otherwise anyone interested might petition under the general principle that

(a) Reported by H. PHAR, Esq., Barrister-at-Law.

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when powers are to be exercised by a court of law any person interested in calling those powers into execution is entitled to come before the court, and the only reason for putting in such a section is to show that that is not the meaning of the Legislature, but that the right of calling for the exercise of the powers shall be confined to the persons so described. When we turn from the words, which on this point appear to me perfectly clear, to the reason of the thing, the matter seems to me equally clear. The person who is to put the powers of the court in motion for a lease or a sale of a settled estate, is naturally the person in the possession of it. It would be a very singular thing for the Legislature to enact that a remote remainderman might harass the person in possession by a petition for sale or leasing of an estate with which he has at that time nothing to do, and I am sure it would be a surprise on the framers of this Act if they were to be told that anybody interested in the estate had a right to petition. But then, it is said, assuming that to be so where there is a person coming within the description of the 16th section, still, where there is no such person in existence, there must be somebody to petition. But I do not see why. The 2nd section of the Act is not a general power given to the court, which must necessarily, therefore, be exercisable at the instance of some one, but it is a modified power subject to the restrictions and provisions of the Act, and it really comes to no more than this—putting in two sections what is well expressed in the Lands Clauses Consolidation Act in a single section—that the court may, upon the petition of so-and-so, make such-and-such an order, which is the result, as I understand it, of the two sections together. I have already decided (33 L. T. Rep. N.S. 89; L. Rep. 20 Eq. 297) that, under the peculiar terms of these wills, Mrs. Taylor is not a person coming within the description of the petition given in the 16th section, and it follows from what I have already stated that she is, therefore, not a person entitled to petition under the Leases and Sales of Settled Estates, and her petition must fail upon that ground. A second point was discussed, which is also a very important point, as to what should be the mode of exercising the discretion given to the court under the 3rd section of the Act of 1874 (37 & 38 Vict. c. 33). That section enables the court to dispense with the concurrence or consent of the persons named in the 17th section of the original Act, “but the court, in considering the application, shall have regard to the number of persons who concur in or consent to the application and who dissent therefrom . . . and to the estates or interests which such persons respectively have, or claim to have, in the estate as to which such application is made.” It appears to me that that is a discretion which is to be exercised having regard to two sets of circumstances, which I may describe in a short way, with which we are familiar under other Acts of Parliament, namely, “number and value.” Now, the position of the parties is this: Mrs. Taylor, the tenant for life, is a lady of the age of sixty-one years, and she is entitled beneficially for life in substance, though not in form. If she survives a gentleman of the age of forty-three, she will then become entitled beneficially to the whole; if she dies in his lifetime he will become entitled to the whole. He dissents, and there is no other person interested.

The result is, therefore, that there is one on one side and one on the other, and it is a very difficult thing to say, as regards the freehold, at all events, who has the greater interest. As regards the leaseholds, some of them are for short terms, having sixteen or seventeen years to run, and no doubt by actuarial valuations the lady would have by far the greater interest. Under such circumstances, if I were satisfied that the court could exercise its discretion, I do not know where the court ought to stop. It does not appear to me that the meaning of the new statute was that the court should decide simply according to its own notion of what would be best to be done with the property. It does appear, as far as I can form an opinion at present as to the grounds on which such jurisdiction should be exercised, that it was only in cases of comparatively unimportant persons—that is to say, unimportant as regards value or interest in the estate—dissenting, that the court ought to exercise such a power as this, and I should require much further argument to convince me that where the persons were equal in number, and where the values of their interests approach so closely as they do in the present instance, the court, having regard to the number and value of interest of those who dissented, ought to exercise the discretion given to it by the 3rd section of the Act of 1874. My present opinion is that it ought not. Therefore, upon both grounds, I shall reject this petition, so far as it is a petition under the Leases and Sales of Settled Estates Acts. [His Lordship then proceeded to deal with another part of the petition, which is not material for the purposes of the present report.]

From this decision Mrs. Taylor appealed.

Bagshawe, Q.C. and *F. G. Bagshawe*, for the appellant.—Though it cannot be contended, owing to a previous decision of the Master of the Rolls on this will (reported in 33 L. T. Rep. N. S. 89; L. Rep. 20 Eq. 297), that Mrs. Taylor is a person entitled to possession or receipt of the rents and profits of the estate, yet the general power of granting leases which is conferred upon the court by the 2nd section of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120) must be capable of being exercised at the instance of somebody; and if it be held that Mrs. Taylor is not entitled to present a petition, there is no one so entitled in the present case. The 3rd section of the Act of 1874 (37 & 38 Vict. c. 33) gives the court a discretionary power, which ought to be exercised here, as it would clearly be beneficial that leases should be granted, and the interest of the appellant is greater than that of the remainderman who dissents.

Ince, Q.C. and *Laing* for the remainderman.—The property is let to weekly tenants, and the testator could not find any solvent person to take a lease of it. If a lease were granted to an insolvent person, the property might be left in a ruinous condition at the end of the term, and as the property is leasehold, the remainderman might thus incur very serious liabilities. He, therefore, objects to the granting of a lease.

Bagshawe, Q.C. in reply.

JAMES, L.J.—The Master of the Rolls has not decided anything on the general construction of the Act, but has merely decided that, having regard to the very peculiar terms of this will and to the peculiar mode in which the rents and profits of part of the property are to be applied in repair-

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ing the whole, it is in this case impossible to authorise leases to be granted. Having regard to the nature of Mr. Keily's interest in the property, and to the reasonable objections he may have to any leases being granted of such a property as this, and having regard also to the power given to him as trustee to manage, and to the perilous position in which he would find himself with regard to the covenants if the property were leased, I am of opinion that his opposition to the petition would have been perfectly fatal under the old Act, and is an opposition to which, under the new Act, the Master of the Rolls was quite right in giving overwhelming weight, and he was right in saying that it was not intended by that Act that any person's interest should be interfered with. I think that Mr. Keily has a right to contend that he can point out various things which make him object to giving to anybody a lease in which he does not concur. That is sufficient to determine the case on an appeal from the Master of the Rolls. With regard to the other points, I should have required more time to consider the construction of the Acts of Parliament if I had thought that the decision of the Master of the Rolls could be considered as a decision that a tenant for life, who is to receive the rents and profits during her life through the hands of a trustee, is not the tenant for life within the meaning of the Acts, but I take the decision of the Master of the Rolls to be based on the very peculiar provisions of this will, the mode in which the property was divided into two parts, and the mode in which the rents of one part, which were his own, are devoted to the repair of the whole, and the provisions compelling the trustees to repair, and so on; and there is a strong indication of intention on the part of the testator that the management should not be taken out of the trustees by an application under the Act or otherwise, except by the court itself appointing a receiver. I am of opinion that the decision of the Master of the Rolls should be affirmed, and the appeal dismissed with costs.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A., also concurred.

Solicitors for the appellant, *Harting and Sons*.
Solicitors for the respondent, *J. Keily*.

Wednesday, July 26.

(Before JAMES and MELLISH, L.JJ., and
BAGGALLAY, J.A.)

CASHIN v. CRADDOCK. (a)

Practice—Pleadings—Scandalous and irrelevant matters—Striking out statement of claim—Rules of court 1875, Order XXVII., rule 1.

A statement of claim had been drawn by the plaintiff himself, containing sixty-four paragraphs, which occupied eighteen printed pages. The formal claim was divided into twelve heads. The subject matter of the suit was the sale of certain collieries to the London and Brighton Cheap Coal Supply Company; and the statement contained serious charges of fraud against several of the defendants, and was made in such a confused way that it was impossible to ascertain what the real ground of complaint was.

On an application to strike out the whole of the

claim on the ground that it was scandalous and tended to prejudice and delay the fair trial of the action,

Held (affirming the decision of Vice-Chancellor Bacon) that the statement was unintelligible and and that the charges were brought in a form it was impossible to meet. It would be oppressive to the defendants to allow such pleadings to remain on the record, and therefore the statement must be struck out, but without prejudice to the plaintiff's right to file a new statement of claim.

THIS was an appeal from an order of Vice-Chancellor Bacon striking out the whole of a statement of claim on the ground that it contained many offensive and irrelevant and unintelligible statements. The facts were as follows:

In February 1873, Mr. Senior, one of the defendants, executed an informal agreement to sell to the plaintiff his interest in the Oakley Colliery at Barnsley, and on 26th April, this agreement was embodied in a more formal instrument which set forth that it was made contingently on Mr. Senior's being able to obtain the consent of the original lessors of the colliery in question. On 21st April the plaintiff entered into an agreement for the sale of his interest in the colliery to the defendants, Messrs. Craddock and Smyth, as trustees for the London and Brighton Cheap Coal Supply Association. Mr. Senior alleged that he could not obtain the consent of the original lessors, and that the agreement between himself and the plaintiff was accordingly determined, and that he subsequently sold his interest in the colliery to Messrs. Craddock and Smyth. Disputes having arisen between the plaintiff and the several defendants, three suits were instituted in Chancery, and a decree was eventually taken by consent in all three.

The present action was brought for damages for breach of contract, and for specific performance of the agreements of February and April 1873, and the statement of claim, which had been drawn by the plaintiff himself, consisted of sixty-four paragraphs, occupying eighteen printed pages.

The statement contained serious charges of fraud against several of the defendants, and was made in such a confused way that it was impossible to ascertain what the real ground of complaint was.

In the court below,

Kay, Q.C. and Freeling moved, on behalf of the first defendant on the record, that this statement of claim might, under Order XXVII., r. 1, be struck out as unintelligible and irrelevant, and an abuse of the process of the court. In the course of their argument, reference was made to the old practice in the time of Elizabeth (1596), when, according to Munro's *Actæ Cancellariæ*, one Mylward, who had drawn a long replication of the length of six score sheets of paper "fraught with much impertinent matter not fit for this court," was sentenced for his abuse of the practice of the court, to be paraded bare-headed round about Westminster Hall while the courts were sitting, with his head put through a hole cut in the obnoxious pleading, the same hanging about his shoulders with the written side outward.

Sir H. Jackson, Q.C., Hastings, Q.C., Bush and Warmington made similar motions for other defendants.

The Solicitor-General (Sir H. Giffard) and Bomer

(a) Reported by E. STEWART ROOME, Esq., Barrister-at-Law.

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for the plaintiff, contended that under the new practice, where a party was allowed to draw, and, as in this case, had actually drawn, his own pleadings, a certain amount of laxity would be allowed, and attempted to show that a clear story might be made out of this statement on which relief could be granted.

In giving his judgment, the Vice-Chancellor said: No doubt this is a remarkable case. The Solicitor-General has said very properly that the Legislature has taken a different view from that which before prevailed of the practice in these and in other courts, and that now it is competent to any man to state his own case in his own way. But that is the only privilege which has been granted to suitors. They have not the privilege of abusing the practice of the court; they have not the privilege of bringing charges against the persons whom they sue as defendants, and making very foul and offensive charges against them, which the defendants have no competent means of meeting. Even if the charges were not foul and offensive, as many of them are, they would be such as the defendants could not, by any possibility, answer. Many of them are wholly irrelevant to the case, which the plaintiff is supposed to state by his statement of claim, and many of them are unintelligible. It would be an abuse of the practice of the court to permit such a document as this statement of claim to remain upon the file, notwithstanding the more extensive privilege which plaintiffs now have of filing their own statements of claim. It is not for me to point out to the plaintiff how he might frame his statement if he has any cause of complaint against the defendants. If he does not take advice he must then run the risk of acting upon his own advice. That I cannot help. What I take to be my plain duty is this, not to permit the practice of the court to be made an instrument of oppression; and I think I should oppress the defendants grievously and most unjustly if I suffered them to be called upon to answer such a statement as this. The statement is unintelligible; it is inexcusable in many respects; it is incoherent; and it is inconsistent. It would be impossible to deal with such a case as the plaintiff states. It is in mercy to him—although I have nothing to do with his interests more than the interests of any other suitors—when I say that I think I ought not to permit such a statement to remain upon the record. The consequences of its remaining would most likely be utter defeat to the plaintiff if he has a rightful claim. All that I can do is to direct this statement to be struck out of the records of the court. At the same time I cannot withdraw from the plaintiff, and I will not withdraw from the plaintiff, the right to make another statement if he has cause of complaint. It will not be at all difficult for him, I dare say, with his own intelligence—but if not, with the assistance of persons who can advise him—to state his case, if case he has, but it would be a most abominable oppression to suffer these defendants to be under not only the imputation and obloquy which is contained in the statement, but to be called upon to meet a case which from beginning to end they can hardly be supposed to ascertain from the statement. Therefore this statement must be struck out as being an abuse of the practice of the court—that is, as altered by the Judicature Act, not the old practice of the court by

which the gentleman who has been referred to was pilloried with his own replication.

On the appeal from this decision the plaintiff appeared in person, and contended that Order XXVII., rule 1, did not give the court power to strike out the whole of a claim.

Kay, Q.C., Sir H. Jackson, Q.C., Hastings, Q.C., Freeling, Bush, and Warrington, for the several defendants, were not called upon.

JAMES, L.J.—I think the Vice-Chancellor could not have done otherwise than he has done. There seems to me upon this statement to be some ground of complaint; of course I am only assuming that some of these statements are true. But they have been so mixed up that I do not think it possible for the court or judge to strike out any one part. The Vice-Chancellor has held that this is an abuse of the court. It appears to me that that is so. First of all there is a long story about a conspiracy to inveigle or intimidate this gentleman into doing something which he did not do. That can only be done for the purpose of prejudice, and he says: "I made an agreement, I stuck to that agreement, and they have tried to inveigle me into altering it, and they tried to intimidate me to alter it, and wrote letters to me which were false." It is impossible to answer that statement. Then he said there were motions in court, and bills in court; the bills were false, supported by false affidavits. There is not a single thing throughout the whole proceedings which have taken place in which there are not charges such as these. It is utterly impossible, therefore, for us to hear the plaintiff upon those, because they are not relevant to any issue, although he has a right to tender a statement of claim. He says; "I had an agreement, of which agreement I wanted to have specific performance, and I have obtained a decree by consent, which to a certain extent gives me what I wanted, but I have been deprived of it since by some one." It is not for me to tell him how to frame his statement. It is conceivable that there might be a ground of a claim if expressed by a proper statement, but it is impossible for half a dozen defendants to be called upon, as the Vice-Chancellor said, to answer statements of this kind, containing all kinds of charges of falsehood and perjury and matters quite irrelevant to the case, and I do not think it is possible that we can separate them, or that the statement can be amended by us by striking out what is wrong. It is not for the court to make the plaintiff's claim for him, or to say how much can be supported, and the Vice-Chancellor has stated in his judgment, and rightly enough, that he does not mean to deprive him of making a legal statement of claim. He may do it himself, or get advice to put his claim in some manner by which it can be reasonably made the means of advancing the statements the defendants are to meet. I think it would be shocking if, under the new procedure such a thing as this could be entertained. I do not recollect such a bill as this being filed in the old Court of Chancery containing so much irrelevant matter as this statement of claim does. That is the ground upon which the Vice-Chancellor proceeded, and I think he was right.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—As both the Lords Justices concur in the judgment of the Vice-Chancellor, it does not matter what my opinion of this case is, but I must confess that, not having had the opportunity of hearing counsel on the other side

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I do entertain some doubt as to whether the order of the Vice-Chancellor was right. I am disposed to doubt whether, having regard to Order XVI with reference to multifariousness, as well as to the terms of Order XXVII., which is more particularly under consideration, the plaintiff in this case has not a right to introduce the various matters in respect of which he claimed relief all together in the same statement. At the same time I feel bound to say that this statement is drawn in a way and in a form which nobody can approve, and I certainly should have desired to have concurred in the view that was taken by the Vice-Chancellor, although, at the present moment I do entertain doubts, but certainly not sufficient doubts to induce me to dissent from the decision which has been arrived at.

JAMES, L.J.—The appeal will be dismissed with costs, but we think the plaintiff should have an opportunity of filing a new statement of claim, and it should be added that it is dismissed without prejudice to his doing so.

Solicitors: Jones and Co., Torr and Co., Bradford and Co.

Wednesday, Aug. 2.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

FLOWER v. LLOYD. (a)

Patent Law Amendment Act (15 & 16 Vict. c. 83, s. 41)—*Patent suit—Particulars of objections—Insufficiency.*

In a patent suit, the form of order requiring the defendant to furnish the plaintiff with further and better particulars of objections on which he means to rely at the trial, should follow the words of the Patent Law Amendment Act (sect. 41), which require the defendant to state merely "the place or places at or in which, and in what manner, the invention is alleged to have been used or published prior to the date of the letters patent."

THIS was an appeal by the defendants from an order of Vice-Chancellor Bacon.

The action was brought to restrain the infringement of a patent held by the plaintiffs for obtaining, by a certain process, direct impressions or printing on tin or sheet iron. In their statement of defence the defendants alleged that the process protected by the patent was a process whereby colours were transmitted on to the metal in a dry state, whereas the impressions produced by the defendants were obtained by means of damp stones; and they further alleged that the process of printing upon tin or metal surfaces, by means of damp stones, was well known, and had been publicly practised in England before the date of the patent, and was not at such date a patentable process within the meaning of the patent laws. In their particulars of objection the defendants alleged that the patent in question only extended to protecting certain special processes therein more particularly described, and also stated that the defendant would insist upon such other defences as were or might be mentioned or referred to in, or admissible under, any part of their statement of defence.

The plaintiffs having taken out a summons for further particulars of the defendants' objections, the Vice-Chancellor ordered that the defendants

should deliver to the plaintiffs further and better particulars of objections, stating therein the names and addresses of the persons by whom, and the places wherein, and the dates at, and the manner in which the process of printing upon tin or metal plates by direct impression, by means of damp stones, was known and publicly practised in England before the date of the patent, and that in default thereof, the words from and after the words "in a dry state," in the 6th paragraph of the statement of defence, should be struck out, and in that case no evidence should be given by the defendants on the trial of the action of such prior publication.

On the appeal,

Sir H. Jackson, Q.C. and De Castro for the defendant contended that the Vice-Chancellor had no power to make the order appealed from. Sect. 41 of the Patent Law Amendment Act, after providing for the delivery by the defendant in any action for the infringement of letters patent, of particulars of any objections on which he meant to rely at the trial, contained a proviso that "the place or places, at or in which, and in what manner the invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars." The particulars ordered to be furnished far exceeded the requirements of the Act.

Kay, Q.C., Aston, Q.C., and Macrory for the respondents submitted that the particulars of objections ordered, were only those usually required under the circumstances. They cited

Morgan v. Fuller, 14 L. T. Rep. N. S. 353; L. Rep. 2 Eq. 297;

Palmer v. Cooper, 22 L. T. Rep. 91, 123, 136; 9 Exch. Rep. 231;

Palmer v. Wagstaffe, 23 L. T. Rep. 227; 8 Exch. Rep. 840; a.c. 23 L. J. Rep. 295, Exch.;

Fisher v. Dewick, 1 Web. P. C. 551;

Hull v. Ballard, 27 L. T. Rep. 221; 1 Hurl. & N. 134; a.c. 25 L. J. Rep. Exch. 304.

Their LORDSHIPS were of opinion that whatever might have been the practice as to the particulars required to be furnished, they could not safely go beyond the words of the Act of Parliament. The order of the Vice-Chancellor must therefore be varied by limiting it to an order for the defendants to deliver to the plaintiffs further and better particulars of the place or places, at or in which, and in what manner the process of printing upon tin by direct impression by means of damp stones, referred to in the 6th paragraph of the defendant's statement of defence, was known or publicly practised in England prior to the 8th March 1864, the date of the plaintiff's patent. Under the order, as varied, the defendants would still be required to furnish full and sufficient particulars. The costs of appeal and the costs below would be costs in the cause.

Solicitors: G. H. K. Fisher; Flower and Nussey.

Tuesday, Aug. 8.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

SLOMAN v. THE GOVERNOR AND GOVERNMENT OF NEW ZEALAND. (a)

Practice—Service of writ—Substituted service—Action against Colonial Government—Rules of Court 1875, Order IX., r. 2.

An action was brought against the Governor and Government of the Colony of New Zealand, to recover damages for the alleged breach of an emigration contract expressed to be made between the Queen of the first part, the Agent-general in England for the government of the said colony of the second part, and the plaintiffs, who were shipowners of Hamburg, of the third part.

The Common Pleas Division made an order for substituted service of the writ upon a London solicitor who had acted as solicitor on behalf of the Government of the colony in England.

On appeal from this order :

Held, that an action could not be maintained against the Governor and Government of the Colony of New Zealand, and that, therefore, no order could be made for substituted service of the writ.

This was an appeal from an order of a Divisional Court of the Common Pleas Division of the High Court.

The action was brought by Messrs. R. M. Sloman and Co., shipowners, of Hamburg, against the "Governor and Government of the Colony of New Zealand" to recover damages for the alleged breach of an emigration contract, entered into on behalf of the Government of New Zealand, on the 14th May 1874.

This contract was expressed to be made between her Majesty the Queen, for and on behalf of the colony of New Zealand, of the first part, Isaac Earl Featherston, of Westminster Chambers, Victoria-street, the Agent-General in England for the Government of the said colony of New Zealand, as agent for and on behalf of the said Government, of the second part, and Sloman and Co., of the third part; and it provided for the conveyance of emigrants from the port of Hamburg to the colony.

This contract was made under the powers conferred upon the Governor of New Zealand, by two passed by the General Assembly of New Zealand, statute and respectively entitled "The Immigration and Public Works Act 1870" (33 & 34 Vict. No. 77), and "The Immigration and Public Works Act Amendment Act 1871" (35 Vict. No. 75). By the 35th section of the former Act it was provided that, "in order to give speedy effect to the provisions of this Act, the Governor may enter into such contracts as may seem proper, with any person or persons whatever, within or without the colony, for the selection of, conveyance to, or settlement in, any province of the colony, of such classes of immigrants, and in such numbers as the superintendent of such province shall request; and any such contract may or not, as the Governor shall think fit, form part of any contract for the construction of any railway, or any road or other work which the Governor is by this Act authorised to construct; and any such contract may, as the Governor shall think fit, either relate solely to the selecting or introduction of immigrants, or may also provide for giving any such immigrants employment on any railway or road or other work, which the governor is hereby authorised to construct, or may provide for giving free or other grants of land to any such immigrants, or may provide for compensating the person with whom the contract is made, either in money or by grants of land, or partly one and partly the other, or by guaranteeing to such person an agreed amount of interest not exceeding

six per centum per annum on moneys expended by such person on or about such purposes as aforesaid, and guaranteeing repayment of the principal moneys so expended. Provided always that after the 31st Dec. 1871, all such contracts shall be made only in accordance with such regulations as may from time to time be made under the provisions of this Act." And by the 4th section of the Immigration and Public Works Act Amendment Act 1871, it was provided that "all contracts under the said Act" (meaning the Act of 1870) "this Act, or any Act authorising the construction of any railway or other work under the said Act, or this Act hereafter made shall be entered into in the name of the Queen, her heirs and successors," &c.

On the 17th July 1876, an application was made under the Rules of Court 1875, Order IX., rule 2, before a divisional Court of the Common Pleas Division, consisting of Coleridge, C.J., and Archibald, J., for an order for substituted service of the writ in the action on Mr. John Mackrell, a solicitor in the City of London, who had acted as solicitor on behalf of the Government of the Colony of New Zealand in this country.

In delivering judgment Coleridge, C.J., said: In this case, without saying what the result of these proceedings hereafter may be, and without being supposed to intimate an opinion favourable to Mr. Mathew, as to what the ultimate result of his motion will be, we think it far too important a matter to be settled on this form of motion and at this stage of the proceedings, and therefore at his peril Mr. Mathew may take his rule in the terms in which he has asked for it.

An order was accordingly made for substituted service of the writ on Mr. Mackrell.

From this order Mr. Mackrell appealed.

Edwyn Jones (with him *Benjamin, Q.C.*) for the appellant.—The order made by the Common Pleas Division is entirely wrong. There are really no defendants to the action, for the Governor and Government of the Colony of New Zealand are not a corporation, nor is the governor alone a corporation. But though the order may be a nullity, the appellant ought not to be compelled to run the risk of deciding whether he ought or ought not to appear on behalf of the Government.—[*MELLISH, L.J.*—This is substantially an action against the Queen, and I think it has been held that you cannot have a petition of right in this country in respect of a colonial matter, because there would be no funds here to answer the demand.] The remedy is in the colony under the Crown Redress Act, which provides in terms similar to those of the Petition of Right Act in this country, that the remedy shall be by petition of right, and there is an apportionment of public funds to answer any judgment given on such petition of right. Mr. Mackrell, who has undoubtedly acted as solicitor on behalf of the Government of New Zealand in this country, was summoned to shew cause why substituted service should not be served upon him. While the order stands Mr. Mackrell is placed in considerable difficulty, and he is entitled to appeal against the order.

JAMES, L.J.—This proceeding appears to me so utterly new and strange that I should like to hear what the respondents have to say.

Watkin Williams, Q.C. and *J. C. Mathew* for the respondents.—The question decided in the court below, and the question now to be decided,

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is simply whether we are entitled to an order for substituted service, and not whether the action can be sustained. [JAMES, L.J.—Are you entitled to have an order for substituted service, where the defendant is a fictitious nonentity? MELLISH, L.J.—You must show *prima facie* that the defendant is an existing being.] By the New Zealand Immigration Act of 1870, as amended by the Act of 1871, the Governor is authorised on behalf of the Government of New Zealand, to enter into contracts in different parts of the world for the purpose of promoting immigration, and that has the effect of incorporating the Governor and Government. [MELLISH, L.J.—The contract is made in the name of the Queen.] The Common Pleas Division thought that this important question ought not to be decided on this summary motion. But if the merits must be gone into now, we say that we are without remedy if we cannot sustain this action. The remedy by petition of right in the colony is only in respect of matters arising in the colony, and this contract was made in Europe. A petition of right in England is out of the question, for it cannot be supposed that the taxpayers of this country can be called upon to pay the debt of a colonial government. The Queen and Mr. Featherston are merely nominal parties to the contract; the real parties are the Governor and Government of New Zealand. [MELLISH, L.J.—Surely the Government is the Queen, and the Government is not liable to be sued. You never can get paid unless the New Zealand Assembly votes money for the purpose.] That shows the reasonableness of these proceedings. If we got judgment for the amount claimed by us, we could not issue execution for it, but having got our judgment we could submit it to the New Zealand Assembly for a vote. [MELLISH, L.J.—You could not sue the governor in the colony even for a private debt.] Order IX., rule 2, empowers the court to make an order for substituted service, if it be made to appear that the plaintiff is from any cause unable to effect prompt personal service. [BAGGALLAY, J.A.—How can you have substituted service unless you could have direct service? MELLISH, L.J.—An order for substituted service cannot be made without the leave of the court or a judge. I think the court is bound to see, before making such an order, whether there is any defendant who could be served directly.] If we cannot serve in this way for recovery on the contract we are without any remedy of any sort or kind.

Without calling for a reply,

JAMES, L.J. said: With all deference to the opinion of the Court of Common Pleas, it appears to me that we must deal with this now on the present application, and that no good can arise from reserving it for solemn argument, or for some proceeding which may be taken when something has been done which is called substituted service. In order that there may be an order for substituted service, there must be some person or persons or body corporate on whom there could be original service. There is no body politic of any kind, that resides in England or has a place of business in England, called the Governor and Government of New Zealand, therefore there could be no original service here. You have no right to have substituted service on somebody representing them, unless you have a case for original service. The only case for original service is against some body or New Zealand, and to make an order for

serving them in New Zealand would be treating them or it as something existing. The same difficulty would be felt there. If the writ were taken to New Zealand to be served there, there would be the same difficulty in finding out who was to be served. What is the thing called the Governor and Government of New Zealand? It appears to me that you might as well serve the President and Government of the United States and get substituted service here, or the Emperor of Russia and get substituted service, or any republic abroad and get substituted service, because they cannot be served properly in this country. There might be some difficulty in suing sovereign bodies, or bodies *quasi* sovereign, as a colonial government is. You cannot have substituted service on somebody as representing something which does not exist at all. I cannot bring myself to entertain any doubt that there is any such entity in the world as the Governor and Government of New Zealand. There is an individual who for the time being is the Governor of New Zealand. There are certain persons carrying on the Government; there are a Colonial Secretary, and a Colonial Treasurer, and an Attorney-General, and others, and there are the members of the Representative Assembly and Council who constitute the Legislature; but to call that a corporation, and a governor and a government, seems an abuse of language. We must take notice that there is no such thing in existence as a Governor and Government of New Zealand, and I think we ought not to allow substituted service on some individual on the ground that he is a representative of them in this country.

MELLISH, L.J.—I am of the same opinion. The Court of Common Pleas have not decided that an action can be maintained against the Governor and Government of New Zealand; they seem to have thought it extremely doubtful whether it could be maintained, but they are of opinion that the question ought not to be decided on the present application. I am of opinion that it ought to be and must be decided on the present application, because if we allow substituted service to go, the consequence is that if the Governor and Government do not appear, then judgment will be given, I cannot think it is right to allow the judgment of the High Court to be given against such a body as the Governor and Government of New Zealand unless the court sees they are a body liable to be sued in this court; and before we determine whether we should give substituted service, it is for us to determine whether we ought to give direct service. Unquestionably the Governor and Government of New Zealand do not live within the ordinary jurisdiction of the High Court. The writ should *prima facie* be served abroad, and before we consider whether we should give substituted service, it is well to consider whether it would be possible or right, to issue a writ to be sent out to New Zealand to be actually served on the Governor and Government of New Zealand in a matter relating to New Zealand. It is an admitted fact that the contract is made in the name of the Queen. By an Act of the New Zealand Legislature by which they have enacted that all contracts relating to immigration shall be made in the name of the Queen, all persons who enter into such a contract, Messrs. Sloman, or whoever they may be, have perfect notice that they are entering into a contract made in the name of

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the Queen. It is perfectly well known as a proposition of law that with regard to contracts entered into in the name of the Queen and by the Queen, there is no remedy in respect of them except by petition of right. If a contract is made by the Queen, you cannot sue a ministerial officer who enters into that contract by his own name. If he did anything illegal, he would possibly be liable to be sued for his illegal acts. But the action proposed to be brought here is an action against the Governor and Government of New Zealand on a contract, which contract is made in the name of the Queen. I cannot understand how such an action can possibly be maintained, or how the Governor and Government of New Zealand can be made to appear. The Secretary of State for India has been made a corporation sole, and for some purposes the other Secretaries of State have been made corporations sole. An Act of the New Zealand Legislature has been produced which, it is said, has made the Governor of New Zealand a corporation sole, but I have great doubt whether the Colonial Act could make him a corporation sole. If they have made him a corporation sole, it is plain that the colonial Legislature never intended these contracts to be made in the name of the governor, so that the governor, as a corporation sole, should be liable to be sued on them. It is enacted in plain terms that the contracts shall be made in the name of the Queen, and it is enacted that they shall be made in the name of the Queen for the express purpose of preventing actions from being brought on the contracts. If they made the contracts in the name of the agent, the agent would be liable to be sued, and if they made the contracts in the name of the governor the governor would be liable to be sued; so they have enacted that the contracts shall be made in the name of the Queen, in order that there may be no remedy against the agent or the governor. Everybody has notice of this, and, in entering into a contract of this kind, knows that he is entering into a contract made in the name of the Queen. Authorities have been cited to show that ministers cannot be sued, that a ministerial officer who enters into a contract in the name of the Queen cannot be sued, and it may be that the Governor and Government of New Zealand are not liable to be sued. That being so, in my opinion it would not be right to try and compel the Governor to come in and defend. What I fear is that we should enable the plaintiffs to get a judgment against the Governor and Government of New Zealand, who might be advised not to appear, as it would be against their dignity to appear, and thus a judgment would be obtained which could not be enforced, and that would bring the jurisdiction of the High Court into contempt, and we ought not to allow such a thing to be done.

BAGGALLAY, J.A.—I am of the same opinion. Under the Rules of Court 1875, Order IX., rule 2, if the plaintiff is from any cause unable to effect prompt personal service, then he can have substituted service. That is in cases where there could be personal service, if there were not difficulties in the way. But it never was intended to give a power of obtaining substituted service, simply and solely because the plaintiff did not know how to describe the parties he sought to sue. That is the case here. I do not see how any personal service, according to the rules of ser-

vice, could be effected on defendants or a defendant, described as the Governor and Government of the Colony of New Zealand. If no personal service could be effected on defendants so described, it appears equally impossible for the court to direct substituted service. It appears that the plaintiffs in this case, not being able to serve those whom they desire to sue as defendants, endeavour to get substituted service on a gentleman whom they happen to find in the City of London.

Appeal allowed with costs.

Solicitors for the appellant, *John Mackrell and Co.*

Solicitors for the respondents, *Parker and Clarke.*

Wednesday, Nov 8.

(Before JAMES, L. J., BAGGALLAY and BRAMWELL, JJ.A.)

HOLSTE v. ROBINSON. (a)

Patent—Expiration of foreign patent—English letters patent dated previously to, but sealed after the expiration—15 & 16 Vict. c. 83, ss. 24 & 25.

Application by defendants in a patent case for liberty to add to their defence, on the ground that in the last fourteen days they had discovered that a foreign patent for the invention in question had been taken out in Austria, and had expired there Dec. 13, 1867, and that the English letters patent, which though dated Sept. 1867, were not sealed until after Dec. 13, 1867, were, therefore, invalid under sect. 25 of 15 & 16 Vict. c. 83, which provides that no letters patent for any invention for which a foreign patent has been obtained, and which shall be "granted" in the United Kingdom after the expiration of the term for which such foreign patent was granted, or was in force, shall be of any validity.

Held (affirming the decision of the Master of the Rolls), that the word "granted" referred to the date of the letters patent, and not to the date of sealing, and that the plaintiff's patent must, therefore, be taken to have been granted in Sept. 1867.

THIS was an appeal from a refusal of the Master of the Rolls to allow the defendants in a patent case to add to their defence on the ground that, within fourteen days before their application to the Master of the Rolls, the defendants had discovered that a foreign patent for the invention in question had been taken out in Austria between the application for and actual sealing of the plaintiff's English patent. The letters patent were dated the 17th Sept. 1867, and were expressed to be granted to the plaintiff, Carl Holste, for the use in the United Kingdom, of an invention for improvements in blast furnaces, being a communication from abroad. On the 17th Dec. 1867, the great seal was affixed to this patent. Before the sealing, but after the said 17th Sept. an Austrian patent was taken out for the same invention, but was allowed to drop in 1870. The defendants had put in their answer before discovering this fact, and they now moved that they might be at liberty either to file a supplemental answer raising the question that the plaintiff's letters patent for the

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United Kingdom were granted in respect of an invention first invented in a foreign country, and by the subject of a foreign prince or state, and that a patent, or like privilege, for the exclusive use or exercise of such invention in a foreign country was there obtained before the grant of such letters patent in the United Kingdom, and that by reason of the expiration of or determination of the term during which the patent in such foreign country continued in force, all rights and privileges under the plaintiff's English letters patent became void; and that the defendants might be at liberty to file interrogatories with a concise statement for the examination of the plaintiff on the matters aforesaid; or else that issues might be directed and settled in the cause, including an issue raising the question aforesaid, and that the plaintiff might be ordered to deliver to the defendants particulars of the breaches intended to be relied on by the plaintiff at the trial. The question turned upon the Patent Law Amendment Act 1852, sect. 25, which provides that "where letters patent are granted for a foreign invention, and a foreign patent for such invention is obtained before the grant of such letters patent, the rights under such letters patent shall cease upon the determination of the term of the foreign patent;" and upon sect. 24, which provides that "any letters patent . . . sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date." In the court below the Master of the Rolls said:—"This application is to add to a defence in a patent suit, although an answer has been put in. I should have no difficulty in giving the leave asked for if anything had been since discovered which was not with due diligence discoverable before. It is indeed a matter of course in patent suits. I remember in a suit of *Benard v. Levinstein* (11 L. T. Rep. N. S. 505, 766), in which I was engaged, Vice-Chancellor Wood allowed the defendant in the middle of the trial of issues to add a new issue. In the present case the defendants say that they have discovered within the last fourteen days that a foreign patent was granted for the same invention before the plaintiff's patent was taken out. Now the 25th section of the Patent Law Amendment Act says that where in the case of a foreign invention a foreign patent is obtained before the grant of letters patent in the United Kingdom, the rights under the latter shall cease upon the expiration or other determination of the terms of the foreign patent. The answer to this application is very simple. The foreign patent in question was dated after the English one, but it appears that it was obtained before the English patent was sealed. Everything, therefore, turns on the meaning of the word 'grant.' I have no doubt that it refers to the date. This is shown by the 24th section:—"Any letters patent . . . sealed and bearing date as of any day prior to the day of the actual sealing thereof shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date." Therefore, for the purposes of the Act the patent is to be read as if sealed on the date which it bears; if it had been sealed on that date it would have been then granted. This motion will accordingly be refused with costs; but

the plaintiff must deliver particulars of breaches." Upon the appeal,

Aston, Q.C. and *F. C. J. Millar* for the appellants, contended that the point now raised was not frivolous, but of substance. Section 24 did not have the effect of ante-dating the patent where, as in this case, a foreign patent had been obtained between the application for a grant and the date of sealing the letters patent, having regard to sect. 25, which on grounds of public policy, was framed for the purpose of preventing foreign patentees who did not first apply for a patent in this country from obtaining protection for their invention beyond the duration of their foreign patent.

Davey, Q.C. and *J. Henderson*, for the plaintiff, were not called upon.

JAMES, L.J., was of opinion that this litigation was frivolous. He had no doubt on the construction of the Act of Parliament. It was clearly expressed in sect. 24 that for all purposes of the Act letters patent sealed and bearing date as of any date prior to the day of the actual sealing thereof, should be of the same force and validity as if they had been sealed on the day as of which the same were expressed to be sealed. The plaintiff's patent must be taken to have been "granted" on the 17th Sept. 1867, and the appeal motion must be refused with costs.

BAGGALLAY, J.A. was of the same opinion.

BRAMWELL, J.A., in concurring, desired to state that he was in no way influenced by the lateness of the appeal.

Solicitors, *A. H. Müller; Pritchard, Englefield, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before The MASTER OF THE ROLLS).

Aug. 2 and 3.

FRYER v. MORLAND. (a)

Succession duty—Reversionary charge—Succession Duty Act (16 & 17 Vict. c. 51.)

*By a settlement an estate was limited to such uses as D. and his son C. should jointly appoint, and subject thereto to the use of D. for life, with remainder to C. for life, with remainders over. C.'s life estate became vested in the plaintiff, who contracted to sell it to D. in consideration of 15,000*l.*, to be paid down, and 52,000*l.* to be payable on the death of D., and to be secured on the estate; and, in pursuance of that contract D. and C., in exercise of the joint power of appointment, charged the estate with the sum of 52,000*l.*, payable on the death of D. The plaintiff having contracted to sell this reversionary charge to the defendants, they raised the objection that on the death of D., succession duty would become payable on the 52,000*l.* In an action for specific performance of the contract for sale,*

*Held, that the transaction between the plaintiff and D. being a bona fide sale, no succession duty would be payable on the 52,000*l.* upon the death of D., and that the title was good.*

THIS was an action to enforce specific performance of an agreement to purchase a reversionary

(a) Reported by G. W. KING, Esq., Barrister-at-Law.

charge. The Powderham Castle Estates, in Devonshire, were, by a settlement, limited to such uses as the Earl of Devon and Lord Courtenay should jointly appoint, and subject thereto to the use of the Earl of Devon for life, with remainders over, Lord Courtenay's life estate became, by virtue of a mortgage and foreclosure decree, vested in a Mr. Fryer, and passed under his will, at his death, to his widow, the plaintiff, who contracted to sell the reversionary life estate of Lord Courtenay to the Earl of Devon, in consideration of 15,000*l.* to be paid down, and 52,000*l.* to become payable on the death of the Earl of Devon, and to be secured upon the estate. In pursuance of that contract the Earl of Devon and Lord Courtenay, in exercise of the joint power of appointment contained in the settlement, charged the estate with the sum of 52,000*l.*, payable on the death of the Earl of Devon. The plaintiff had now contracted with the defendants for the sale of this reversionary charge to them, and they took the objection that on the death of the Earl of Devon, succession duty would become payable on the 52,000*l.*, and this action was brought to have that question determined.

Chitty, Q.C. and *Rigby* for the plaintiff argued that the transaction with the Earl of Devon was a *bonâ fide* sale, and that succession duty would not become payable on the Earl of Devon's death.

Davey, Q.C. and *Radcliffe* for the defendants.

The following cases were cited:

In Re Peyton, 7 H. & N. 265;

Attorney-General v. Yelverton, 7 H. & N. 306;

Attorney-General v. Floyer, 9 H. L. C. 150;

Lord Breybrooke v. Attorney General, 9 H. L. C. 477.

JESSEL, M.R.—The case no doubt is one of the very greatest possible importance, because it calls for the decision, for the first time, on a question which must constantly arise, and which, on a consideration of the Act, evidently must be determined on a general view of its meaning, and not on any nice criticism of any particular section, the mode of construction which has been adopted as regards this Act by the House of Lords in Lord Saltoun's case. The real question I have to decide is this, does a conveyance or assignment by way of *bonâ fide* sale, come within the provisions of the Act of Parliament? That is really the question. The facts are not very complicated; but, as it appears to me, they raise that question, and that question only, and the substantial facts are these: Lord Devon was tenant for life of the Powderham Castle Estates, in Devonshire, and his son, Lord Courtenay, was tenant for life in remainder. Both tenancies for life were preceded by a joint power of appointment exercisable by Lord Devon and Lord Courtenay. Lord Courtenay's estate had become, by assignment, that is, by virtue of a mortgage and foreclosure decree, the absolute property of a Mr. Fryer, and passed under his will, at his death, to Mrs. Fryer, who was therefore the absolute owner of the reversionary life interest of Lord Courtenay, and, by virtue of that absolute ownership, could have prevented any exercise of the joint power by Lord Devon and Lord Courtenay without her assent. In that position of matters Mrs. Fryer contracted with Lord Devon to sell to him the reversionary life estate of Lord Courtenay in consideration of a sum of 52,000*l.*, a reversionary sum to be paid after Lord Devon's death, and to be charged on the estate, and of a sum of 15,000*l.* to be paid down.

That, therefore, was a simple sale for money down, and money payable on the purchaser's decease, the latter sum of money to be secured by a charge on an estate. It is a pure and simple sale. It is a very common case, where a sale is made in consideration of a future payment, to secure the payment in some way or another. The mode of securing the payment, whether by a charge on the estate sold, or on any other estate, seems to be quite immaterial considering the nature of the transaction. It was a simple sale of the life estate for money to be secured in a particular way. In pursuance of that contract (Lord Devon being in equity the owner of the life estate of Lord Courtenay, the fether as to the exercise of the joint power was removable), Lord Devon and Lord Courtenay, in exercise of the joint power, charged the estate with the 52,000*l.* payable on the decease of Lord Devon; and Mrs. Fryer having contracted to sell that 52,000*l.* charged in reversion on the estate, the purchaser objects to the title on the ground that, on the death of Lord Devon, succession duty will be payable on the 52,000*l.* As I said before, that raises the simple question whether, on a sale out and out, for that is what it was as regards the charge, succession duty is payable at all. Now what is the object of the Succession Duty Act? The Act is for granting Her Majesty duties on succession to property and for altering certain provisions of the Act charging duties on legacies and shares of personal estates. The succession duties are provided by the 10th section to be payable at different rates according to the relationship of the successor to the predecessor; a lineal descendant pays 1 per cent. and so on, and a stranger pays 10 per cent. Looking, therefore, at the Act as a whole, it is, in fact, an Act to grant a duty of succession to property by persons succeeding to gratuitous life estates. That is the object of the Act. The only exception that I can find to that in principle is, that a marriage consideration is treated as if it were a gratuitous title for this purpose. That kind of contract which is made on marriage to provide for the issue is treated as succession. That seems the general intention of the Act. Now it is opposed to that intention that a purchaser for value, who has paid the full value of the property, is to pay the duty besides. He has already bought it, and he gets nothing by the death of or falling in of the life. On the death of the person, or the falling in of the life, the property comes into possession. It is bought and paid for probably, according to the terms, at its full value. It would be an unfair thing to make him pay a tax to the Crown, and it would be very singular to make him pay a tax graduated according to his relationship to the vendor, so that if a man bought by auction who happened to be the son of the vendor, he should pay 1 per cent., and if a stranger bought he should pay 10 per cent. It does appear to me that I should be going against what I conceive to be the purview of the whole Act to say that a conveyance or assignment on a *bonâ fide* sale was within it at all. Therefore, I approach the Act with the impression that it is not intended to impose a new tax on alienations. The next question is, what are the words of the Act? because, whatever my views may be of the general meaning of an Act of Parliament, of course I must have regard to the words. Now the words in which it is sought to include this property are

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the words in the second section of the Act. If it is not included within that, it is not included in any other section. This section is as follows: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession." What the Act means is property in possession to which any person has or shall become beneficially entitled, but it does not say so. A man becomes beneficially entitled to property in one sense undoubtedly before he gets into possession. The section goes on "and the term 'successor' shall denote the person so entitled and the term 'predecessor' shall denote a settlor, donor, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Now what is the possible meaning of these latter words? How can it be said that the interest of the purchaser is derived from the vendor? He does not derive it from the vendor, he derives it from his own money which bought the property. It seems to me a straining of language to say that a purchaser for value derives his interest from the vendor. A person speaking of a horse which he had bought for money would not say that he derived the horse from the horse dealer, but that he bought it with his money. That is his title to the horse. His title as purchaser is the title of a man who has derived his interest from his money; and I should say it would be a most extraordinary use of language to say that he derived his interest in the horse from the horse dealer. If he did derive it from the horse dealer, why not from the horse breeder, who sold it to the horse dealer. I do not see how far you are to go if this is the sort of derivation meant. The man who bought it for money did not derive it, in that sense, from anything but his money. In my opinion the fair meaning of those words at the end of the second section cannot be construed so as to include a *bonâ fide* purchaser for value. Therefore I think, both on the fair construction of the wording of the Act, and a fair regard to the purview of the Act, that the section does not include an assignment for value in money or money's worth. That being my opinion, I shall decide that the title was good. But the next thing to consider is whether there are any decisions the other way, because, whatever my opinion about the Act of Parliament might be, if there are decisions in conflict with it, I might be bound by those decisions. In the first place there are several decisions which seem to confirm the view which I take of the Act, that is to say, cases where a disposition was made by the purchaser on a purchase. The question arose who was the "predecessor," and it was held that if a person bought for valuable consideration, either money or money's worth, and instead of taking a conveyance to himself direct took a conveyance by way of

settlement on himself and others in succession, that he was a settlor; that is, that the title was derived from the purchaser and not from the vendor. I may cite on this question *Re Jenkinson* (24 Beav. 64) which was followed by *Attorney-General v. Baker* (4 H. & N. 19). I may say that in both those cases, the consideration was money's worth rather than actual money paid down; but they do, notwithstanding that, confirm the doctrine that the derivation of title is not from the vendor but from the purchaser; in other words, that the vendor cannot in any sense be the predecessor. The only other case which at all bears on the subject is *Floyer v. Bankes* (3 De G. J. & S. 311), where Lord Westbury says this "In framing the Act, the word 'succession' was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purchase"—that dictum is exactly in accordance with the view I take—"Money or property, the right to receive or possess which might arise upon death under a contract made *bonâ fide* in return for other money or property was not as between the contracting parties to be treated as a succession, but it was not intended to except property arising upon death under contract for valuable consideration generally." Then he goes on to deal with the 17th section which, I admit, raises some difficulty as to the construction. Therefore, so far as regards the decisions they do not militate against the proposition which I think is correct, but rather favour it, though none of the decisions are precisely in point. Then arguments were raised on the 17th section of the Act which I must for a moment advert to. It was said—if that is the correct view of the Act what was the 17th section put in for at all? It begins "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured or between the insurers and any assignee of the assured." No doubt you might have a gratuitous policy of insurance, but I do not think it is fair to the Legislature to imagine or suppose that they contemplated any such case. I must read the words "policy of insurance" there to mean a policy of insurance effected in the ordinary way in consideration of a premium or premiums. If that is so, that is a contract for money without doubt. It is a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring. It is clearly a contract which could not be fairly described, as I read it, as a disposition of property at all; because a mere covenant to pay money is not a disposition of property in the ordinary sense. The insurance company does not die, and therefore a covenant to pay money on the death of some other person is a mere contract to pay money. It is no disposition of the property of the insurance company, or of anybody else. It does not appear to me, therefore, to be within the words of the first part of the 2nd section, any more than it is within the second part of the 2nd section. Why it was excepted I do not know. It probably was excepted to quiet the fears of persons interested in insurance companies. But if I am right, it was not required as not being within either branch of the 2nd section. The 17th section goes on, "And no

bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made." The same observations apply to that. A bond or contract for the payment of money is not a disposition of property. It might have been in one sense, if it had been the death of the person himself, because it gives a right against his assets: but this is on the death of any other person, therefore it remains a bond or contract to the end. Why it was put in, I cannot say, except that it must have been put in by way of precaution, as in the case of policies of insurance. I cannot find that either of the things excepted are within the provision from which they are intended to be excepted. The section then goes on, "But any disposition or devolution of the moneys payable under such policies, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." These words are not wanted either. I admit that the first part of the section was not wanted, but the persons who argue that the first part was wanted must show that the latter part was wanted. Nothing can be clearer than that a settlement of money payable is a settlement of property within the ordinary meaning of the term, and in fact there has been an express decision that a policy of insurance itself was property though the liability to pay the money may not be a disposition of property. But I think that in construing an Act of Parliament in which provisions are inserted that are not absolutely required but by way of caution, it is by no means necessary to infer that because these provisions are put in everything not included in the exceptions are to be included in the general provision in the Act, and which by itself would not include the thing excepted. It appears to me, therefore, that the argument on the 17th section does not assist the case. The only other argument was an argument on the 7th and 15th section. The 7th section is as follows: "Where any disposition of property not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation, or assurance of, or contract for any benefit to the grantor or any other person for any term of life," then the benefit reserved shall be a succession. The object is plain enough; it was to prevent a man conveying the fee reserving to himself a life interest. But it excepts a *bonâ fide* sale; and of course the argument was, if all *bonâ fide* sales are excepted why are the words "not being a *bonâ fide* sale" put in? I cannot say. But I cannot read those words as meaning anything more than that they were intended to show that any attempt of this kind, any attempt gratuitously to reserve a life interest to the original owner, should be deemed to create a succession. I agree that it was not absolutely necessary perhaps to except a *bonâ fide* sale. It was merely formal to except it, and nothing can be derived in the shape of argument from that section. As regards the 15th section, it seems to me, that if there is any argument at all on that section, it is in favour of the view I take. The object and meaning of the 15th section is

this, that where a person buys an existing succession he shall pay the original duty, that is, the duty that would have been paid by the successor if there had been no purchase. But it seems to me to show that the framers of the Act never intended to look at the relationship between purchaser and vendor, because that would have made the rate depend on his consanguinity, whereas the rate does not; it is still to depend on the consanguinity of the original owner of the succession; in other words, they do not consider that the mere fact of a purchase is to create a new succession or alter the matter at all. It is not a very strong argument either way, but as far as it goes I think it is in favour of the view I adopt. On the whole I am of opinion that succession duty is not payable on this *bonâ fide* sale, and consequently the title is good.

Solicitors: *Kingsford and Dorman; Radcliffe, Cator, and Martineau.*

Friday, Nov. 3.

NEWMAN v. PIERCY. (a)

Legacies—Number of legatees—Mistake in number—Evidence as to identity.

A testatrix bequeathed to "Mrs. W., widow of W. W." 100l., and to each of her three children a like sum of 100l. At the date of the will Mrs. W. had married again, one P. She had had three children by W., one of whom had died before the date of the will, but not to the knowledge of the testatrix. By her second husband she had six children, all living.

Held, that the two children by W. were alone entitled. The rule that when there is a mistake in the number of a class, to each of whom a legacy is bequeathed, all the members of the class take although more than the number specified in the will, is only a presumption of law which may be rebutted either by the will itself or by extrinsic evidence.

ELIZABETH HOCKLEY made her will dated 8th Aug. 1873, whereby after bequeathing sundry legacies she bequeathed to "Mrs. . . . Walden, widow of the late William Walden, 100l., and to each of her three children a like sum of 100l."

The testatrix died on the 7th Oct. 1874 without having revoked or altered her said will, which was duly proved by the executors thereof.

At the date of her will there was no such person as Mrs. Walden, widow of William Walden. William Walden married in 1846 Mary Offard, and died in 1857. His widow was married in 1858 to William Joseph Punter, who is still living.

Mrs. Walden, now Mrs. Punter, had five children by her first husband. Two died in early infancy. The others were Elizabeth Mary Walden, who died in 1870, at the age of nineteen years; Emily Laura Walden, now Drew, who is still living; and Ann Lois Walden, now Hill, still living. By her second husband she has six children now living.

The bill was filed 12th March, 1875, by the executors, for the administration of the estate, and the only question of law which arose was upon the construction of the gift to the three children of Mrs. Walden. The defendants were four of the

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next of kin, who were interested in the residuary estate.

Andrew Thomson for the plaintiffs, the executors.

Fischer, Q.C. and *Mirams* for the children of Mr. and Mrs. Punter.—The usual rule applies that where there is a mistake as to the number of children all take, the number being looked upon as a mistake, and all being equally objects of the testator's bounty [*JESSEL, M.R.*—Is there any case where that doctrine applies in which there is contrary evidence of intention? *Ohitty, Q.C.*, referred to *Hawkins on Wills*, p. 62.]: (*Daniel v. Daniel*, 3 De G. & Sm. 337.) [*JESSEL, M.R.*—I see the Vice-Chancellor Knight-Bruce in that case says: "If the testatrix herself could interfere she would probably reverse my decision." That is rather strong language for a judge to hold. As Mr. Hawkins puts it, two things are assumed: First, that the gift describes the legatees as children of A. B. Here it is one of the questions in the case whether they are the children of A. B. And secondly, if they are A. B.'s children, and the number is incorrect, evidence is admissible as to who was intended to take. *Chitty* referred to *Wrightson v. Calvert*, 1 J. & H. 250.] But which three of the eight children are to take? The plaintiffs ask your Lordship to say that two children only are to take; the gift is to three. [*JESSEL, M.R.*—A. B. has two children; there is a gift to three of 100*l.* each; or there were three and one has died. Is it not a gift to each of the two?] That is not this case. It turns out there are eight children; which are the three intended? *Jarman Vol. II.* 158 puts it: "It often happens that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases it is highly probable that the testator has mistaken the actual number of the children, and that his real intention is, that all the children, whatever be their number, shall be included. Such accordingly is the established construction, the numerical restriction being wholly disregarded. Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator." [*JESSEL, M.R.*—First, *Jarman* has forgotten the question of evidence. There may be evidence to point out the objects intended. Next, he has forgotten whether there may not be something in the will to control the general rule. His proposition is too wide. There is no Mrs. Walden at all. There is a person who once filled that character, and she had children. Your children never were Mrs. Walden's children.] He referred to

Critchett v. Taynton, 1 R. & M. 541;

Spencer v. Ward, 22 L. T. Rep. N. S. 702; L. Rep. 9 Eq. 507;

Carvey v. Hibbert, 19 Vesey, 229;

Yeats v. Yeats, 16 Beav. 170;

Lee v. Lee, 10 Jur. N. S. 1041;

Barrington v. Tristram, 6 Vesey, 345.

Ohitty, Q.C. and *Warmington*, for the defendants, and *Roxburgh, Q.C.* and *Bush* for next of kin, having liberty to attend proceedings, were not called upon.

JESSEL, M.R.—I must say, notwithstanding the pressure of the authorities which have been cited, I am of opinion that I am compelled by authority

to decide as I do. The testatrix had a half brother, William Walden, who married and died in her lifetime, and to her knowledge left children. There were five children. Two died in early infancy; there are two now living; the third died at nineteen. It further appears that the testatrix kept up friendly intercourse with her brother's widow, who had married again. That intercourse ceased in 1867. It is clear that up to the year 1867 the testatrix was aware that her brother's widow had three children living, and had married again and had children by Mr. Punter, her second husband. The will was made on the 8th Aug. 1873. It gives to Mrs. Walden (she leaves a blank before the name) 100*l.*, and to each of her three children a like sum of 100*l.* The only further evidence is, that the testatrix died, and that on her death there was no Mrs. Walden in existence, and, consequently, there were no persons answering to the description of children of Mrs. Walden. There is parol evidence, showing in addition to what I have said, that the testatrix made inquiries about three years before the date of the affidavit, i.e., some time in the year 1872. At all events, it was not very long before Aug. 1873. She inquired "where Mary (William's widow that was) lived, and how many children she had." It is obvious that the testatrix did not know the state of the family. I think there is no evidence to show that she ever knew of the death of Mrs. Walden's daughter. There is evidence to some extent that she was ignorant of the number of children of Mary, "William's widow that was." She had been a widow and ceased to be so. Beyond what I have stated there is no evidence. It is not shown that she knew the number of Mary's children. She did know there were some children, and it is shown that there were six. I think, also, I may say that we must not throw out of consideration the description in the will. Could these six children ever have been described as the children of Mrs. Walden? At no period were they the children of the widow, Mrs. Walden. She had ceased to be the widow of Mr. Walden, and could not properly be described by those words. Who are so described, then? Clearly the three children of the widow, Mrs. Walden, who had three children. It is not shown that she knew of the other children. The motive no doubt was, that Walden was a relative of the testatrix. These children were the nephews and nieces, as the case might be, of the testatrix. That being my conclusion on the evidence, is there any rule or principle of law to be found in the decided cases against this result? If there were, I should follow it. What is the rule of law? It cannot be stated more favourably to the present applicants than that where there is a gift to the children of anyone, "children" means all the children. It still means all the children, though the number, three, four, or five be specified, unless there is evidence to show which of the children are meant; or to put it, as Sir William Grant puts it: "The ground on which the court has proceeded is, that it is a mere slip of expression; the meaning is all children . . . and the court conceiving the intention to be to give to each child so much, strikes out the specified number." I have this rule restated twice; once in *Yeats v. Yeats* (16 Beav. 170). I must say I am by no means prepared to admit that I should have come to the same conclusion as to the particular facts of that case. The law is rightly laid down

When there is a latent ambiguity the principle is well settled by authority. When a testator gives a legacy or separate legacies to a number of objects, and the court finds that the number is greater than that specified by the testator, it discovers, if it can, which of this number are intended to take. If it is unable to do so, it infers or presumes that the testator intended all to take, notwithstanding the numerical error. But the court only resorts to striking out the number when it altogether fails to discover who are meant, both from the words of the will and from extrinsic evidence. Vice-Chancellor Wood, in *Wrightson v. Calvert* (1 J. & H. 250), says: "The principle of the earlier cases on this subject was to avoid an intestacy by reason of uncertainty." That is, of course, too widely expressed. It is not what the Vice-Chancellor meant. He meant, "unless there is some evidence to enable you to discover who are meant." He is referring to cases in which this is impossible. There were legacies in that case to two of the testator's grandchildren, and there was a reference to their place of residence. It turned out that there were three grandchildren, but only two of them resided in the place mentioned. It was held that this was sufficient on the face of the will to enable the court to discover which of the grandchildren were to take. I am going to refer to Mr. Hawkins's book, p. 60, who expresses the rule with his usual accuracy: "It is a convenient rule to remedy mistakes in the number of legatees intended by the testator . . ." (There must be a mistake. This rule does not apply where there is evidence who were meant.) "When a gift to children describes them as consisting of a specified number, which is less than the number in existence at the date of the will, the court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled; unless it can be inferred who were the particular children intended." I think that is quite right. First, by the will they must be children of a particular person. The will here describes the person whose children they are, and that assists me in discovering who are designated. The rule of law is the non-presumption of mistake in the absence of inference to the contrary. The court is bound to infer if there are circumstances warranting an inference. It is only a presumption of mistake—a presumption which may be rebutted, if there is evidence to rebut it. It can be got rid of by that kind of evidence which fairly shows that it is not a right presumption. The words of the will and the state of circumstances may point out the particular persons intended; and in this case only the children of Mrs. Punter by her former husband, William Walden, were intended to take.

Solicitors: *Mirams; Kays.*

(Before Vice-Chancellor MALINS.)

Monday, May 1.

SALAMON v. SOPWITH. (a)

Lease by trustees—Covenant for renewal at a like rent—Specific performance.

Trustees of a messuage and premises, partly freehold, and partly leasehold for a term of which fourteen years were unexpired, but which lease

was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, and covenanted to use their best endeavours to obtain a renewal of the lease when they would grant him a lease for a further term of seven years from the expiration of his tenancy, at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding twenty-one years.

Before the expiration of W.'s lease the reversion in fee had become vested in other persons, who would not renew the lease on the old fine; the property had much increased in value:

Held, that the trustees were bound to use their best endeavours to obtain a renewal to themselves, and to grant W. a further lease according to their covenant, and that if they could not obtain such renewal, W. was entitled to a further lease of the freehold portion of the premises only.

THE bill in this suit prayed a declaration that the defendants, Henry Lindsell Sopwith and George Langridge, the trustees of the marriage settlement of the defendants, William Alder and Emily Jane Alder, his wife, were bound to use their best endeavours to obtain the renewal of certain leasehold premises, according to a covenant in that behalf contained in an indenture of lease of the 18th Feb. 1861, under which the plaintiff claimed, and that the defendants, William Alder and Emily Jane Alder, were bound, so far as necessary, to give their consent thereto.

By an indenture of settlement, dated the 26th Dec. 1859, between Emily Jane Alder (then Sopwith) of the first part, William Alder of the second part, and William Colnett and John Blaxland, of the third part, being the marriage settlement of Mr. and Mrs. Alder, certain hereditaments and premises were granted and assured to the use of Colnett and Blaxland, upon certain trusts therein mentioned, and the trustees were thereby empowered, with the consent of Mr. and Mrs. Alder, to demise the premises for the time being subject to the trusts of the settlement, at a rack rent for any term not exceeding twenty years in possession.

Part of the trust property consisted of a messuage and premises called No. 23, Ludgate-hill, part of which was freehold, of which the fee was then vested in the trustees, and the other part leasehold, held under a lease from the Dean and Chapter of St. Paul's, which lease would expire on the 25th March 1875, the lease being vested in the trustees less the last seven days thereof. The lease was renewable by custom, and the whole of No. 23, Ludgate-hill, was occupied as one property. In the year 1861 an agreement was, in the first instance, entered into between C. F. Waldo and the then trustees, for a lease by the trustees to Waldo, of No. 23, Ludgate-hill, for the term of twenty-one years, at the yearly rent of 275*l.* The trustees, however, having discovered subsequently what was the nature of their interest in the leasehold portion, it was arranged that they should at once grant to Waldo a lease of the entire premises for the term of fourteen years, and should covenant, if practicable, to grant him a further lease for seven years, from the expiration of the term of fourteen years, at a like rent.

Accordingly, by an indenture of lease, dated the 18th Feb. 1861, between the trustees of the first part, Mr. and Mrs. Alder of the second part, and Waldo of the third part, in pursuance of the power

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contained in the settlement, the trustees, with the consent of Mr. and Mrs. Alder, demised the premises, No. 23, Ludgate-hill, to Waldo for the term of fourteen years, from the 25th Dec. 1860, at the yearly rent of 275*l*.

And the indenture contained the following recital and covenant:

And, whereas, upon the treaty for the lease of the said demised premises, it was understood and agreed by and between the said parties hereto, that the said messuage and premises should, if practicable, be demised for the term of twenty-one years, at the rent and subject to the covenants hereinbefore reserved and contained, but in consequence of a portion of the said premises being held under a lease for a term whereof fourteen years only, less seven days, will on the 25th March next be unexpired, it has been mutually agreed that the said parties hereto of the first part should enter into the covenant for a renewal of the said lease next hereinafter contained. Now, therefore, the said parties hereto of the first part, for themselves, their heirs, executors, administrators, and assigns (covenanting only so as to bind themselves and the survivor of them, his heirs, executors, and administrators personally, whilst the said hereditaments and premises should be vested in them or him), do hereby covenant with the said Charles Foster Waldo, his executors, administrators, and assigns, that they the said covenanting parties, or some or one of them, their or some or one of their executors, administrators, or assigns, shall and will use their and his best endeavours to obtain a renewal of the said lease from the parties capable of granting the same. And in case and so soon as they or he shall have obtained such renewal, shall and will forthwith grant to the said Charles Foster Waldo, his executors, administrators, or assigns, a lease of the said messuage and premises hereby demised for the further term of seven years, commencing from the expiration of the said term of fourteen years hereby granted, at the same rent and under and subject to the same covenants and agreements in all respects as are hereinbefore reserved and contained.

By an indenture dated the 29th Jan. 1866, the indenture of lease of the 18th Feb. 1861 was assigned to the plaintiff, and some time prior to the year 1874 the defendants, Sopwith and Langridge, became the trustees of the settlement of the 26th Dec. 1859. The leasehold portion of the premises subject to the lease ultimately became vested in the Ecclesiastical Commissioners.

In the month of July 1874, the plaintiff called the attention of the defendants to the covenant for renewal of his lease, and requested a renewal accordingly, to which application the defendant Sopwith replied by letter:

We are advised that until arrangement is made with the Ecclesiastical Commissioners, we are not in a position to grant a lease, and we further learn the value of houses in Ludgate-hill is so largely increased that 400*l*. per annum is a fair rental for the house now in your occupation. As trustees, we are of course bound to do our best for the party interested, and I am sure it will facilitate, as I have once suggested, if you will make us an offer, we then can possibly come to some arrangement for granting a lease on the termination of our difficulty.

Subsequently the trustees sent to the plaintiff a memorandum of terms on which, if a renewed lease should be obtained from the Ecclesiastical Commissioners, they would grant the plaintiff a lease of the premises for seven, fourteen, or twenty-one years, from the 24th March 1875, at the rent of 375*l*.

The plaintiff, however, refused to comply with these terms, and not being able to obtain a renewal from the trustees, he, on the 17th Dec. 1874, filed his bill against the trustees and Mr. and Mrs. Alder, alleging that the trustees might, by using their best endeavours, obtain a renewal from the Ecclesiastical Commissioners, and charging that in any event he was entitled to a renewal of the

freehold part of the premises, whether of the leasehold part also or not, and prayed as above.

By the answer of the defendants, it appeared that applications had been made to the Ecclesiastical Commissioners for a renewal of the lease, but up to that time without success, and they alleged that they were informed that if a new lease were granted by the Ecclesiastical Commissioners, a heavy fine would have to be paid, or a higher rent would be demanded, which would render it detrimental to the *cestui que trusts* if the plaintiff were to have his under-lease still at his former rent. They also submitted that the original trustees had no authority to enter into the covenant for renewal, and that the covenant was entirely onesided, as there was no obligation on the part of the lessee or his assigns to accept such renewal.

Glasse, Q.C. and Webb, Q.C., for the plaintiff.—We agree that if the trustees had used their best endeavours to get a renewed lease from the Ecclesiastical Commissioners, the plaintiff could not have brought an action on the covenant; but the obligation to pay a large fine for renewal is no defence: (*Simpson v. Clayton*, 4 Bing. 758.) But if the trustees cannot obtain a renewal of their lease, the plaintiff is at least entitled to have a renewed lease of the freehold part: (*Harnett v. Yielding*, 2 Sch. & Lef. 549), disapproved of by Lord St. Leonards in Sugden's Vendors and Purchasers, 14th edit. 307.

J. Pearson, Q.C. and Cooper Willis, for the defendants.—We submit that the covenant entered into by the original trustees to renew was an improper covenant. The trustees knew at the time that a renewal of their lease could not be obtained without the payment of a heavy fine, and they had no power to contract to obtain a renewal without knowing what would be the amount of the fine. They had, in fact, no interest in the leasehold after the expiration of the then existing term beyond a mere expectation, and how could they as trustees covenant to grant a lease at a certain rent of property of which they had only an expectation? The power contained in the settlement is to grant a lease in possession at a rack rent, but it is not disputed that the property is now worth 400*l*. per annum, and it would be detrimental to the trust estate to let it now at the old rent. But we say also, that if the trustees cannot obtain the renewal of the lease from the Ecclesiastical Commissioners, the plaintiff cannot force them to grant a further lease of the freehold alone. It was evidently the intention of the lease of 1861 that the whole should be held as one property. There is a great distinction between cases like the present, where the covenant to renew is by trustees, and cases where it is entered into by the owner himself. In the case of *Simpson v. Clayton*, the covenant to renew was by the owner himself. There is also no covenant by the plaintiff binding him to accept a renewed lease, and he could not have been compelled to accept one. They cited

Doe v. Bettison, 12 East, 304;
Harnett v. Yielding (ubi sup.);
Butler v. Powis, 2 Coll. 156;
Battenworth v. Dean of St. Paul's, 1 Bro. P. C. 240;
Moore v. Clench, 34 L. T. Rep. N. S. 13; L. Rep. 1 Ch. Div. 447;
White v. Clutton, 8 Cl. & Fin. 766;
Mortlock v. Buller, 10 Ves. 292;
Dyas v. Cruick, 2 Jo. & Lat. 460.

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Re STEAD'S MORTGAGE.

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Glasco, Q.C., was not called upon to reply.

MALINS V.C., stated the facts of the case, and said:—No doubt the parties interested in the property considered that, subject to the payment of the fine for renewal of the lease every seven years, the leasehold property was as much their own as the freehold. Then, in the year 1861, the trustees in whom the freehold was vested, with the consent of Mr. and Mrs. Alder, in strict pursuance of the powers of the settlement, enter into a contract with Waldo to grant him a lease of the premises for twenty-one years. Before the lease is executed, it comes to the knowledge of the parties that there were fourteen years only unexpired of the leasehold portion, and that although the trustees could grant a lease for twenty-one years of the freehold portion, they could not therefore grant it for more than fourteen years of the leasehold. They then decided that a lease should be granted for fourteen years, with a covenant to renew for seven years on its expiration. Then, in 1874, an application for renewal was made by the plaintiff to Mr. Sopwith, and I am sorry to find that the cause of refusal was that the property would then let for 400*l.* a year. It is not suggested that 275*l.* was not the utmost rent that could be got at the time of the lease in 1861, and if it had been that there was some legal or technical difficulty in the way of granting the renewed lease, there would have been some excuse for the trustees' refusal to grant it. The contract is clear and distinct, and for valuable consideration, that the property shall be held for twenty-one years at the yearly rent of 275*l.* Mr. Pearson did not deny that if the trustees were the owners of the property they would be bound to grant the renewed lease, but they are trustees who have the fee in them, and the covenant runs with the reversion and binds the present trustees just as much as if their hands and seals had been put to the deed of the 18th Feb. 1861. There was no impropriety in trustees who had power to grant a lease for twenty-one years granting a lease for fourteen years, with a covenant to renew for seven years at the end of the term. The object of this is explained by the recital which precedes the covenant. There is, in my opinion, no breach of trust. The trustees are authorised by the settlement to demise both the freehold and leasehold property for a term of twenty-one years. The covenant is, in my opinion, reasonable and proper and binding upon the trust estate. Several cases have been cited, amongst others the case of *Moore v. Clench*, but the observations of the Master of the Rolls in that case do not apply here. Neither does *Mortlock v. Buller* apply; this is not a case of a breach of trust. I quite agree with what is said by Lord St. Leonards in *Dyas v. Cruise*, that Lord Redesdale in *Harnett v. Yielding* went too far in what he there laid down. I take it to be clear that if A., being seised in fee of one acre of land, and having a leasehold interest in another, grants the whole to B. at an entire rent, B. is entitled, if A.'s interest ceases after fourteen years, to retain the freehold portion at an apportioned rent. It was said that the covenant of renewal did not bind the plaintiff to accept the renewed lease, but that is not necessary in order to entitle the plaintiff to specific performance. His Lordship accordingly decided that the trustees must use their best endeavours to obtain a renewal of the lease from the Ecclesiastical Commissioners, and that if they

failed to obtain such renewal, the plaintiff would be entitled to his further lease for seven years of the freehold portion of the property alone.

Solicitors for plaintiff, *Spyer and Son.*

Solicitor for defendant, *John Burton.*

April 28 and May 5.

Re STEAD'S MORTGAGE. (a)

Equitable mortgage—Mortgaged property taken by corporation—Payment of purchase-money into court—Petition by mortgagee for payment of his principal and nineteen years' interest out of purchase-money—Six years' interest only allowed—3 & 4 Will. 4, c. 27, sect. 42; "distress, action or suit."

A corporation agreed to purchase certain freehold premises subject to an equitable mortgage with an agreement to give a legal mortgage, and paid the money into court. The equitable mortgagee petitioned that out of the fund there might be paid to him the principal money then due and nineteen years' interest.

Held, that the petition must be treated as a "suit" within the meaning of 3 & 4 Will. 4 c. 27, sect. 42, and that the mortgagee was entitled only to his principal money and six years' interest.

On the 8th Jan. 1857, Richard Stead borrowed of John Swaine the sum of 400*l.*, which, with interest at 5*l.* per cent., was secured by the promissory note of Stead of that date, payable on demand, and also by deposit with Swaine of the title deeds and writings relating to a freehold inn or public-house called the Harper's Arms, situate in Leeds, belonging to Stead. Such deposit was accompanied by a memorandum signed by Stead as follows:

Memorandum that the several title deeds and writings relating to an estate belonging to me, and situate in Harper-street, Leeds, in the county of York, together with a promissory note for 400*l.*, and given to John Swaine, are deposited and given to him for securing 400*l.* and interest on demand, being money lent by him to me, and, I hereby undertake to give a mortgage upon the said estate, if required by the said John Swaine, his executors or administrators.

RICHARD STEAD.

Dated the 8th day of January 1857.

Stead died on the 15th July 1857, having by his will, dated the same day, devised the Harper's Arms to his trustees upon the trusts therein mentioned.

By an indenture dated the 5th Nov. 1864, and made between Swaine of the one part and the petitioners of the other part, Swaine assigned to the petitioners all debts and sums of money due to him secured by mortgage and the full benefit of any security for the same upon certain trusts therein declared, and at the same time he handed to the petitioners the title deeds and writings relating to the Harper's Arms.

On the 7th Feb. 1875, the Corporation of Leeds, having occasion for the purposes of the Leeds Improvement Act 1872 to purchase the Harper's Arms, agreed with the beneficiary under the will of Stead for the purchase thereof for the sum of 1050*l.*

On the 11th June 1875 the Corporation paid the sum of 1050*l.* into court under the Lands Clauses Consolidation Act 1845, and the Leeds Improvement Act 1872.

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Re LETCHFORD (an infant).

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A petition was now presented by the assignees of the mortgage stating that there was now owing to them on the security of their equitable mortgage the whole of the principal sum of 400*l.* with interest thereon at 5*l.* per cent. from the year 1857, and praying that out of the fund in court they might be paid the whole of such principal money and interest. On the hearing of the petition on the 28th April, the Vice-Chancellor, considering himself bound by the decision of Kindersley, V.C., in *Edmunds v. Waugh* (13 L. T. Rep. N. S. 739; L. Rep. 1 Eq. 418), held that the presenting the petition by the assignees of the mortgage was not an "action or suit" within the meaning of 3 & 4 Will. 4, cap. 27, sect. 42, and that they were entitled to be paid the whole amount of principal and interest due out of the money in court; but subsequently his Lordship directed that the point should be reargued.

Higgins, Q.C. and *J. T. Humphry* for the petitioners.—The words of the Act (3 & 4 Wm. 4, c. 27 sect. 42) are that no arrears of interest in respect of any money charged upon land shall be recovered "by any distress, action, or suit," but within six years after they become due; there are no general words such as "or any other proceeding," and these words cannot be imported into the Act, which is a disabling one, in order to include a proceeding by a petition. Nothing is more clear from the judgment of Vice-Chancellor Kindersley in the case of *Edmunds v. Waugh* (13 L. T. Rep., N.S. 739; L. Rep. 1 Eq. 418), than that presenting a petition is not a suit. That case is the only authority on the meaning of the words "action or suit," and it is undistinguishable from the present case. As there was an agreement to give a legal mortgage, the petitioner is in the position of a mortgagee with a covenant for repayment of principal and interest, and inasmuch as the estate of the deceased mortgagee is liable to his simple contract debts, we could, on the principle of *Rolfe v. Chester* (20 Beav. 610) and *Thomas v. Thomas* (27 L. T. Rep., O.S. 148; 22 Beav. 341), take the whole interest to the principal as against the heir of the mortgagor, though we admit we could not as against the land directly get more than six years' interest by action or suit. If we had enforced the agreement to give a legal mortgage before the land was taken by the corporation, it would have contained a power of sale under which we might have sold, and then we should have been entitled to retain the whole amount of interest due. The only question in such cases is as to the remedy. Here we are not seeking a remedy, but asking the court to give us what is our own, as one of the parties interested in the fund in court. They cited also:

Elvy v. Norwood, 5 De G. & Sm. 240;
Du Vigier v. Les, 2 Ha. 326;
Shelford's Real Property Stats., 8th edit., p. 252;
Spears v. Hartley, 3 Esp. 81;
Hamor's Devises' case, 2 De G., M. & G. 366;
Shaw v. Johnson, 4 L. T. Rep., N.S. 460; 1 Dr. & Sm. 412.

Glasse, Q.C. and *Dundas Gardiner*, for the respondents, were not called on.

Dauney, for the corporation.

MALINS, V.C.—What I said last week I said not so much because it was my own opinion as because I felt bound by the decision of Kindersley, V.C. in *Edmunds v. Waugh* that a petition is not an action. Now, *Edmunds v. Waugh* was the

case of a mortgage with a power of sale which had been exercised by the mortgagee. It is not and cannot be disputed that after sale by the mortgagee, the money being in his hands, a right of retainer would exist. But the case here is very peculiar. This was a mere equitable mortgage with a memorandum agreeing to give a legal mortgage. No doubt if a mortgage had been prepared it would have contained a covenant for repayment and a power of sale in case of default, but a legal mortgage never was demanded. The principle of *Elvy v. Norwood* has no application here, and whether it is consistent with *Edmunds v. Waugh* it is not necessary for me to say, on account of the difference between the cases. According to the case of *Shaw v. Johnson*, if the mortgagee had foreclosed the mortgage he could have recovered only six years' interest. Now, in the present case the Corporation of Leeds contract to purchase the property and pay the purchase money into court. What is the consequence of that? The land is turned into money; the devolution of the money is the same as that of the land would have been, but matters are changed to this extent that the remedy of the mortgagee is now against the money instead of the land. The remedy is by petition for payment of the money out of court. This is not, indeed, a distress, an action or a suit, but I think that a petition under these circumstances ought to be treated as a suit by the mortgagee to recover his principal and interest, in which case he would be allowed to recover only his principal and six years' interest. Being, therefore, not bound as I thought, by the decision of Kindersley, V.C. in the case of *Edmunds v. Waugh*, which was a case of retainer, I am of opinion that the general principles must apply to this case, and that the petitioner is entitled only to his principal money with six years' interest.

Solicitors: *Torr and Co., R. Smith, Simson and Co.*

Friday, May 26.

Re LETCHFORD (an infant). (a)

Lease of infant's property, 1 Will. 4, c. 65, sect. 17—*Infant entitled subject to his father's tenancy by the curtesy—Jurisdiction of the court.*

An infant, who was entitled in fee to a small share in freehold premises, subject to his father's tenancy by the curtesy, petitioned the court under 1 Will. 4, c. 65, sect. 17, to sanction an agreement entered into by his father and guardian, and the co-owners of the property to grant a building lease. Held, that the court would sanction the lease under the Act, although the infant was not seized in possession.

The infant's interest being very small, the court dispensed with the deposit of the counterpart lease with the Record and Writ Clerk, and gave liberty in settling the lease to adopt the terms of a draft approved by the owners of the other shares, and dispensed with the surveyor's affidavit as to the beneficial terms of the lease.

THIS was the petition of Robert Henry Letchford, an infant, by his father and guardian under the Act of 1 Will. 4, c. 65, praying that a lease might be granted of certain freehold hereditaments of a share in which the infant was seized in fee simple

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

in remainder expectant on the decease of his father, who was tenant by the curtesy.

The petition stated that the petitioner, who was an infant of the age of eighteen years, was, as heir-at-law of his mother Elizabeth Letchford, deceased, seised or entitled for an estate in fee simple in remainder, expectant upon the decease of his father, Robert Michael Letchford (who was tenant thereof for his life by the curtesy of England), and free from incumbrances, of or to one undivided fourteenth part or share, and one third part of one other undivided fourteenth part or share of and in certain freehold houses and premises in the City of London. That the owners of the other parts or shares, including the said Robert Michael Letchford, had recently agreed with certain builders for a lease to them of the premises for a term of ninety-nine years, with a proviso that if, at any time within nine years, the lessees should be desirous of purchasing the premises, they should be at liberty to do so. That the terms on which it had been provisionally agreed to lease the premises were very beneficial, and the rent the best that could be obtained. The petition therefore prayed that the contract might be carried into effect, and that the petitioner might be at liberty to execute the lease when settled and approved by the judge.

Onwald for the petition.—The only question is whether the court will authorise the lease where the infant is not entitled in possession; but the Act does not say the interest is to be in possession. The cases of *Re Evans* (2 My. & K. 318) and *Ex parte Legh* (15 Sim. 445), may be considered authorities against the application; but an order similar to that now asked for was made in *Re Spencer's Trust* (17 L. T. Rep. N.S. 200; 16 W. R. 306), where the circumstances were the same as the present.

Glasse, Q.C. (*amicus curiæ*), referred to *Re Clark* (13 L. T. Rep. N.S. 732; L. Rep. 1 Ch. 292), where Lord Cranworth said that the statute ought to be construed liberally.

By 1 Will. 4, c. 65, sect. 17, it is enacted that :

Where any person, being an infant under the age of twenty-one years, is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years and subject to such rents and covenants as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases and covenants and provisions therein shall be settled and approved of by a master of the said court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the master's office until such infant shall attain twenty-one, but with liberty to proper parties to

have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital, mansion house, and the park and grounds respectively held therewith for any period exceeding the minority of any such infant.

MALINS, V.C.—I confess I should not have come to the conclusion arrived at in *Re Evans* myself; I should be disposed to put a rather more liberal interpretation upon the Act. The object of the Act is to make the best use possible of the infant's estate. I think the order in *Re Spencer* was quite right.

The order was made accordingly that the lease should be granted and in consideration of the smallness of the interest of the infant in the property, the deposit of the counterpart of the lease, when granted, with the record and writ clerk, was dispensed with, as also the affidavit of a surveyor as to the terms of the lease being beneficial for the lessors, and the court also gave liberty in settling the lease to adopt the terms of a draft approved of on behalf of the owners of the other shares in the property.

Solicitors: *Lovell, Son, and Pitfield*.

(Before Vice-Chancellor BACON).

Tuesday, Nov. 14.

HUTCHINSON v. BASHAM. (a)

Jurisdiction—Bankruptcy or Chancery—7 & 8 Vict. cap. 70—Application to rectify a deed or to charge trustees with wilful neglect or default.

In cases coming under 7 & 8 Vict. c. 70, application to rectify a deed, or to charge trustees with wilful neglect or default, should be made in Bankruptcy, not in Chancery.

The plaintiff, being unable to meet his engagements, and not being a trader, presented a petition under 7 & 8 Vict. c. 70. Resolutions for carrying into effect the proposals contained in the petition were duly passed by the creditors; the plaintiff accordingly executed a deed conveying all his property to trustees for the purpose, as he believed, of carrying into effect these resolutions. Subsequently, however, he ascertained that this deed did not carry out the resolutions as passed by the creditors, and being advised that the Act 7 & 8 Vict. c. 70 contained no power to rectify deeds or to charge trustees with wilful neglect or default, he filed a bill in Chancery. Defendant demurred on the ground that adequate relief could be obtained in Bankruptcy, and that that was the proper court to apply to.

Held (allowing the demurrer), that under the 15th section of Act 7 & 8 Vict. c. 70, cases of this kind were to be construed by analogy to the bankruptcy law, which had power to grant adequate relief, and therefore that application to the Court of Chancery was unnecessary.

The plaintiff in this suit was, in the month of December 1852, a debtor unable to meet his engagements with his creditors, and, not being a trader within the meaning of the Acts then in force relating to bankruptcy, presented his petition to the Court of Bankruptcy in London under the provisions of the Act 7 & 8 Vict. c. 70, on the 7th Dec. 1852, whereby, after giving an account of his debts, and the names, residences, and occupations of his creditors, he, in accordance

(a) Reported by W. C. DAVIES, Esq., Barrister-at-Law.

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with the requirements of the said Act, set forth an account of his estate and effects, and of all debts and rights due to or claimed by him, and proposed for the future payment or compromise of such debts and engagements to assign to trustees the several debts due to him in trust for his creditors and himself, three-fourths for his creditors, and one-fourth for himself, and also to convey and assign all his real and personal property, the whole for his creditors, whether in possession or reversion; and in case the same should be insufficient, then, to pay over one-fourth of the profits of his future business until the several debts should be discharged. Resolutions carrying these proposals into effect were duly passed by the creditors.

In the month of May 1853, upon the invitation as he alleged of the defendant Basham, the solicitor to some of the principal creditors, the plaintiff, without taking any independent professional advice in the matter, executed an indenture, dated the 17th May 1853, which purported to be, and, as he then believed was, in accordance with the before-mentioned resolutions as passed by his creditors. Subsequently, in the year 1870, the plaintiff (as he alleged), for the first time, became thoroughly aware of the effect of the said indenture of the 17th May 1853, and as it did not appear to carry into effect the resolutions as passed by the creditors, he filed a bill on the 30th March 1871 against Basham and the trustees of the indenture of the 17th May 1853, asking that the agreement effectuated by such resolutions of the creditors might be specifically performed, and that the said indenture of the 17th May 1853 might be rectified in conformity with such resolutions, and that the defendants might be ordered to account for moneys received or retained by the defendant George Basham or by themselves as the plaintiff's trustees, or which, but for their wilful default or neglect, ought to have been received; and further, for execution (if necessary) of the trusts of the said indenture of the 17th May 1853 by the court and for accounts.

To this bill the defendant Howard, one of the trustees, demurred, on the ground, that all the relief the plaintiff prayed for by his bill he could obtain in the Court of Bankruptcy, and that that court was the proper court to apply to.

De Gez, Q.C. and *W. S. Owen* for the demurring defendant, after stating the facts were stopped by the court.

W. Benshaw (Kay, Q.C. with him) in support of the bill.—The 9th section of the Act 7 & 8 Vict. c. 70, only provides that a trustee of any petitioning debtor under this Act shall produce on oath or solemn declaration once every six months "a full and true account of all monies, property, and effects of such petitioning debtor come to his hands, and of the disposal thereof," but it gives no power to charge trustees with wilful neglect and default. In a case before James, L. J., on the 2nd Aug. 1870 (*Howard v. Elderton*, which is not reported), it is there expressly stated, as I see from the shorthand notes, that the statute has not provided for wilful default, therefore the plaintiff is obliged to seek the assistance of this court. Another ground for applying to this court is that the plaintiff requires the rectification of the deed of 17th May 1853, to do which the Court of Bankruptcy has not any power. If a trustee is guilty of wilful neglect or default he must be

chargeable somewhere, therefore we submit that the bill must be sustained. These are not ordinary circumstances, and are sufficient to warrant an application to this court. They referred to

Martin v. Powning, 20 L. T. Rep. N. S. 133; L. Rep. 4 Ch. 356;

Jenney v. Bell, L. Rep. 2 Ch. Div. 547.

De Gez, Q.C. in reply, referred to

Stone v. Thomas, 23 L. T. Rep. N. S. 359; L. Rep. 5 Ch. 219;

And submitted that the Court of Bankruptcy had full power now to grant all the necessary relief.

BACON, V.C.—The latter part of the 15th section of the Act 7 & 8 Vict. c. 70, enacts "that if any doubts should arise in the construction thereof, that it be construed by analogy to the laws relating to bankrupts and the practice thereof." Now, certainly the Court of Bankruptcy has power to rectify (if necessary) a deed of this kind, and also to charge trustees with wilful neglect and default, and as the Act in question is to be construed by analogy to the Bankruptcy law, there is no necessity for any application to this court; the demurrer therefore must be allowed.

Solicitors, *Henry Stirke*; *Chapman*, *Turner*, and *Pritchard*.

(Before Vice-Chancellor HALL).

Monday Nov. 6.

ORR v. DIAPER. (a)

Discovery—Intended litigation—Liability of third parties to give discovery.

The plaintiffs were manufacturers, the defendants shippers and carriers. The plaintiffs were in the habit of sending goods abroad through the defendants. They had particular trade marks affixed to all their goods so sent. They discovered that goods were shipped through the defendants with counterfeit marks identical with their own, upon which, on the refusal of the defendants to furnish them with the names and addresses of the persons so infringing their trade marks, they brought their action for discovery, to which the defendants demurred on the grounds that no litigation was intended against them—they were third parties to the contemplated action and in the position of witnesses who might be called upon to give evidence in an action against those who had infringed the plaintiffs' rights.

Demurrer overruled with costs and discovery ordered.

By the statement of claim it appeared that the plaintiffs have for many years past carried on the business of sewing cotton and thread manufacturers in partnership at Glasgow, N. B., and at Crofthead, near Neilston, N. B., under the style or firm of B. F. and J. Alexander and Co.

They supply sewing cotton and thread both for home and foreign markets, including India and South America, and large quantities are sent for export to Valparaiso.

The plaintiffs have carried on this business for more than thirty-five years. Their sewing cotton and thread are made up in small balls, which are wrapped in blue paper parcels and then in drab coloured paper packets. Since 1838 the plaintiffs' firm have been in the habit of making use of three tickets to distinguish their sewing cotton and

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thread from sewing cotton and thread made by other manufacturers. Each of these tickets is of a particular colour and shape, with a particular device and inscription. These tickets, with slight variation, have always been used by the firm upon the packets and in the balls of sewing cotton and thread manufactured for the Valparaiso market, and are well and widely known in the trade and to the public as belonging exclusively to the plaintiffs' firm, and are looked upon as a guarantee that the goods upon which they are placed are manufactured by the plaintiffs.

In the summer of 1874 the plaintiffs discovered that considerable quantities of sewing cotton of an inferior quality were being sold in foreign markets, and especially at Valparaiso, packed in precisely the same manner as the plaintiffs' goods.

The defendants carry on an extensive business at Liverpool as shippers, and are continually shipping cotton thread to Valparaiso and other places where the plaintiffs' cotton thread is sold and held in high estimation.

Previously to the 10th April 1876 the plaintiffs ascertained that the defendants were and had for some time been shipping cotton thread to Valparaiso and elsewhere packed in the same manner and bearing the same counterfeit tickets. And on the 10th April 1876 Messrs. Grundy and Kershaw, of Manchester, the plaintiffs' solicitors, wrote to the defendants inquiring for the name of the person from whom they received the goods bearing the said counterfeit tickets.

They received no answer till the 4th May 1876, when Messrs. Hull, Stone, and Fletcher replied to the effect that in the absence of more definite information as to the shipments, the ship, the consignees, and the date of shipment, they could not give the information required.

On the 5th May 1876 Messrs. Grundy and Kershaw wrote to Messrs. Hull, Stone, and Fletcher stating that their trade mark was being imitated in the most impudent manner, and goods bearing such counterfeit trade mark had been shipped through Messrs. Diaper and requesting the names and addresses of all persons and firms from whom they had received cotton thread for shipment to Valparaiso within the last two years. If they did so the necessity for further proceedings might cease.

On the 12th May 1876 Messrs. Grundy and Kershaw wrote again to Messrs. Hull, Stone, and Fletcher requesting an answer to their letter of 5th May 1876, but they received no answer to either of their letters.

The defendants have for the last two years shipped and still ship goods for Valparaiso and elsewhere bearing the said counterfeit trade marks, and the plaintiffs gave particular instances of this practice.

The defendants know the said tickets and the said counterfeit tickets and the injury sustained by the plaintiffs. The plaintiffs sought this discovery in aid of proceedings contemplated by the plaintiffs.

The defendants demurred on the ground that they were not sufficiently interested in the contemplated proceedings, and were liable to be examined in such proceedings as witnesses.

Dickinson, Q.C. and *Ingle Joyce* for the demurrer. The writ is simply for discovery. This action cannot be converted into an action for relief. If it were, it would be demurrable, as there is no

statement entitling to relief. Under the old system there might have been an intention to proceed by action at law. Then it would have been proper in a court of equity to seek discovery in aid of the action. *Mitford on Pleading*, 4th edit. under 5th head "Demurrer," p. 191. It must be alleged that the plaintiff is entitled to sue the defendant in some other court, or that another suit is being instituted. By this proceeding there is no litigation between the parties—no statement that litigation is even intended. But there is a statement that litigation is intended between other parties. The object of discovery is to make use of it against the person of whom it is asked. There are indeed circumstances in which such discovery as is now sought can be obtained, *a.g.*, where a corporation is sued which is incompetent to give discovery on oath. There is also a statutory power to the same effect: see *Dixon v. Enoch* (26 L. T. Rep. N.S. 127; L. Rep. 13 Eq. 394.) That was a case of libel, and the action was to discover who the proprietors of the newspaper were. The jurisdiction was given by 6 & 7 Will. 4, c. 76, which recognizes as the general rule the nonliability of strangers to give discovery. In every case in which a carrier carries goods is he to inquire into the title of the persons who send the goods? Can third persons, other than the consignor and consignee, have a right of action against the carrier? We rely on both grounds; first, that as the claim stands it is demurrable, as it is not pursued against the person sued or intended to be sued; and, next, that it is not against a person against whom the plaintiff alleges a right to sue. If discovery were now given, there would be an end of the suit. The statement of claim cannot be amended for the purposes of relief. That must be by another action. And it is not shown what the intended proceedings are, where they are to be taken, or against whom. In ordinary cases, even if relief were obtained, such discovery could not be obtained before decree: (*Carver v. Pinto Leite*, 25 L. T. Rep. N.S. 722; L. Rep. 7 Ch. App. 90.) By the Mercantile Trade Mark Act 1862, a right to discovery is only given in cases of sale or exposure for sale. But, under the new system, can an action for discovery be maintained when all the proceedings are taken in the same court? See *Mitford*, p. 186.

Queen of Portugal v. Glyn, 7 Cl. & Fin. 486;
Mayor and Corporation of London v. Levy, 8 Vesey, 404.

W. Pearson, Q.C. and *E. S. Ford*, for the plaintiffs, were not called upon.

HALL, V.C.—The demurrer must be overruled. In *Dixon v. Enoch*, Vice-Chancellor Wickens said: "The supposition that if the plaintiff knows the name of one proprietor, he can make him tell the names of all the others; but that, not knowing one name, he cannot get the information from the printer and publisher, who is the agent of the proprietors, and is put forth to stand between them and the public, is one that does not commend itself to one's common sense, and is not to be accepted without absolute necessity." That is the view I take in this case. Nothing but necessity would compel me to allow this demurrer. Here there is a party having goods sold as his, and having his rights infringed, he does not know by whom. The defendants ship goods to Valparaiso and other countries. Some

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of these goods have marks which counterfeit the plaintiffs' marks. The plaintiffs apply to the defendant to give them the names of the shippers. The defendants do not give the names, and require from the plaintiffs particulars which it is probably out of their power to give. Then they write a letter, which is set out in the statement of claim to this effect: "If you are prepared to give the information we require the necessity for further proceedings may cease." That seems to me to be a provisional statement amounting to this: "If I get the information I ask, I shall take no proceedings against you. If you do not give me the information, I shall take proceedings against you to obtain it." The position of the defendants shipping goods with counterfeit trademarks would make them liable to an injunction restraining them from sending those goods. The plaintiffs seek discovery to enable them to restrain this piracy. Mr. Joyce said that they cannot obtain discovery alone against these defendants, without at the same time taking other proceedings against them. But the answer to that is, that the plaintiffs want to take complete measures against the real delinquents. They want to make the shippers liable. It is said, again, that the defendants are only in the position of witnesses. Even if they are so, the ordinary rule with reference to witnesses is applicable. This case is within Lord Redesdale's words, which have been cited. The plaintiffs do show a title to sue the defendants in some other court under the old practice, but now, by reason of the union of all the courts, in this court. As to the case before Wickens, V.C., it depended, no doubt, upon the statute. The proceedings to be taken would have been in the nature of criminal proceedings; and this difficulty was guarded against by the statute. But the reasons given in that case apply to this. Mr. Joyce has referred to the case of *Carver v. Pinto Leite*, to show that, even if discovery is granted, it must be limited. But it can be limited in this way: by the court not allowing it to be used for any other purpose than that for which it is sought. The discovery will be restricted if it can be restricted. But in this case it cannot be done. The plaintiffs can do nothing without discovery; they are at a dead look; they can take no effectual proceedings against anyone unless they obtain the discovery they ask. The other authorities referred to do not prevent this bill from being maintained. To dismiss it would be a denial of justice. The demurrer is overruled with costs, and the defendants may have one month to make the discovery sought.

Solicitors: *Pritchard, Englefield, and Co.*, for Grundy and Kershaw, Manchester; *Gregory, Rowcliffes, and Rawle*, for Hull, Stone, and Fletcher, Liverpool.

QUEEN'S BENCH DIVISION.

June 29 and 30 and July 4.

SWIRE v. REDMAN AND HOLT. (a)

Partnership—Joint debtors—Arrangement between partners—Dissolution—Liability.

The two defendants, who were merchants and manufacturers in partnership, were in the habit through the plaintiffs' firm of consigning goods to another firm in China for sale, the proceeds of

which were to be remitted to the plaintiffs in London. These remittances, by an agreement in writing, were to be held specially to meet the liability the plaintiffs might have incurred by advances to the defendants effected by accepting their drafts, and any balance was to be paid to the defendants. When these acceptances became due the defendants were bound to pay the plaintiffs any deficiency, and if the sales were delayed so as to prevent the remittances from arriving in time to meet the acceptances, the plaintiffs were accustomed to accept fresh drafts which the defendants negotiated for that purpose. At the dissolution of the defendants' partnership, of which the plaintiffs had notice, some of plaintiffs' acceptances upon goods as yet unsold were due and were met by fresh drafts in the names of the two defendants in liquidation and accepted as usual by the plaintiffs. One of the defendants then gave plaintiffs notice, as the fact was, that he had taken over all the stock of the defendants' firm, and the plaintiffs agreed at his request to accept fresh drafts in his name only; and this action was brought against both defendants to recover the balance due to plaintiffs upon acceptances in plaintiffs' hands, some of which were received before and some after the plaintiffs had notice of the arrangement between the partners and had accepted fresh drafts in the name of the one defendant only.

Held, that the plaintiffs were entitled to recover the whole of their claim against both defendants.

Oakeley v. Pasheller (4 Cl. & F. 207) discussed.

THIS was an action to recover advances alleged to have been made by the plaintiffs to the two defendants upon consignments of goods made by the defendants to China, the proceeds of the sale of which were to be forwarded to the plaintiffs. The defendant Holt allowed judgment to go by default, and the defendant Redman's defence was that his partnership with Holt was dissolved and that the plaintiffs had accepted the whole liability of the defendant Holt.

The case was tried at the Easter Sittings in London, before Bramwell, B., who ruled that the facts opened by the defendant Redman's counsel were no defence on his part, and entered judgment against both defendants for 5479*l.* 5*s.* 11*d.*, the amount claimed.

An order was subsequently obtained on behalf of the defendant Redman calling upon the plaintiffs to show cause why there should not be a new trial on the ground of misdirection of the learned judge in holding that, assuming all the facts alleged by the defendant to be proved to the satisfaction of the jury, the plaintiffs were nevertheless entitled to a verdict.

Cohen, Q.C. and Gainsford Bruce showed cause.

Benjamin, Q.C. and Wills, Q.C. supported the order.

The facts and arguments sufficiently appear in the written judgment of the court.

Cur. adv. vult.

July 4.—COCKBURN, C.J. delivered the judgment of himself and Blackburn, J. prepared by the latter: In this action tried before Baron Bramwell the defendant Holt made no defence, and the action was tried between the plaintiffs and Redman, who defended. After the evidence for the plaintiffs had been completed Mr. Benjamin stated the defendant Redman's case, but the learned judge ruled that, supposing that the facts opened

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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should be proved, there was no case for the defendant to go to the jury, and he directed a verdict for the amount claimed, which was 479*l.* 5*s.* 11*d.* The facts proved on the evidence for the plaintiffs, so far as it is necessary to state them, were that the defendants, Redman and Holt, had been in partnership as spinners and manufacturers at Haworth, and also as stuff merchants at Bradford. They were in the habit, through the plaintiffs' firm, of consigning goods to Messrs. Butterfield and Swire, in China, for sale, the proceeds of which were to be remitted by Butterfield and Swire to the plaintiffs' firm in London. By an agreement in writing dated the 29th Dec. 1868, between the plaintiffs' firm and the defendants, these remittances were to be held specially to meet the liability the plaintiffs might have incurred by advances to the defendants, effected by accepting their drafts, and any balance was to be paid to the defendants. The mode in which the advances were made was that the defendants drew on the plaintiffs drafts proportioned to the invoice value of the goods consigned. These drafts the plaintiffs accepted and the defendants discounted their acceptances. When the acceptances became due, if the remittances did not put the plaintiffs in funds to meet the acceptances, the defendants were bound to pay the plaintiffs the deficiency. There seems to have been no express agreement at any time as to what was to be done in case the goods were not sold before the maturity of the acceptances, but in practice the plaintiffs in such cases accepted a fresh draft, which the defendants negotiated, and thereby obtained funds which they handed to the plaintiffs, who were thereby enabled to take up the first acceptances and so to let the defendants have the benefit of the advance for a further time without being under cash advance. There could be no doubt that this was so constantly done that Redman and Holt would have felt aggrieved if the plaintiffs had suddenly refused to prolong the advances in this way, and would have had a right in such case to say that the plaintiffs were treating them harshly. Whether the plaintiffs would by so doing have committed a breach of contract on which an action would have lain, is, to say the least, doubtful, and from the way in which the case was disposed of, without actually taking the opinion of the jury on any question, the defendants' counsel are probably entitled to argue that any points left doubtful must be taken to have been found in the way most favourable to him. The course described was pursued for five years, till, on the 31st Dec. 1873, the partnership between Redman and Holt expired by efflux of time, and of this the plaintiffs were then informed. At this date there were goods to a large amount consigned to Butterfield and Swire, and in their hands unsold, on the security of which the plaintiffs had, by accepting the drafts of Redman and Holt, made advances to the extent of many thousand pounds, for which the plaintiffs were liable, though they had been kept out of cash advances. Holt, who had always managed the foreign trade, continued to manage the outstanding affairs of the late firm. He procured the renewal of the advances on many of the goods in the manner already described by procuring the plaintiffs to accept fresh drafts which he negotiated, and thereby obtained the funds necessary to keep the plaintiffs out of cash advances. These fresh drafts were drawn in the name of

"Redman and Holt in liquidation." This continued till the 16th Nov. 1874, up to which date the plaintiffs had no notice or knowledge that Redman and Holt were not equally interested in winding-up the affairs of the late firm and realising the proceeds of their consignment. On that day Holt, by a letter of the 16th Nov. 1874, informed the plaintiffs that it had been finally arranged between him and Redman that he, Holt, should take over the whole of the stock of the old firm, and Holt suggested for that reason that future drafts should be signed in his own name instead of that of Redman and Holt. This was acceded to, and several of the advances originally made to the old firm of Redman and Holt on goods consigned by them and then their property, though now Holt's property, were continued in the manner described, the drafts by the discount of which the plaintiffs were kept out of cash advance being drawn on the plaintiffs by Holt in his own name. The date of the writ in this action was the 3rd Dec. 1875. Before that time the goods originally consigned by Redman and Holt had been sold and the proceeds received by the plaintiffs. These proceeds were not sufficient to repay the advances made to Redman and Holt; the deficiency was the amount for which the verdict was taken. Part of this deficiency, 2000*l.* and upwards, arose in respect of advances on which there had been renewals prior to the 16th Nov. 1874 by means of drafts of Redman and Holt in liquidation, but in respect of which there had been no renewals after the day on which the plaintiffs were affected with notice that the defendants Redman and Holt had agreed that Holt should take the stock of the old firm, and consequently that as between themselves Holt should be bound primarily to discharge the liabilities on that property, including the advances which the plaintiffs had made on their security to Redman and Holt jointly. The remainder of the claim, 3000*l.* and upwards, was in respect of advances on goods not sold on the 16th Nov. 1874 and on which the advances had been continued, the plaintiffs being kept out of cash advance by means of acceptances of Holt's drafts discounted in the manner described. The question in the cause is whether Redman is still liable for either of these sums. It seems to us clear that the original advances were money lent to Redman and Holt for which they were debtors, and that the drawing of fresh drafts, which were accepted as described, was not in any way a satisfaction of that debt but only machinery by which it was provided that the time for payment should be extended without the plaintiffs coming under any cash advance. Part of Baron Bramwell's ruling was that there was no evidence that there had been any taking by the plaintiffs of Holt's sole liability in accord and satisfaction of the liability of Redman and Holt. And this, when the rule was moved, was thought so clearly right that no rule was granted on that point. But the effect of the transactions was to grant an extension of time. For during the interval between taking up of one of the drafts and the maturing of the substituted draft by means of which it was taken up, the plaintiff could not have sued. And one point made by Mr. Benjamin in his opening was that the effect of this giving of time, as he said, to Holt alone, was to discharge Redman. So far as regards the 2000*l.* odd, as to which there had been no renewal after the 16th

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Nov. 1874, this seems to us absolutely untenable. For we think it clear law that a creditor, who has two principal debtors, may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may, by his suit against the one debtor, bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by the bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor. The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all. And if no damage at all has been received there is no compensation due to anyone. And this, we cannot but think, is consistent with sound sense and clear justice. And therefore, so long as the plaintiffs had no notice that the relation between Redman and Holt had been changed from that of joint principal debtors to something else, the plaintiffs might bind themselves to Holt in any way they pleased to give him time, without thereby affecting in any way their remedy against Redman, the co-debtor; and this we apprehend is clear, not merely in justice and sense, but on all decisions both at law and equity. But where the two who become liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different. The relation of principal and surety gives to the surety certain rights. Amongst others, the surety has a right at any time to apply to the creditor and pay off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right, and if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety, in the immense majority of cases not damaging him to the extent even of a shilling, must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems, if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the Legislature. And as it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor: (*Pooley v. Harradine*, 7 E. & B. 431; *Greenough v. McClelland*, 2 E. & E. 424; and *Oriental Financial Corporation v. Overend, Gurney, and Co.*, L. Rep. 7 Ch. Ap. 142.) This rule, whether it was origi-

nally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone, and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time. The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before—to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that it is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants' derogating from the plaintiffs' right without their consent. It was however argued, that however much this might be contrary to principle, it was established by the House of Lords in *Oakeley v. Pasheller* (4 Cl. & F. 207; 10 Bli. N. S. 548). We do not think that any such point either arose or was decided in that case. The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in *Lindley on Partnership*, 3rd ed. p. 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor Sir Charles Oakeley was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house which was indebted to Sir Charles, and then, by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the Lords we think sufficiently appears from both reports, ill as they are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondents could not be liable for his default except in consequence of some arrangement by which they became his sureties. In the very meagre report of the judgment of the Master of the Rolls in *Bligh* 10 Bli. N. S. at p. 578, he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir Charles, which Kynaston could not be without Sir Charles's consent, "and Shera's estate surety only." And during the argument in the House of Lords, Lord Lyndhurst points out the difficulty in converting a joint debtor into a surety without the creditors' assent (10 Bli. N. S. at p. 586; and 4 Cl. & F. p. 232). He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice (10 Bli. N. S. p. 587). And, finally, in the judgment he says, "An arrangement was made between Sir Charles Oakeley and Kynaston (10 Bli. N. S. p. 589). This would have been quite irrelevant unless Kynaston had become

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new debtor, and the other parties, by agreement with Sir Charles, sureties for him. It is impossible to suppose that if Lord Lyndhurst had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (as appears from 10 Bligh N. S. at p. 586, 4 Cl. & F. p. 232) there was no previous decision, he would have done it in so perfunctory a manner as he appears to have done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little. It is, however, true that in *Wilson v. Lloyd* (L. Rep. 16 Eq. 60, 70), Bacon, V.C., in citing *Oakeley v. Pasheller*, takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three. No English case has actually decided this point if *Oakeley v. Pasheller* does not. But there is an Irish case cited by Mr. Wills, which should be noticed. It is that of *Maining v. Lewis* (Ir. Rep. 3 C. L. 495; in error Ir. Rep. 5 C. L. 229). There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench, on demurrer, unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which Lawson, J., based his judgment, which turned the scale. After stating the point, he says: "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies of a creditor by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law:" (Ir. Rep. 5 C. L. p. 231.) So far we quite agree with him; but he adds, "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of Lords in *Oakeley v. Pasheller*, and that I ought to follow it implicitly. Had Mr. Justice Lawson thought, as we do, that the decision in *Oakeley v. Pasheller* proceeded on the ground that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal. We think, therefore, that the rule in this case should be discharged on this ground. There is another point which it is not necessary for us to decide, but which it is as well to mention. Redman and Holt had when in partnership requested the plaintiffs to give time under the circumstances and in the way which they did after the dissolution to Holt alone. And if the plaintiffs were not under a legal obligation to do so, there was a strong moral claim on them to do so. It seems strange justice to relieve Redman because the plaintiff in dealing with Holt after the dissolution in winding-up a partnership pursued the very course which Redman had sanctioned and requested, if he had not stipulated to it; and *Oakford v. European Shipping Company* (1 H. & M. 182) seems an authority for saying it is not equity. Our judgments will be in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Flux and Co.*

Solicitors for defendants, *Field, Roscoe, and Co., Taylor and Co. Bradford.*

Friday, Nov. 10.

HERSCHFIELD v. LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY CO. (a)

Deed of release—Fraudulent misrepresentation of fact or law—Invalidation of deed.

In an action for injuries arising from a railway accident, it was pleaded that plaintiff had, upon payment of a certain sum, released the defendants from all further claim.

Plaintiff replied that such release had been obtained by fraudulent misrepresentation of facts, and of the legal effects of the deed of release.

Held, upon demurrer, that the fraudulent misrepresentation alleged invalidated the deed.

Semble, that a deed is invalidated by a fraudulent misrepresentation as to its legal effect.

THE plaintiff claimed damages for injuries sustained in a collision upon the defendants' railway.

In the statement of defence, it was stated, *inter alia*, that an officer of the company had had an interview with the plaintiff subsequent to the collision, and (4), that at such interview the plaintiff informed the said officer that he intended to make a claim against the defendants arising out of the said collision, and after some discussion upon the subject between the plaintiff and the said officer, it was ultimately agreed between them that the defendants would pay to the plaintiff (as they then accordingly did through their said officer) a sum of 3*l.* 3*s.* in full satisfaction and discharge of all cause of action which he then had, or at any time or times thereafter might have against the defendants on account of or in any way incidental to the said collision, and he the plaintiff would (as he then accordingly did) accept such sum from the defendants in full satisfaction and discharge of such cause of action, and would then and there make and execute (as he then and there in fact did) a release to the defendants from such causes of action.

Reply. Paragraph 2 admitted the above paragraph of the statement of defence, and continued: The plaintiff says that he (the officer) procured him to execute the said release by fraudulently representing to him for that purpose that his injuries were of a trivial and a temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, even though he had executed the said deed, be in a position to obtain, and would obtain, further compensation from the defendants in respect thereof; and the plaintiff further says, that fully believing in the said representations, and acting upon the faith thereof, he was induced thereby to execute the said deed, and then executed the same upon and subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should turn out to be more serious than he then anticipated.

3. That the injuries of the plaintiff did turn out to be of a more serious nature than he anticipated at the time of executing the said deed.

Demurrer to reply, on the ground that the representations alleged to have been made to the plaintiff by the defendants' agent were merely representations as to facts within the plaintiff's

(a) Reported by A. H. FOYSSER, Esq., Barrister-at-Law.

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own knowledge, and that the same were not nor was either of them respectively alleged to have been false, to the knowledge of the person making such representations.

Jeune (Lopes, Q.C. with him).—There is only one allegation of misrepresentation—that plaintiff's injuries were not serious, but if they were so the deed would not bind him; there was merely a fraudulent statement as to the legal effect of the deed. [LUSH, J.—Suppose plaintiff could neither read nor write.] In that case there might be fraud in reading the deed, but there the deed would be void *ab initio*:

Foster v. Mackinnon, 20 L. T. Rep. N. S. 887; L. Rep. 4 C. P. 704;

Thoroughgood's case, 2 Co. Rep. 9b.

Here the defendant was deceived not as to the actual contents but as to the legal effect of the release. *Lewis v. Jones* (4 B. & C. 506) shows the distinction. In his judgment, Bayley, J. says: "The only question is, whether plaintiff was induced by any fraudulent representation to sign the agreement. . . . That, however, was a misrepresentation merely of the legal effect of the agreement. Now every man is supposed to know the legal effect of an instrument which he signs." [LUSH, J.—These were merely innocent misrepresentations. Suppose a lawyer stated to a layman that a deed would have a different effect to what it had in reality.] A fraudulent misrepresentation of a legal effect is a contradiction in terms; fraud would imply knowledge in one and not in the other, but *ex hypothesi*, both parties know the legal effect of a deed: (Leake on Contracts, p. 182.) "The misrepresentation of the legal effect of a written agreement which a party signs with a full knowledge of its contents, is not a sufficient ground in law for avoiding the agreement:" (see also Chitty on Contracts, 10th edit. p. 631.) *Beattie v. Lord Ebury* (26 L. T. Rep. N. S. 350; L. Rep. 6 Ch. App. 777) is distinguishable, there being failure of consideration in that case. The presumption here is that the man knew the legal effect of what he signed, and so could not be deceived.

Wood Hill, for plaintiff.—In *Lewis v. Jones* (*ubi sup.*), the word "supposed" has been misunderstood; it means, is supposed to know until the contrary has been proved. Fraud is sufficient to upset a judicial decision, surely it will invalidate a release: (*Lee v. Lancashire and Yorkshire Railway Company*, 25 L. T. Rep. N. S. 77; L. Rep. 6 Ch. App. 527.) On broad grounds, such a deed obtained in such a manner should not be upheld.

Jeune here referred to *Edwards v. Brown* (1 C. & J. 312).

MELLOR, J.—I see no obstacle to our giving full effect to this replication. It clearly and sufficiently informs us that two representations were made by the officer of the company—the first was, that plaintiff's injuries were of a temporary and trivial character, and that the sum of three guineas was sufficient compensation for them, and there is a distinct allegation that this was fraudulently done. The second and distinct representation was, that in case the injuries should prove to be of a more serious nature, the release would not operate as a bar to future proceedings. At the end of the replication there is a denial of the facts alleged by the officer of the defendants. There has, therefore, been a fraudulent representation of facts and a fraudulent statement that the deed would

would not be binding under the circumstances which have arisen. Now I entirely approve of fair and reasonable settlements between railway companies and the public without resort to litigation; still I am extremely glad that representations such as these in the case before us afford no bar to a plaintiff's preferring his claim for injuries before a jury. There is no obstacle in law, and we are also now at liberty to act upon the rules of equity as to fraud. I am opinion that the plaintiff is entitled to pursue his action.

LUSH, J.—I am of the same opinion. I do not think it necessary to say in this case whether a fraudulent misrepresentation of the legal effect of the deed would be sufficient to invalidate it. Bayley, B., in the case cited by Mr. Jeune, says, in deciding another point: "Though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled:" (*Edwards v. Brown, ubi sup.*) It is not necessary to decide that point here, but if it were, I should emphatically say that such a fraudulent misrepresentation would be sufficient to invalidate the release.

Demurrer overruled.

Solicitors for the plaintiff, Neal and Philpot.

Solicitors for defendants, Norton, Rose, and Norton.

Friday, Nov. 17.

DUKE OF DEVONSHIRE v. HEMATITE STEEL COMPANY, LIMITED. (a)

Rating of iron mines—Deduction from royalties—Reservation in lease—Liability of lessor—The Rating Act 1874 (37 & 38 Vict. c. 54), s. 8.

By sect. 8 of the Rating Act 1874, where the lessee of a mine is exempt from being rated to any poor or other local rate, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him, one half of any such rate paid by him.

The plaintiff and defendants contracted in a lease of iron mines that the rent and royalties payable by the defendants, the lessees, should be free and clear of and from all rates, taxes, tithes rent charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature. The defendants deducted from their royalties half of the rates paid by them under this Act, and the plaintiff brought this action to recover the deduction.

Held that this section of the statute overruled the reservation in the lease, and that the defendants were not liable for the half of the rates which they had deducted.

This was a special case stated by consent of the parties for the opinion of the court under Order XXXIV., r. 1.

1. By an indenture of lease dated 17th June 1864, and made between the plaintiff of the one part, and Henry William Schneider and Robert Hannay, of Barrow-in-Furness, in the county of Lancaster, iron masters, of the other part, the plaintiff granted to the said Henry William Schneider and Robert Hannay license and authority to get and raise all iron ore that might be found in and under the lands in the parish of Dalton-in-Furness,

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

in the county Palatine of Lancaster, described in the schedule and plan to the said lease, together with power to open limestone quarries, and to work any such quarries then opened in the said lands. The lease to continue for the term of thirty-one years from the 1st Jan. 1864, but to be determinable as therein mentioned.

2. The reservation of rent in the said lease is in the words following: "Yielding, paying, and delivering unto the said Duke, his heirs and assigns, during the said term, the annual rent of 500*l.*, by equal half yearly payments, on 1st July and 1st Jan. in each year, and also at the same periods the royalty of 1*s.* 4*d.* per ton for every ton of 2240*lbs.* of iron ore which in any half year shall be dug, raised, and taken out of the said premises over and above 3636 tons. And also at the same periods the royalty of 1*d.* per ton of 2240*lbs.* of limestone, which in any half year shall be dug, raised, and taken out of the said premises, such rent and royalties to be free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature."

3. The covenant by the lessees for the payment of rent is in the words following: "That they the said Henry William Schneider and Robert Hannay, their executors and administrators, shall and will from time to time, and at all times during the said term, pay the said rent and royalties hereby reserved at the times, and in the manner herein mentioned."

5. The interest in the said lease of the lessees was assigned to, and is now vested in, the defendants.

6. There was due and owing from the defendants to the plaintiff in respect of the rent and royalties on iron ore payable under the said lease on the 18th Sept. 1875, the sum of 937*l.* 4*s.* 1*d.*, and on 22d May 1876 the sum of 945*l.* 10*s.* 4*d.*, making together the sum of 18,824*l.* 14*s.* 5*d.*

7. The defendants, after the passing of the statute 37 & 38 Vict. c. 54, became liable to pay, and have paid, for poor and local rates imposed upon them as such lessees as aforesaid in respect of the iron ore worked by them under the said lease, and on which they were liable to pay to the plaintiff the said sum of 18,824*l.* 14*s.* 5*d.*, the sums following, that is to say, the sum of 1296*l.* in respect of the poor rate, and the sum of 1728*l.* in respect of the local rate, making together the sum of 3024*l.*, the value of the iron ore raised by the defendants, being for the purposes of the assessment of the defendants to the said rates taken at the sum of 2*s.* 3*d.* per ton.

8. The defendants claimed to be entitled to deduct from the plaintiff the sum of 1098*l.*, being the sum at which one half of the said local and poor rates so paid by the defendants amounted to, calculated upon the said sum of 18,824*l.* 14*s.* 5*d.*, so payable by the defendants to the plaintiff for the said royalties.

9. The defendants having claimed to be entitled to deduct from the plaintiff the said sum of 1098*l.*, have paid to the plaintiff the sum of 17,726*l.* 14*s.* 5*d.* in respect of the total of 18,824*l.* 14*s.* 5*d.* mentioned in the sixth paragraph, leaving unpaid the sum of 1098*l.*

10. On 31st May 1876, a writ was issued in this action, in which the plaintiff claimed to recover from the defendants the sum of 1098*l.* as the balance remaining due to him from the defendants in respect of the said royalties.

11. The plaintiff contends that the defendants are not entitled to deduct from the rent and royalties payable by them to him any money in respect of the rates so paid by them.

12. The defendants contend that they are entitled to deduct the full sum of 1098*l.* in respect of such rates.

13. The question for the opinion of the court is whether the defendants are entitled to deduct from the plaintiff the said sum of 1098*l.*

Kay, Q.C. (with him Bowen), argued for the plaintiff.—This case turns upon the application of sects. 8, 9 and 10 of the Rating Act 1874 (37 & 38 Vict. c. 54), to the circumstances herein stated. By sect. 8, "Where any poor or other local rate which, at the commencement of this Act, any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by him one half of any such rate paid by him. Provided that he shall not deduct any sum exceeding what one half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty, or dues so payable by him." By sect. 9: "Where any occupier, lessee, licensee, grantee, or other person is authorised by this Act to deduct any rate or sum in respect of a rate from any rent, royalty, or dues payable by him, then (1) Any payment so authorised to be deducted shall be a good discharge for such amount of rent, royalty, or dues as is equal to the amount of such payment, and shall be allowed accordingly. (2) Any payment so authorised to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty, or dues may be payable. (3) The person receiving the rent, royalty, or dues shall have the same right of appeal and objection with reference to the rate and to the valuation of the hereditament in respect of which the rate is payable, as he would have if he were the occupier of such hereditament." By sect. 10: "After the commencement of this Act, the hereditaments to which the poor rate Acts are extended by this Act, and which are thus made rateable to the relief of the poor, shall be rateable to all local rates in like manner, as if the poor rate Acts had always extended to such hereditaments." The words of the lease with respect to payment by the defendants of future rates are very extensive, and may well be held to be within the exemption contained in the 8th section. [LUSH, J.—You must show that the defendants have specifically contracted to pay poor rates and local rates in the event of the abolition of the exemption existing in the year 1864.] The words of the reservation in the lease are sufficiently specific to include the defendants' liability for the whole of these rates: the rent and royalties are to be free and clear of and from all rates and deductions whatsoever, parliamentary, parochial, or of any other nature.

Edwyn Jones (with A. Wills, Q.C.) appeared for the defendants, but was not heard.

COCKBURN, C.J.—This case to my mind is clear enough: it turns upon the construction of a reservation in the plaintiff's lease of some iron mines

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to the defendants, whereby the defendants, the lessees, undertake to pay certain rents and royalties, which are "to be free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature." I quite agree that this clause is sufficient to entitle the plaintiff to the royalties in full, without any deduction for poor or local rates, were it not for the words of the 8th section of the Rating Act 1874. An occupier of a mine previously exempted, but rated under that Act, "may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one half of any such rate paid by him." The exception in the parenthesis is very clear and precise, and we cannot expunge from it the word "specifically." It cannot be said there is any such contract as that described in this exception to be found in the lease before us. As I understand the effect of this clause in the lease, when the contract is general to pay rates and taxes, all existing rates, and all newly imposed rates of an ordinary character, are to be paid by the lessees; but with regard to this new rating liability imposed upon mines by the Rating Act, there can be no duty upon lessees to pay the whole of the new rates, unless the parties to the lease had previously considered the probable abolition of the existing exemption, and specifically provided for meeting it when it might take place. In other cases, where the parties have made no specific contract for such a contingency, half of the new rates must be paid by the lessor, and half by the lessee. In order to escape this liability on the lessor's part to share these rates, there must be expressed in the contract a reference to this particular extension of the application of poor rates, or to the prospect thereof. In this lease no specific contract was made to pay these rates in the event of the abolition of the then existing exemption, therefore I think the statute has bound our hands, and the plaintiff cannot recover in this action.

LUSH, J.—I am of the same opinion, and I also think that the Act entitles a tenant to deduct half his payments under this new legislation, unless there has been an express and a specific provision for this particular possible rateability in his lease.

Judgment for defendants.

Solicitors for both parties, Currey, Holland and Currey.

COMMON PLEAS DIVISION.

Monday, Nov. 6.

ELLIS v. THE MANCHESTER CARRIAGE COMPANY (LIMITED). (a)

Ancient lights—Sale of adjacent land—Right of purchaser to build.

Where the owner of a house has sold a piece of adjacent land without reserving right to lights he cannot maintain an action for obstructing his ancient lights by building on the land.

Proof that the land so built on was a public street would not enable the owner of the house to maintain such an action.

THIS was an action for damage to the plaintiff's reversion by obstruction to lights. The plaintiff had a reversionary interest in certain houses

and shops in Rochdale-road, Manchester, which had been built more than twenty years before the plaintiff purchased the property. Afterwards, about the year 1869, the plaintiff bought some other houses and land in Emmet-street, near the property which he had previously purchased. In 1870 the plaintiff sold the Emmet-street property, which, after certain mesne assignments, was subsequently purchased by the defendants. In the conveyance by which the plaintiff sold the Emmet-street property, there was no reservation of rights of light. The defendants knocked down the houses on the Emmet-street property, and built stables on their site. The stables covered more ground than the cottages, and came nearer to the back windows of the plaintiff's houses in Rochdale-road, and darkened the plaintiff's lights. The case was tried at the Manchester Summer Assizes, 1876, before Mr. Ambrose, Q.C., sitting as commissioner, who ruled that the plaintiff had made out no case in point of law, and directed the verdict to be entered for the defendants. Leave was given to the plaintiff to move to have the damages to which he should be entitled assessed by an arbitrator, if the court should hold that the learned commissioner was wrong in ruling that no case was made out.

Jordan moved accordingly.—The ruling was wrong, and the plaintiff is entitled to maintain this action. The houses in Rochdale-road having been built for more than twenty years, the plaintiff had acquired an indefeasible right to light as against the occupier of the Emmet-street property; and the fact that the two properties had at one time been held by the plaintiff would make no difference: (*Frewen v. Phillips*, 11 C. B., N. S., 449.) The main point relied on for the defendants was that in the conveyance by which the plaintiff sold the Emmet-street property no rights of light were reserved, and therefore according to the case of *White v. Bass* (7 H. & N. 722; 31 L. J. 283, Ex.), the plaintiff had no right to light as against the defendants; but that case is distinguishable from the present, for there the ownership had never been severed before the granting of the lease, and no easement had been acquired. [DIXMAN, J., referred to the note to Gale on Easements, p. 104, 5th edit., where the judgment of Channell, B., in *White v. Bass* (*ubi sup.*) and *Curriers' Company v. Corbett* (2 Dr. & Sm. 355) are cited.] Those cases are distinguishable, for here the plaintiff was prepared to prove that part of the land built on by the defendants was part of a public street, and no person would have any right to build on a public street, and therefore it was unnecessary for the plaintiff to insert any stipulation against so building in his conveyance. In *Curriers' Company v. Corbett* (*ubi sup.*) the land built on was not part of a public street.

GROVE, J.—I am of opinion that there ought to be no rule. We are bound by the decision in the *Curriers' Company v. Corbett* (*ubi sup.*), which is absolutely on all fours with the present case, as Mr. Jordan admits, unless the present case could be distinguished if the ground built on was a public street; and there are other cases to much the same effect, which show that where a person sells land without reserve he sells it for all purposes. It is alleged here that the land built on was a public street, but of that fact there is no evidence. If the action had been one for impeding the plaintiff in the use of the street,

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

[Ex. Div.]

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evidence that it was a public street might have been important; but here the action was for building so as to impede the plaintiff's lights, and therefore it was immaterial whether the land was a street or not. The defendants could not be expected to be prepared to meet such evidence, and it might be that the street had been abolished. Here the person from whom the defendants purchased the land had a perfect right to sell it, and when he sold it to the defendants they bought it with the right to build on it. There will be no rule.

DENMAN, J.—I am of the same opinion. In *Tenant v. Goldwin* (2 Lord Raym. 1093) Lord Holt, C.J., said, "If indeed the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house." No doubt this is not a decision, but it is the dictum of a very learned judge; and in *White v. Bass* (*ubi sup.*), to which case Mr. Jordan very fairly called our attention, Channell, B., adopts the words of Lord Holt to which I have referred, and the case was so decided. *The Curriers' Company v. Corbett* (*ubi sup.*) is to the same effect, and the weight of authority is very strong against the proposition contended for on behalf of the plaintiff. Mr. Jordan says that the cases to which I have referred do not apply here, because he was in a condition to prove that the land on which the defendants built was part of a public road; but there was no issue as to that; it was a simple case of persons building on land which they had bought without any rights being reserved. If it were a public road I do not say how the case might stand as to the defendants' liability to an action for building on the road, but that case is not before us.

Rule refused.

Solicitors for plaintiff, *Chester, Urquhart, and Co.*, for *McEwen*, Manchester.

EXCHEQUER DIVISION.

Friday, April 28.

(Before KELLY, C.B., and CLEASBY and POLLOCK, BB.)

MURPHY v. PHILLIPS. (a)

Master and servant—Defective machinery—Accident to servant arising from—Master's duty to examine machinery—Liability of master.

The plaintiff, a stevedore in the defendant's service, was engaged in loading the defendant's ship with iron girders, which were being lifted on board by a chain attached to a donkey engine, when the chain suddenly snapped and a girder fell upon the plaintiff and injured him. It appeared from the evidence that some of the links of the chain were worn, and some also were badly welded; and that a person accustomed to chains could, on looking at the chain in question have observed these defects; also that there were well-known methods adopted by "chain testers" for examining and testing chains. The chain in question which had been employed for the purpose, had been in use on the defendant's premises for seven years, and had not been

examined or tested in any way before the accident. The jury found in answer to questions put by the learned judge, that the breaking of the chain was caused partly by bad welding and partly by its worn condition; that it was not in a fit condition for the work it was put to or to sustain the weight lifted by it; that the defendant did not know of its defective state, but that he might have discovered it had he chosen to examine the chain himself or to have had it examined by a competent person.

Held by the Court (Kelly, C.B., and Cleasby and Pollock, BB.), discharging a rule to enter a nonsuit, that the defendant having failed in his duty to ascertain the condition of the chain, was liable to the plaintiff, his servant, in an action to recover damages for the injury sustained by the latter through the breaking of the chain.

In this case, which was an action tried before Kelly, C.B., the plaintiff sought to recover compensation in damages from the defendant for bodily injuries sustained by the plaintiff by reason of an accident occurring, as the plaintiff alleged, through defective machinery supplied by the defendant to the plaintiff, as a workman in the employment of the defendant, his master. The defendant pleaded "not guilty," on which plea issue was taken and joined, and the circumstances of the case, as they appeared at the trial, were as follows.

The plaintiff was a stevedore, in the service of the defendant, and was engaged in loading a ship for the defendant with iron girders, which were lifted on to the ship by means of chains attached to a donkey engine. In the course of lifting one of these girders the chain to which it was attached suddenly gave way, and broke in two, and the girder fell on the plaintiff and crushed him severely, and so causing the injuries complained of in the declaration.

According to the evidence that was given at the trial, it would seem that the chain in question was not equal to the strain that was being put upon it on this occasion; that some of the links of it were worn, and were also badly welded. It was proved also that a person who had been accustomed to handle and deal with chains could, upon a slight examination, have perceived these indications of wear and of bad welding, and have at once been convinced that the chain was unfit for the use to which it was being put. Evidence was given by a chain maker, that he could see with the naked eye that the chain was defective in two or three places, and dangerous and unfit for use. It was stated also that there were well-known and ordinary methods for testing chains adopted by persons called "chain testers," employed for the purpose; but it appeared that this particular chain had not been tested, or in any way examined before being used on this occasion. The chain was one of a large quantity of chains in use on the defendant's premises. The defendant, it appeared, did not personally interfere in the work of lifting the girder, and the plaintiff had no knowledge or experience of chains.

The jury, in reply to questions put to them by the learned Chief Baron in summing up the case, said that they found that the breaking of the chain was caused, partly by bad welding and partly by its worn condition; that the chain was not in a fit condition for the work it was put to, or to sustain the weight lifted by it on the occa-

(a) Reported by H. LEIGH, Esq., Barrister-at-Law.
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sion of the accident; that the defendant did not know of the defective condition and unfitness of the chain, but that he might have discovered it had he chosen to examine the chain himself, or to have it examined.

Upon these findings a verdict was entered for the plaintiff, with 100*l.* damages, and leave was reserved to the defendant to move to set that verdict aside, and to enter a nonsuit or a verdict for the defendant, on the ground that there was no evidence of negligence to fix the defendant with liability on the findings of the jury, or on the evidence.

Kemp, for the defendant, accordingly moved for and obtained a rule nisi to that effect, and now

O. Hall (with whom were *T. Salter*, Q.C. and *Scott*) for the plaintiff, showed cause against it.—It was clear that this chain was not fit for the purpose for which it was supplied by the defendant on this occasion to the plaintiff, and it was clear also that the defendant could, and that he was bound and ought to, have known that such was the case. The accident was the result of the defendant's negligence alone. It was clearly the duty of the defendant, as the master, to have the chain tested before being put to such a heavy strain upon it. Here was a chain seven or eight years old which had never been examined or tested. There were regular "chain testers," who are employed for the purpose, and, as the Lord Chief Baron put it to the jury, it was the defendant's duty as an employer to see that his chains were fit for use, and to have them periodically tested. The wear and tear had worn the surface of the iron in parts away and exposed the bad welding, so that any chain tester could have spied the defect at once. The plaintiff had no knowledge of chains and trusted to his master. There was no evidence that the accident occurred through the negligence of any fellow workman of the plaintiff, and no evidence was called to show that any of the other chains in store were a whit better. Nor was there any evidence of contributory negligence on the part of the plaintiff. He cited and referred to *Paterson v. Wallace* (1 Macq. H. of L. Cas. 748), and the judgment of Lord Campbell; *Barton's-hill Coal Company v. Reid* (3 Ib. 266), and per Lord Cranworth at p. 276; and *Weems v. Mathieson* (4 Ib. 227), and the judgment of Lord Wensleydale. [Pollock, B. referred to *Ormond v. Holland* and another (1 E. B. & E. 102).]

Kemp, for the defendant, *contra*, in support of his rule, was willing to accept the law as laid down in the case of *Ormond v. Holland*, referred to by Pollock, B. The difficulty was not so much as to the law as it was to its application to the case in hand. In *Ormond v. Holland*, the late Hill, J., then at the bar, in arguing that case, at p. 109 of 1 E. B. & E., stated the law as follows: "The master, in the absence of a special contract, is not liable to the servant unless it can be shown that the master himself was guilty of negligence. If he personally interferes, and is guilty of negligence, he is liable; or if he negligently chooses incompetent servants, and in consequence of their incompetency the accident occurs, he is liable for his own personal negligence in choosing such servants; but, unless some negligence he brought home to him personally, he is not responsible for the consequences of an accident occurring to a servant in his employment." That exposition of the law was

applicable here, and was in favour of the defendant. There was no negligence in the defendant here. He did not personally interfere in the management of the engine or the hoisting of the girder on this occasion. The jury have found that he did not know of the defect or unfitness of the chain, and they also found that the accident arose from two causes combined, viz., partly by wear and tear, and partly by the bad welding of the chain. After the accident every link, except this broken one, bore a strain of $3\frac{1}{4}$ tons, which was a convincing proof that but for the bad welding the broken link would have borne the strain of this girder, which weighed only 18cwt. It was the additional fact of the bad welding which caused the chain to break, and for that defect the master cannot, within the ruling of any of the cases, be held liable. To hold him liable for it would bring the case within the mischief pointed out in *Priestley v. Fowler* (3 M. & W. 1), of making him responsible for the negligence of others. If the defect were so plain as to be seen on a simple inspection, the same means of inspection were open to the plaintiff as to his master, and he might have seen the defect, and have refused to use the chain, and, if he did not do so, then he was a contributor to the accident himself. In any view of the case it is submitted that the plaintiff's verdict cannot stand, and that the defendant's rule must be made absolute.

KELLY, C.B.—I am of opinion that this rule must be discharged. The present is a case presenting some features of peculiarity. The chain in use on the occasion, and which, by snapping asunder, caused the accident and consequent injury to the plaintiff, was one of a lot of chains belonging to the defendant, and used in his business, and it had become so much worn by long and constant use that it was, at the time in question, in need of being repaired, and was, in fact, in such a condition that if unrepaired it was dangerous and unfit to be used, and serious mischief was not unlikely to be the result of its being used in its then condition. This was shown by the evidence of various witnesses at the trial; but it was also shown and proved that the accident was also due to the bad welding of the chain. The jury consequently by their verdict found that the accident and consequent injury to the plaintiff arose from those two causes combined, viz., the worn condition of the chain, supplemented by the bad welding. It then became a question whether, from whatever cause the accident may have occurred, it was or not the duty of the defendant, as the master and employer of the plaintiff, to see and examine from time to time the state and condition of the chains and other machinery employed upon his premises in his business. I am of opinion very clearly that it was, and that the defendant was bound from time to time, as the occasion might require, to have the chains used in his business, and of course, therefore, the particular chain in question, properly and duly examined and tested periodically. And the jury found that the defendant could, by reasonable care and caution from time to time, have found out and been made aware that the chain in question was not in a condition in which it could be used with safety. He, however, failed to do that, and must, therefore, be held to have been guilty of negligence both in fact and in law, and to be liable consequently to the plaintiff in the present action.

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ULEASBY, B.—I have come to the same conclusion. This is a case of a somewhat peculiar character. No doubt there is an obligation or duty on a master as regards his servants, to use reasonable care in a case of this kind. Now here, I think that the defendant was under an obligation to ascertain that this chain was fit for use in the work in which it was about to be employed, and that it was not in a dangerous condition. This might have been accomplished by the defendant in two ways. He might have appointed a fit and competent person expressly to superintend and see to the examining and testing of the chain, and had he done so he would of course have been himself exempt from all liability; or he might have examined the state of the chain himself. Since, however, neither of these modes of examining, and testing, and becoming aware of the state of the chain, was adopted by the defendant prior to the happening of the accident, he must, I think, be held liable for the consequences. The danger in this case was rather peculiar. The accident occurred through the wearing or giving out of one of the links of the chain. True it is, that this link might not have given way simply from the wear and tear to which it had been subjected, had there not been added thereto the fact of the original defective welding, yet still the danger was actually caused by the wearing out of the link. The question then comes, whether or not there was shewn to have been a want of reasonable and proper care on the part of the defendant, the master? Now, the jury have not found specifically, in answer to the question put to them by my Lord, that there was such a want of care; but, in substance and effect, their findings, in answer to the several questions put to them, do amount to a verdict to that effect. It is clear that the unsafe and unfit state of the chain could have been ascertained by the defendant, had he only taken the ordinary and proper means to have the chain examined and tested, and, indeed, the jury in answer to the question, "could the master have discovered it?" distinctly said, "Yes, he could have done so by a reasonable examination." If the chain were indeed in such a state that its unfit and unsafe condition must have been patent and obvious to every or anyone who might take it in hand to use it, then, of course, it may be said that the plaintiff himself could have observed its defective state, and if he did not do so that there was so far contributory negligence on his part. I am of opinion, however, that it would be straining the evidence on this part of the case too far were we to say that there was evidence here of such contributory negligence as would or ought to prevent the plaintiff from recovering damages from the defendant in this action.

POLLOCK, B.—I am of the same opinion. The verdict of the jury in this case means that there was a failure of legal duty on the part of the defendant as regards the plaintiff, namely, a failure on his part to perform and fulfil the obligation that lay on him to take all due and reasonable care that dangerous machinery, or machinery which, if not in perfect order, might and must be dangerous, was sufficient in itself, and in such a fit and proper state and condition, that the plaintiff and the other servants of the defendant might use it in his business with safety and freedom from danger. It is hardly possible to lay down any one general rule with respect to the

duty of a master to examine into the state and condition of the machinery that is used in his business, and the question is obviously one of degree; but it is to be noted that in the present case the defendant was aware of the age of this chain, whilst the plaintiff was not, from his position, at all likely to have knowledge as to the length of time during which it had been in use. There are numerous cases, no doubt, in which a plaintiff has been held unable to recover damages by reason of his having himself in some way been guilty of negligence contributing to the happening of the accident. I do not think, however, that the circumstances of the present case are such as to bring the plaintiff within the principle of those cases. In the cases referred to the dangerous condition or defect of the machinery or implement, or whatever it might be, was patent and visible to the eye of any ordinary person, or the servant was equally competent as the master to ascertain by inspection the state of the machinery, &c. But here that was not the case, nor could the plaintiff be expected to have been aware of the precise state and condition of the chain. The defendant, therefore, is not, in my judgment, exempted under the circumstances of this case from his liability to the plaintiff, and this rule must accordingly be discharged.

*Rule discharged.*Solicitor for plaintiff, *Musgrave*.Solicitors for defendant, *Scard and Sons*.

Tuesday, Nov. 14.

HOLDEN AND WIFE v. KING. (a)

Assault—Action for aggravated assault on woman—Conviction before justices of same assault in form of common assault—24 & 25 Vict. c. 100, ss. 42, 43, 45—"Same cause."

Upon an information by the plaintiffs before justices, under 24 & 25 Vict. c. 100, s. 42, for unlawfully assaulting and beating the female plaintiff, the defendant was convicted and sentenced to suffer a term of imprisonment and to pay the costs, or in default a further term of imprisonment. The defendant paid the costs and suffered the imprisonment.

In an action for the same assault, in the form of an aggravated assault, as to which jurisdiction is given to the magistrates under sect. 43,

Held that the action was a proceeding for "the same cause" as that adjudicated upon by the justices, and was therefore barred by sect. 45.

ACTION for assault.

Two actions were originally brought, one by the plaintiff Thomas Holden to recover damages for an assault committed on him by the defendant, the other by Thomas Holden and Mary Rebecca his wife to recover damages for an assault committed by the defendant on the said Mary Rebecca Holden, in which action the husband also claimed damages for the loss of his wife's services. The two actions were, however, consolidated.

To the statement of claim in the first action, the defendant, in his statement of defence, raised the following defence:

First, not guilty. Secondly, that after the committing of the said alleged assault, the plaintiff preferred a complaint and charge of

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the said alleged assault before John Dixon Dyke, Esq., Frederick Luck, Esq., and William Walton, Esq., justices of the peace of the county of Kent, sitting at Sittingbourne, in Kent, having jurisdiction to try the same, and the said justices caused the said defendant to be summoned to answer the said complaint and charge; and thereupon the parties appeared, and the said justices heard and determined the same, and convicted the defendant of the alleged assault, and adjudged that the defendant should pay a fine of 40s., together with a further sum of 48s. 5d. costs, and the defendant thereupon paid the said sum forthwith, and before action.

And in answer to the statement of claim in the second action the defendant also pleaded not guilty, and a similar plea to the second plea pleaded in the first action, terminating with an averment that the justices convicted the defendant of the alleged assault, and adjudged that the defendant should pay the sum of 2l. 18s. 5d. for costs, and further should suffer a term of imprisonment with hard labour for fourteen days, and the defendant before action thereupon paid the said sum of 2l. 18s. 5d., and suffered the said term of imprisonment with hard labour awarded.

On these pleas the plaintiffs joined issue, and replied that the action was not in respect of the same cause as that which was adjudicated upon as therein alleged, on which issue was joined.

At the trial before Cleasby, B., at the Maidstone Spring Assizes, 1876, the following facts were proved:

On the 10th July, 1875, the male plaintiff who had been on strike, was at the Wheatsheaf public-house, at Eastchurch, with his wife, who had in her hand a basket of vegetables. The defendant, who was under the influence of drink, came in, and, pulling some onions and lettuces from Mary Holden's basket, began to tear them to pieces. Upon the husband's expostulating, the defendant knocked him down, and then struck Mary Holden a blow on the head and knocked her down, repeating the blow with great violence when she got up, fracturing her jaw, and causing her other injuries, and knocking her down a second time.

On the Monday following the assault, the plaintiffs applied for summonses against the defendant for unlawfully assaulting and beating the plaintiffs, which summonses were heard on the 16th Aug., when the magistrates, for the assault on the husband, fined the defendant 40s. and 48s. 5d. costs, and for the assault on the wife they passed a sentence on him of fourteen days' imprisonment with hard labour, and further adjudged that he should pay 2l. 18s. 5d. for costs, or suffer a further term of one month's imprisonment. The money was paid by the defendant, and he likewise suffered his term of imprisonment.

Upon these facts a verdict was entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them for 10l. 10s. for the injury to the wife, and 5l. 5s. for the loss of the wife's services.

The sections of 24 & 25 Vict. c. 100, bearing on the case, are as follows:

Sect. 42. When any persons shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on the behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, with or with-

out hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5l.

Sect. 43. When any person shall be charged before two justices of the peace with an assault and battery upon any male child whose age shall not exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently presented under the provisions hereinbefore contained as to common assault and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned for any period not exceeding six months, or to pay a fine not exceeding 20l.

Sect. 45. If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

CLEASBY, B., was the only member of the court present, but by the consent of both the parties the case was argued before him.

Gates, Q.C. and Glyn, now moved accordingly. —It is not disputed that the assault on the husband was adjudicated upon by the magistrates, but that on the wife was not adjudicated upon by them, the plaintiffs are therefore entitled to recover in this action, in respect of the aggravated assault on the wife. In order to avail himself of sect. 45 of 24 & 25 Vict. c. 100, upon which he relies as a defence, the defendant must show that this action is a proceeding "for the same cause" as that adjudicated upon by the magistrates. But he cannot show that; the magistrates merely adjudicated upon the common assault upon the female plaintiff under sect. 42 of that Act, and did not take into consideration the aggravated assault upon her under sect. 43, for which aggravated assault this action is brought. That being so, the case of *Reg. v. Morris* (L. Rep. 1. C. C. R. 90), is directly in point, where it was held that a conviction for assault by justices in petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault.

Henry F. Dickens, for the defendant.—The argument of the plaintiff simply amounts to this, that if A. gives B. three blows on the head, B. is entitled to get A. convicted before the magistrates of two, and to bring an action for the third. The clear intention of sect. 45 of 24 & 25 Vict. c. 100 is to release the defendant from all further proceedings civil or criminal for the same assault for which he has been fined and imprisoned. In the case of *Masper and Wife v. Brown* (L. Rep. 1 C. P. Div. 97) which is absolutely on all fours with the present, it was held that the words "for the same cause" must be taken to mean "for the same assault." The point here then is, Is the assault on this female plaintiff, for which this action is brought, the same assault on her as that adjudicated upon by the magistrates? It undoubtedly is. The information before the magistrates was for a common assault upon her under sect. 42; but by sect. 43 the magistrates have power upon the

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summons for a common assault, if they find that the assault is of an aggravated nature upon a woman, to levy a heavier fine or impose a longer term of imprisonment. A special summons for an aggravated assault is not necessary. The true construction of sects. 42 and 43 is that upon a summons under sect. 42 they can adjudicate upon one under sect. 43. And they have done so here, for in the summons for the assault on the husband the defendant was only fined, in the summons for the assault upon the wife he was not fined but imprisoned. The case of *Reg. v. Morris* is altogether distinguishable. He also cited:

Wemyss v. Hopkins, 33 L. T. Rep. N. S. 9; L. Rep. 10 Q. B. 578; 44 L. J. 130, Q. B.;
Bradshaw v. Vaughton, 3 L. T. Rep. N. S. 373; 30 L. J. 93, C. P.

CLEASBY, B.—If I had entertained any doubt in this case, I should have preferred to have had the case argued again before two judges, but as I feel no doubt whatever, and as the parties consented that the motion should be heard before me, I have no hesitation in giving my decision. There were originally two actions which were consolidated, but with respect to the assault on the husband the plaintiffs' counsel does not deny that that assault was adjudicated upon by the magistrates, and that with respect to that the plaintiffs cannot recover. The whole question is whether the assault on the wife has been adjudicated upon. The action by the husband and wife is for an assault committed by the defendant upon the wife, and the defence set up by him is, that the case was brought before the magistrates under 24 & 25 Vict. c. 100, s. 42, that he was imprisoned for this very assault, and that sect. 45 of that Act releases him from all further proceedings, civil or criminal. But in order that he can avail himself of that defence, he must show that this action is "for the same cause" for which he has been adjudged to be imprisoned. Has he then been adjudged to be imprisoned "for the same cause?" Now if there were one proceeding for a common assault, and another for an aggravated assault, I should have thought that the magistrates in this case could not be said to have adjudicated upon the aggravated assault, and that though to some extent the defendant suffered for the same cause, he would not have been said to have been convicted "for the same cause," but only for the common assaults and battery. But I cannot come to that conclusion. Sect. 42 gives power to the magistrates to impose a fine not exceeding 5*l.*, or a term of imprisonment not exceeding two months, on any person who shall unlawfully assault and beat any other person. Then sect. 43 provides that "when any person shall be charged before two justices of the peace with an assault and battery upon any male child whose age shall not exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault and battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assault and batteries, may proceed to hear and determine the same in a summary way, and if the same be proved, may convict the person accused, and every such offender shall be liable to be imprisoned for any period not exceeding six months, or to pay a fine not exceeding 20*l.*" The language of

that section satisfies me that the information laid is for an assault and battery, and then if it appears that it is an assault and battery on a female of an aggravated nature, the magistrates may deal with it by inflicting a heavier punishment than they could inflict under sect. 42. It seems to me, therefore, to follow that the proper way of proceeding is to lay the information for an assault and battery, and then it is for the magistrates to deal with the case under sect. 42, or if they think fit under sect. 43. That is a matter for their consideration. It does not follow in the slightest degree that because they have not gone to the full extent of the powers given them by sect. 43, that they never took the aggravated assault into consideration at all. Indeed, the fact is that they adjudged the defendant to pay a fine for the assault on the husband, and for the assault on the wife they adjudged him to pay the costs and to be imprisoned. Quite independently of authority, therefore, I think upon the proper construction of sects. 42 and 43, that the magistrates have dealt with the assault upon the female plaintiff, and that there can therefore be no further proceeding. With regard to the authorities, I think the case of *Masper v. Brown*, referred to by the learned counsel for the defendant, is in point, and I can see no distinction between that case and the present. The other cases cited in the course of the argument have, I think, no reference to the case before me.

Motion refused.

Solicitors for plaintiff, *Henry Pook and Son.*

Solicitor for defendant, *Thomas Sisney*, for *John Copland*, Sheerness.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

May 18 and 19.

(Before CLEASBY, B., GROVE and FIELD, JJ.)

THE WAKEFIELD LOCAL BOARD OF HEALTH (apps.)
v. LEE AND ANOTHER (resps.). (a)

Public Health Act 1848 (11 & 12 Vict. c. 63), s. 69
 —Premises "fronting, adjoining, or abutting upon" street.

By 11 & 12 Vict. c. 63, s. 69, local boards of health may, by notice in writing, require owners or occupiers of premises fronting, adjoining, or abutting a street (not being a highway) to sewer, level, &c. such street within a time to be specified in such notice, and in case of default may themselves execute the works, and recover the expenses incurred in ten days in a summary manner from the owners according to the frontage of the premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, by arbitration.

The respondents were owners of premises divided by a narrow stream from a street which had been sewered, &c., under the provisions of the above-mentioned section. The respondents' premises communicated with the street by means of two bridges, one of which belonged to them. The respondents had gates on their own premises, by which they were enabled effectually to close all communication between their premises and the street.

Held, on the above facts, that the respondents' premises fell within the provisions of 11 & 12 Vict.

(a) Reported by B. H. AMFELT, Esq., Barrister-at-Law

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c. 63, s. 69; per *Field and Grove, JJ.*, because they fronted and abutted upon the street; per *Cleasby, B.* (with considerable doubt), because they adjoined the street.

CASE stated by justices of the peace for the borough of Wakefield, under 20 & 21 Vict. c. 63.

At a petty session holden on the 10th March 1875, a complaint was preferred by the appellants under the Public Health Act 1848, s. 69 (a), charging that prior to and on the 3rd April 1872, and thenceforward until after the service of the notice next mentioned, a street called Dyehouse-lane, situate within the district of the appellants' parish (not being a highway within the meaning of the statutes in that behalf), was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the said board, whereupon the said board did, on the 15th Nov. 1872, by written notice in the form or to the effect provided by the statutes in that behalf, and dated the 3rd April 1872, to the respective owners and occupiers of the premises fronting, adjoining, and abutting upon such part of the same street as required to be sewered, levelled, paved, flagged, and channelled, require the said owners to sewer, level, pave, flag, and channel the said street within six weeks from the service of the said notice in manner in the said notice described; that the said notice was not complied with as by law required; and therefore the said board thought fit to execute, and did thereafter execute the works mentioned and referred to therein; that the proportion of the expenses incurred by the said board in so executing the said works to be paid by the respective owners of premises so fronting, adjoining, and abutting as aforesaid, according to the frontage of their respective premises, were afterwards, to wit, on the 27th April 1874, duly settled by the surveyor of the said board, having regard to all the circumstances of the case, and pursuant to the statutes on that behalf; that notice of the amount of the said proportion so settled by the said surveyor was, in accordance with the statutes in that behalf, given more than three calendar months before the 3rd Feb. 1875, being the day of complaint, namely, on or about the 9th June 1874, duly given to all the said owners, and the respective proportions of the said expenses to be paid by the said owners respectively, had theretofore and more than three calendar months before the date of the com-

(a) By 11 & 12 Vict. c. 63, s. 69, it is provided as follows: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled, to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

plaint been duly demanded of all the said owners; but that the respondents, two of the said owners within the meaning of the statute in that behalf made, had not paid, but had refused to pay, that proportion of the expenses so due from them as aforesaid, amounting to the sum of 145l. 13s. 5d., nor had paid, but had refused to pay, the interest in respect of the said sum by law payable by them to the said board, and had not within the time limited by the statute in that behalf, and in manner thereby described, disputed the same; and that there was, therefore, then due from them to the said board, in respect of the premises, the said sum of 145l. 13s. 5d., and the further sum of 4l. 14s. 4d. for interest on the said first-mentioned sum, pursuant to the statute in that behalf, making together the sum of 150l. 7s. 9d., for the recovery of which last-mentioned sum these proceedings were taken.

At the hearing the respondents' solicitor admitted the regularity of the preliminary proceedings taken by the board, and that Dyehouse-lane was a street repairable by the owners adjoining or abutting thereupon.

The street called Dyehouse-lane was situate within the appellants' district, and on the east side of the stream called the River Chald or Ings Beck, which divided the townships of Wakefield and Alverthorpe-with-Thornes, and also divided the premises of which the respondents were owners from Dyehouse-lane. There were two communications with the respondents' premises out of Dyehouse-lane and over the beck by means of two bridges. One of these bridges was made of brick arched over the beck, and might be used by horses, carts, and other carriages, and by foot passengers. The other bridge was a wooden foot bridge, and could only be used by foot passengers. The respondents had gates on their own premises, by means of which they could at their own will and pleasure effectually close all communication between their premises and Dyehouse-lane, and these gates were the only obstructions to the free ingress and egress over the bridges to and from the respondents' premises; but it was stated by one of the respondents that he had known only one cart go over the brick bridge within the last ten years. These bridges had directly communicated between the respondents' premises and Dyehouse-lane for a great number of years, but there was no evidence adduced showing by whom they were erected. It was proved that they had been in existence for fifty years or upwards, and it was also proved that the wooden foot bridge was removed by the respondents at their own cost from its original position some seven or eight years ago, and that it still communicated between their premises and Dyehouse-lane. It was not proved by whom either of the said bridges had been repaired, or that they had ever been repaired by the respondents, except so far as the wooden foot bridge was altered and repaired by them on its removal as aforesaid.

The appellants admitted that they had cleansed or paid for the cleansing of the stream called Chald or Ings Beck up to the middle thereof co-extensive with their premises. The respondents proved that the principal entrance used to their premises was from the street called Westgate, in Wakefield, and not from either of the bridges.

The appellants contended, through their counsel, that the Chald or Ings Beck was a fence bound-

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ing the respondent's property, and that as the respondents had two communications from Dyehouse-lane over the beck by means of an arched bridge for carts as well as foot passengers, and a wooden bridge for foot passengers, their premises fronted, adjoined, or abutted upon Dyehouse-lane in respect of the whole of the frontage of their premises co-extensive with the stream called Chald or Ings Beck.

The respondents contended, through their solicitor, that no part of their property fronted, adjoined, or abutted upon Dyehouse-lane, and produced a conveyance, dated 11th July 1845, of the land and premises in respect of which the present claim was made, upon which conveyance was indorsed a plan of the premises purporting to be thereby granted. According to this plan, the land of the respondents extended only as far as the bank of the stream next their property. They further contended that no part of the stream called Chald or Ings Beck, or the two bridges crossing over it, formed part of the premises in the said conveyance mentioned; that as the principal entrance to their premises was from the street called Westgate, they could not be owners of premises fronting, adjoining, or abutting upon Dyehouse-lane within the meaning of the Act; that the centre of the stream formed the boundary between the township of Wakefield and the township of Alverthorpe-with-Thornes; and that, supposing the respondents had any right to the stream, it would only be as an easement to the centre thereof in the township of Wakefield, and that the other half of the said stream would therefore front, adjoin, and abut upon Dyehouse-lane in the township of Alverthorpe-with-Thornes; that the respondents could not maintain an action for damages done to the bridge crossing the stream, and that under the circumstances they could not be held liable to pay any proportion of the cost of repairing Dyehouse-lane, it being divided from their premises by the stream as before mentioned. The appellants' counsel argued in reply that, if the respondents were owners up to the middle of the stream, it was quite clear they were owners up to the street, for the other half of the stream, from the centre thereof, was portion of the street, and therefore the respondents' premises fronted, adjoined, and abutted upon Dyehouse-lane. We were of opinion that the respondents under the circumstances, were not liable, and accordingly dismissed the complaint, but consented to state a case. The question of law is whether the respondents were liable to pay to the appellants a portion of the cost of sewerage, levelling, paving, flagging, and channelling Dyehouse-lane.

John Forbes, for the appellants.

Tennant, for the respondents.

The following cases were cited and referred to:

School Board of London v. Vestry of St. Mary, Islington, L. Rep. 1 Q. B. Div. 65; 45 L. J. 1, M. C.; 33 L. T. Rep. N. S. 504;

Baddely v. Gingell, 1 Ex. 319; 17 L. J. 63, Ex.;

Reg. v. Newport Local Board of Health, 3 B. & S. 341; 32 L. J. 97, M. C.;

Mayor, &c., of Manchester v. Chapman, 37 L. J. 173, M. C.; 18 L. T. Rep. N. S. 640;

Oldaker v. Hunt, 6 D. M. & G. 376; 1 Jur. N. S. 785;

Plumstead Board of Works v. British Land Company, L. Rep. 10, Q. B. 203; 44 L. J. 38, Q. B.; 32 L. T. Rep. N. S. 94.

Cur. adv. vult.

May 19.—CLEASBY, B.—The question here is, whether the premises of the respondent have been brought within the provisions of the 69th section of the Public Health Act 1848, and whether they can be said to be "fronting, adjoining, or abutting upon" Dyehouse-lane. The facts are shortly as follows: Between the respondents' premises and the lane there is a narrow stream. It seems clear that the whole of the bed of this stream does not belong to the respondents, and the evidence before us tends to show that their boundary was the edge of the bank next their land. Two bridges form the means of communication between the respondents' premises and the street; one of them is of brick, but it was not clearly proved to whom it belonged; it had been only once crossed by a cart during ten years. Besides that there was a wooden bridge, and it appeared to belong to the respondents, for they had removed it, and had exercised such rights relating to it as they thought proper. The respondents could, for all practical purposes, prevent anyone from using the bridge without their consent. We have now to consider whether, upon these facts, the respondents are liable to pay the amount claimed from them. I do not think the Legislature intended the words used in the 69th section to have the same meaning. One of the words which the statute uses is the word "abutting," and in considering whether the respondents' premises "abut" upon Dyehouse-lane, we ought not to forget that the premises in question are on the opposite side of the bridge. I am of opinion that the respondents' premises do not "abut" upon the street, because there is this stream between them, which is not part of the premises, and does not belong to the respondents. I may remark that if the respondents' premises do either front, adjoin, or abut upon a street, the fact that for practical purposes they gain no benefit from their proximity to the lane is unimportant. Owners and occupiers falling within the provisions of the statute are to be assessed according to their frontages, and the argument that those who derive no advantage are not bound to pay is not warranted by the words of the statute: (See *R. v. Newport Local Board of Health (ubi sup.)*). There are two other points to be determined, namely, whether the premises "front" or "adjoin" the street. I confess it does not appear to me that upon the facts stated the premises front the street. Then do they "adjoin"? Now, it occurs to me that as the stream between the street and premises is of very small width, it is not using the word in an unreasonable sense to say they adjoin. The question is substantially one of fact, and the answer might be different if the stream could only be crossed by a ferry. On the whole I should have felt inclined to abide by the decision of the justices: but as both my learned brothers are of opinion that their judgment was wrong, I do not feel inclined to differ from them. The authorities, with the exception of *R. v. Newport (ubi sup.)*, throw no light upon the construction of this section; and the decision in *Baddely v. Gingell (ubi sup.)* was upon a different statute, and the question raised was whether certain houses in a yard could be said to be "within a street;" there the property had a frontage in the street, and its side communication was with the street. In the *School Board for London v. Vestry of St. Mary Islington (ubi sup.)*, the question was whether certain land situated behind a row of

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houses fronting the street "formed part of a street," and great stress was placed by the learned judges on the fact that the only passage out was by passing to the street. The facts in both these cases are very different to the one now before us, and do not, in my judgment, at all aid us in arriving at a conclusion.

GROVE, J.—I think the appellants are entitled to our judgment. If the questions here were of fact I should be inclined to agree with my brother Cleasby, that we ought not to interfere with the decision of the magistrates; what, however, we have to determine is whether upon the facts as stated the defendants' premises are really "fronting, adjoining, or abutting upon" Dyehouse-lane. I feel considerable doubt whether, save in mathematics, there can be exact definitions of words; they must be construed with reference to the subject matter to which they are applied. The question is whether the respondents' premises can be said to "front, adjoin, or abut" the street known as Dyehouse-lane. Now, it is a fact beyond dispute that between the premises and street was a stream of which the breadth was about fifteen feet. Now, I am inclined to think that if a natural division of this kind existed, without any means of access from the one side to the other, that would have been a sufficient interruption to prevent the premises from being brought within the words of the section. But the case does not stop here. We find that there are two bridges over this stream, one of which apparently was the property of the respondents, and under their control. As regards the other bridge no act of ownership was adduced, though that was also under the respondents' control; and carriages coming over it could only gain access to the premises when the respondents opened their gates. I think the premises may be fairly said to "abut" and "front" the street, even if they cannot be said to "adjoin" it. The authorities cited throw some light on this question. In *Baddely v. Gingell* (*ubi sup.*) the occupiers of houses situated in a yard were held liable to be rated as being within a street, though they were separated from the street by other buildings. In the *School Board case* (*ubi sup.*) the question was whether certain houses "formed a street," and Cockburn, C.J., in the course of his judgment, said: "It matters not in point of justice of the case that the house, instead of actually fronting the street, stands in the rear of the street if it has its access from the street. It is the benefit of access to the premises which must be supposed to be the foundation of the liability which the Legislature thinks fit to impose." This is an *à fortiori* case in favour of the appellant, since the words "abutting and adjoining" are not so strong as "forming part of." These premises are in no way fenced off from the street, and I think they clearly front and abut upon Dyehouse-lane, and that the respondents are accordingly liable to pay their proportion of the expenses. I will only add that my brother Field agrees with me in the conclusion I have arrived at.

Judgment for the appellants. Case to be re-mitted to justices.

Solicitors for appellants, *Pitman and Lane*, for *Brown, Wilkin, and Scott*, Wakefield.

Solicitor for respondents, *Badham*, for *J. and J. E. Marsden*, Wakefield.

Thursday, May 25.

COUSINS v. LOMBARD DEPOSIT BANK (LIMITED). (a)
Jurisdiction of court—Appeal from County Court—Motion against evidence—38 & 39 Vict. c. 50, s. 6.

The County Courts Act 1875, sect. 6, which gives an appeal from county courts by way of motion instead of special case, is limited in its application to those matters in which appeals previously existed. A party aggrieved cannot move against a decision of a judge on the ground of its being against the weight of evidence.

THIS was an action for trespass and consequent injury by the seizure and sale of the plaintiff's furniture under a bill of sale. The case was sent to be tried under the 10th section of the County Court Act 1867 (30 & 31 Vict. c. 142), at the Westminster County Court, where the trial took place, before Francis Bayley, Esq., the judge of the said court, without a jury, on the 12th and 13th May.

The plaintiff's evidence was that she kept a lodging-house, and her furniture was of considerable value. She borrowed last September from the defendants certain sums of money for the payment of rent and other purposes amounting in all to about 60*l.* For this she executed a bill of sale upon her furniture for 200*l.* payable by weekly instalments of 1*l.*, or in default of any instalment the whole sum was payable immediately.

In December plaintiff made default of one of her weekly payments, and the defendants seized and sold the furniture, realising 250*l.* thereby. A great number of witnesses were called for the defendants, who disputed the plaintiff's story, but upon the circumstances of the loan and the execution of the bill of sale, as described by the plaintiff herself, the learned judge found amongst other things, that he believed the evidence of the plaintiff, that the execution by plaintiff of the bill of sale was induced by fraud, that the writing in the bill of sale, which expressed the amount and described the furniture, was not inserted in the bill till after the plaintiff had signed it, and that the defendants' witnesses were implicated in the fraud. He assessed the plaintiff's damages at 300*l.*

Dodd now moved on behalf of the defendants for a new trial on the ground that the verdict was against the weight of the evidence.—I admit that until the last County Courts Act there were no means of reviewing a judge's decision upon facts only, but I submit that the effect of sect. 6 of 38 & 39 Vict. c. 50, is to enable a party aggrieved to bring the whole matter of the action before this court. The words are: "In any cause, suit, or proceeding other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit. And if the court to

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

which such appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers. And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy; and the copy so signed shall be used and received on such motion and at the hearing of such appeal." This was clearly such a cause or suit as was intended to be dealt with, and the defendants are aggrieved by the judge's decision. The latter part of the section may perhaps relate to points of law only, but the power to appeal by motion is not limited to such points. That appeals in Admiralty causes on questions of fact were contemplated by this statute appears from the 11th section, which provides for assistance by the Elder Brethren of the Trinity House.

CLEASBY, B.—There was clearly in this case some evidence upon which a jury's verdict for the plaintiff might have been founded; and as to the question of fact raised, sitting as we do to hear appeals under sect. 6 of the County Courts Act 1875, I think we cannot entertain it. What was the old law? Before that Act there could be no appeal except upon points of law raised and stated by the judge himself. The effect of this 6th section is merely to give parties an opportunity to appeal by way of motion upon the judge's notes, instead of by a special case stated by him. The section does nothing but substitute a new mode of appeal for that which existed before; the substance of the appeal is not made more extensive than it was before. The power to appeal is expressed to be against the ruling, order, direction, or decision of a judge. No difficulty can arise on the words "ruling" or "direction;" these can relate only to matters of law. "Order" may perhaps refer to some interlocutory matters, but they are within the scope of the previous appeals. The only word upon which the defendants' contention in this case can be founded is "decision." Now the first difficulty which strikes us is that if this means we are to have the power to set aside a decision of a judge on the ground of its being against the weight of evidence, it is unreasonable that no words which are used can apply to upset the finding of a jury on the same ground. The word may well be limited to a decision on the question whether the facts proved justify such a finding as that to which a judge arrives; but I think it was not intended to give an appeal against the weight of evidence. In our position to-day, sitting as we do to hear appeals which before the Act of 1875 might have been brought before any superior court of common law, but without regard to equity or admiralty appeals, about which we express no opinion, we are clear that our jurisdiction is limited to questions of law. The subsequent part of the section is to my mind sufficient to establish this limitation; it provides that the judge, at the request of either

party, shall make a note of any question of law and the evidence and decision thereon for the hearing of the appeal, but no provision is made for weighing the evidence upon which the judge arrives at his decision. The motion, therefore, cannot be entertained.

GROVE, J.—I am of the same opinion. The question is whether the 6th section practically changes the jurisdiction of the appeal court from County Courts, or whether the change made merely relates to the procedure. If the former were intended, it would certainly have been more clearly expressed than it is, and there is to my mind sufficient to show that the limitation of appeal which existed before is to be continued now. I do not read the section as in any way altering the old system of appeal except as to procedure. There is merely a substitution of the mode of proceeding by motion, where a party chooses, instead of that by special case. The appeal, however, is expressly limited to a proceeding in which any person aggrieved has a right to appeal. The only right of appeal previously existing was upon a question of law, and upon such a question the later part of the section shows the materials by which the Court of Appeal is to be set in motion. There is nothing in the section about the verdict of a jury, even if it should not agree with the opinion of the judge; and that is a strong reason for thinking that all decisions of fact in the nature of verdicts are intentionally excluded from our jurisdiction. I go no further, however, than my brother Cleasby, and state my opinion on this point only with regard to what was the common law jurisdiction in these County Court appeals. I say nothing about the extent of equity and admiralty appeals.

FIELD, J.—This is a motion to set aside the decision of a County Court judge on the ground of its being against evidence. The action, although originally commenced in the Common Pleas Division, was transferred to a County Court under the 10th section of the County Courts Act 1867. The judge has found as a fact, upon conflicting evidence before him, that a certain bill of sale upon which the action turned was obtained by fraud and it is now said that he was wrong in that conclusion. Before the last Act the power to appeal depended upon sect. 14 of 13 & 14 Vict. c. 61, which is applicable, however, only "if either party in any cause of the amount to which jurisdiction is given to the County Courts by this Act shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence." I entirely agree that the 6th section of the Act of 1875 was not intended to enlarge the right of appeal given by the previous Acts. Although some doubt might be raised if the matter depended only upon the first part of the section, I cannot entertain any when the whole of it is taken into consideration. There is an express substitution of motion for special case, which goes far to limit the motion to a matter upon which the special case might before have been stated. There is also a provision for raising a point of law which confirms the view that no other point can be raised. Now a word about equitable appeals, which depended before the last legislation or the Act of 1865. The point of limit to our jurisdiction in those matters has been raised and not settled. I therefore apply my judgment on this case to what may still

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be called common law appeals only. I should like to hear further argument before deciding whether questions of fact can form subjects of appeal in equity or admiralty.

Motion refused.

Solicitor for the defendants, *Edward Lee*.

Thursday, Nov. 16.

(Before CLEASBY B. and GROVE, J.)

MUSSETT v. BURCH. (a)

Justices' jurisdiction—Bonâ fide claim of right—Navigable non-tidal river—Public right of fishing—24 & 25 Vict. c. 96, s. 24.

The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law.

The appellant was convicted under 24 & 25 Vict. c. 96, s. 24 of fishing in water which was private property. The water was part of a navigable river, which was not tidal, and which was navigated by means of locks. At the hearing the appellant set up a public right of fishing, and argued that the jurisdiction of the justices was ousted by such bonâ fide claim of right.

Held, upon a case stated by justices under 20 & 21 Vict. c. 43, that no such right could exist in law, and therefore the jurisdiction of the justices was not ousted.

THIS was a case stated by the justices of Essex, before whom the appellant had been tried on the 15th Jan. 1876, upon an information which charged that he, Thomas Mussett, of Bures St. Mary, in the county of Suffolk, did unlawfully and wilfully, by angling in the day time, take fish in certain water then and there running through certain land belonging to Zachariah Pettitt, the owner of such water, and having a right of fishery therein, contrary to the form, &c.

The above information was laid by George Burch, water bailiff to the Stour Angling Preservation Society.

It further appeared from the case stated that the river referred to, the Stour, is navigable and that it is now used by the Stour Navigation Company by means of locks.

Two or three witnesses deposed that they had fished in the said river for upwards of forty years without interruption.

At the hearing Mussett set up his right to fish in the river as one of the public, and objected that the jurisdiction of the justices was ousted thereby. They nevertheless convicted him, and ordered him to pay a fine of 5s. and costs.

Against this order Mussett now appealed.

Graham, for the appellant.—The information in this case was laid under the 24th section of the Larceny Act, so that a mere bonâ fide claim of right is sufficient to oust the jurisdiction of the justices, for there is no proviso in this Act as in 24 & 25 Vict. c. 97, s. 52, as to a fair and reasonable claim: (*White v. Feast*, L. Rep. 7 Q. B. 353.) The question is, then, did the appellant make a bonâ fide claim of right? if so, the justices were bound to hold their hands: (*Reg. v. Stimpson*, 8 L. T. Rep. N. S. 536; 4 B. & S. 301; *Cornwell v. Sanders*, 7 L. T. Rep. N. S. 356; 3 B. & S. 206; 32 L. J. 6, M. C.) Still, it is impossible to contend that every bonâ fide claim of right is sufficient;

it must be such a claim as can exist in law: (*Hudson v. McCrea*, 4 B. & S. 585; 9 L. T. Rep. N. S. 678; 33 L. J. 65, M. C.) And that case also decides that no right to fish in a non-navigable river can exist in the public. It is admitted that the public have a right to fish in a tidal river. The third case, of a river which is navigable but not tidal is the one before us, and on that there has been no distinct decision in the English courts. *Reg. v. Burrow* (34 Just. of Peace 53) shows that such a claim may be bonâ fide raised in the case of a navigable lake, and that case is subsequent to *Murphy v. Ryan* (Ir. Rep. 2 C. L. 143). The case is one of doubt, and therefore the justices should have stayed their hands. The case states that this is a navigable river. If there is any Act of Parliament with regard to the fishing, it is for the other side to produce it, otherwise this case will not be within *Hargreaves v. Diddams* (32 L. T. Rep. N. S. 600; L. Rep. 10 Q. B. 582).

Croome (Jones with him).—*Reg. v. Stimpson* is not applicable to the present case, for there the right could exist in the public, because the river was tidal, but *Hudson v. McCrea* is in point. In that case the fishing had been uninterrupted for sixty years, but as the river was not navigable it was held that a right to fish could not exist in the public. The decision in *Reg. v. Burrow* does not touch this case at all, as the fishing there was in a lake and not in a river; even if it were in point, it would be distinctly overruled by *Hargreaves v. Diddams* (*ubi sup.*). The river in question in that case was originally not navigable, but it was made so by Act of Parliament and various tolls granted, and there it was held that no right of fishing could exist in the public. Not a single case can be found in which it has been held that the public have such a right in a river which is not tidal.

Graham, in reply.—It is enough for me to show that the justices have decided what is in reality a doubtful case; that being so, *Reg. v. Burrow* is in point, and the jurisdiction of the justices is ousted.

CLEASBY, B.—It appears to me that the question which arises in this case is governed by the decision in *Hargreaves v. Diddams*. The real question is, did a matter of title come before the justices? If it did, they were not entitled to decide it. It is not necessary to ask, was the title established, but did it come in question? Nor is it sufficient that a bonâ fide claim should be raised, but it must be of some right which the law allows. We must not ask whether the appellant had the right in question, but whether such a condition of things exists as would enable him reasonably and fairly to claim such a right. Now, it appears to me that the case in the Irish reports (*Murphy v. Ryan*) is decisive on the point before us. It expressly decides that "the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow," and the following passage is there cited from Hale (*De Jure Maris*, p. 12): "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows," and, it proceeds, that "only in such water is there *primâ facie* a right of fishing common to all." If the river in question were not navigable, *Hudson v. McCrea* would be directly in point to decide that no such right could be raised. Some doubts, however, seem to have been raised with regard to that case by observations made in the case of *Reg. v. Burrow*. But subsequently to

(a) Reported by A. H. FOSBER, Esq., Barrister-at-Law.

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that decision we have the judgment in *Hargreaves v. Diddams*, upon which I think we ought to act in this case. Lush, J. there says: "It is true that this part of the river was made navigable to the public on payment of tolls under the Act of Parliament, but that did not affect the ownership of the soil, and none of the incidents attaching to a navigable river up to the flow and reflow of the tide can properly attach here." We must deal in the present case with the facts that appear before us, it already having been decided that where a river is made navigable the right of fishing is private. Now, here the facts are precisely the same, for we have it as a fact that the river is navigated and used by the Stour Navigation Company by means of locks. It appears as a fact that the locks exist, and therefore *prima facie* the river would not be navigable without such locks, and that the making of such locks does not interfere with private rights of ownership of soil is distinctly decided in *Hargreaves v. Diddams*. The conviction must therefore stand.

GROVE, J.—I am of the same opinion. Mr. Graham has not shown us any case in which the public have been held to have a right of fishing in a river merely because it is navigable or navigated by boats. Can the right to navigate give the right to fish? No case has been made out to satisfy the court that such is the law. My brother Lush's judgment in *Hargreaves v. Diddams* already referred to, seems clearly in point here, and shows that no such right can exist. Again, we have the case *Murphy v. Ryan*, which expressly decides that the public can have no right of fishing in a river which is not tidal. The only case causing any doubt is that of *Reg. v. Burrow*, but that was the case of a lake, not a river, and Mellor, J. appears to base his judgment on the fact that the claim was raised by the occupier of a certain cottage who claimed on the ground of such occupation, and not as one of the general public. Be that as it may, the other cases referred to are too strong to leave any doubt on the question. The claim now set up is one that cannot exist in law, but if that were not so as the claim is so unusual an one that the onus would rest upon the respondent to show that such a right might exist. The locks were probably made within the memory of man, and the defendant ought to have proved that before those locks existed the river was navigable. He has not done so. On these grounds my judgment must be for the respondent.

Conviction affirmed.

Solicitors for appellant: *Walter Moojen and Son*, for *Salmon and Son*, Bury St. Edmunds.

Solicitors for respondent, *Goody and Stock*, for *Smythies, Goody and Sons*, Colchester.

Saturday, Nov. 18.

SCOTT v. LEGG. (a).

Covering in new building without party wall—Addition to old building—Metropolitan Building Act 1855, sects. 9, 27, 28, 46.

By the Metropolitan Building Act, s. 9, any alteration, addition, or other work made upon an old building is to the extent of such alteration subject to the provisions of the Act, which does not otherwise apply to old buildings. By sect. 27,

rule 4, every warehouse containing more than 216,000 cubic feet must be divided by party walls in such manner that the contents of each division shall not exceed such number of feet. By sect. 28, rule 2, no buildings "shall be united, if when so united, they will, considered as one building only, be in contravention of any of the provisions of the Act." And by sect. 46 a justice of the peace may make an order on any builder commanding him to comply with the requisitions of a surveyor made in cases of contravention of the Act.

The appellant, by taking down one of the external walls of an old building, containing more than 216,000 cubic feet, made an addition containing less than 216,000 cubic feet.

Held, that such addition was within the statute, and that the order of a stipendiary magistrate commanding him to divide the old building from the new was good.

THIS was a special case stated pursuant to the Metropolitan Building Act 1855, 18 & 19 Vict. c. 122, ss. 106 and 107, for the purpose of obtaining the opinion of the court on questions of law as hereinafter stated.

1. On the 22nd July 1875, a complaint preferred by Henry Simpson Legg (hereinafter called the respondent) against William Scott (hereinafter called the appellant) under sect. 46 of the Metropolitan Building Act 1855, charging that the said appellant did complete the covering in of a new building erected and united to the then present building, viz., the Anchor Brewery, Mile-end-road, without a party wall, the building so united exceeding the cubical contents allowed by the Metropolitan Building Act above-mentioned, and as required by sect. 27, r. 4 and sect. 28, r. 2 thereof, was heard before H. J. Bushby, Esq., the magistrate of the Worship-street Police Court, and upon such hearing the said magistrate made an order that the appellant should erect a proper party wall so as to divide the new building from the old.

2. Upon the hearing of the complaint the following facts were proved by the respondent and admitted by the appellant.

3. The appellant, the builder, as defined by the 3rd section of the said Metropolitan Building Act 1855, was also the clerk of the works to Messrs. Charrington, Head, and Company, of the Anchor Brewery, Mile-end-road, and the respondent was the district surveyor, under the said Metropolitan Building Act 1855, of the hamlet of Mile End Old Town.

4. The Anchor Brewery, to which the new building is an addition, is an old building erected long before the passing of the above Act, in itself containing a greater number of cubic feet than that specified in sect. 27, r. 4, and is not divided by party walls. The addition, which is roofed in, and which the appellant was making to the front of the old building, taken by itself contains less than the before-mentioned number of cubic feet, but the old and new buildings taken together greatly exceed that amount. [A ground plan and section annexed showed the new building, and the position of the appellants' machinery and plant in the old building.]

5. It was contended by the respondent that a party wall should be made between the old and new buildings, which were so united as to contravene sect. 28, r. 2 of the above Act, and were, therefore, taken together of larger cubical contents than

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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that specified in sect. 27, r. 4. The appellant also relied upon sect. 9 of the Act, which is in the following terms :

Any alteration, addition, or other work made or done for any purpose except that of necessary repairs, not affecting the construction of any external or party wall into or upon any old building or into or upon any new building after the roof has been covered in shall, to the extent of such alteration, addition, or work, be subject to the regulations of this Act, and whenever mention is hereinafter made of any alteration, addition, or work into or upon any building it shall, unless the contrary appears from the context, be deemed to imply an alteration, addition, or work to which this Act applies.

6. It was contended by the appellant; firstly, that by sect. 9 the operation of the said Act as to alterations, additions, or other work made or done for any purpose into or upon any old building was confined to the extent of such alterations, additions, or other work so made or done; secondly, that the enactment of sect. 27 as to party walls was by sect. 7, confined to new buildings which exceed the cubical contents mentioned in sect. 27, r. 4; thirdly, that in the present case a new building having been added to an old building they do not come within sect. 28, which applies to the uniting of new buildings to each other.

7. Upon such hearing the said magistrate reserved his judgment, and on the 29th July 1875, made an order on the appellant commanding him to erect a proper party wall so as to divide the new building from the old, on the ground that the addition of the new building to the old building was an uniting them within sect. 28, r. 2. and that, therefore, the buildings taken together were in contravention of sect. 27, r. 4.

8. The questions of law for the opinion of the court were; firstly, whether sect. 28, r. 2, contemplates the union of a new with an old building, and whether even if it should so contemplate an union, an addition such as appeared by the case was within the said section of the statute; secondly, whether the defendant was rightly convicted under sect. 27, r. 4.

If the court should be of opinion that the said order was legally and properly made and was valid, and the appellant was liable, then the said order was to stand, but if the court should be of opinion otherwise then the said complaint was to be dismissed.

Benjamin, Q.C., for the appellant.

F. M. White, (with him *Biron*) for the respondent. *Cur. adv. vult.*

Nov. 22.—The following written judgment of the court, *Cleasby, B.*, and *Grove, J.*, was delivered by

CLEASBY, B.—The question in this case was whether an addition made to an old building after the passing of the Metropolitan Building Act, 18 & 19 Vict. c. 122, required to be separated by a party wall in order to comply with the Act. By the 27th section any warehouse or building used for the purpose of trade containing more than 216,000 cubic feet must be divided by party walls in such manner that no part contain a greater cubic measurement. This only applies to new buildings; old buildings are not affected by the Act. By the 9th section any addition to an old building is to the extent of such addition to be subject to the regulations of the Act. The addition made by the appellant contained by itself less than 216,000 cubic feet. It was made by taking down one of the external walls of an old building, which contained more than the

contents mentioned, and was not subject to the Act, and building it up at a certain distance, so that the old building and additions contained of course much more than the measurement named. The plan may be referred to. If the addition had contained more than the prescribed contents it was not disputed that the appellant must comply with the Act, and have one or more party walls; but it was contended that as taken by itself it contained less, the 9th section did not apply, and that there were no words in the Act which fairly read could include such a case. If the case had rested on the 9th section only I should have felt great difficulty in holding that it extended to anything beyond the addition itself. But the main reliance of the respondent was placed on the 28th section, sub-section 2, by which it is provided that no buildings shall be united if when so united they shall be in contravention of the provisions of the Act. It was powerfully urged on behalf of the appellant that this was intended to meet a different state of things from the present, namely, the making into one of the two separate buildings, whether new or old, and that it would be straining the language beyond what could be intended to make it apply to so different a subject as the addition to a former building. The answer to this argument is, that the case comes within the mischief intended to be prevented, and that the following consequences will follow from holding the rule not to be applicable to additions to old buildings. A man might have a building of less than the specified dimensions, and he might add a new building also of less than those dimensions, and the two together containing perhaps 400,000 cubic feet would require no partitions, though no such building existed before the passing of the Act. Also, if one wall of the appellant's warehouse should be taken down and 200,000 feet added, he might afterwards take down the three other walls, and make further additions to the same extent, each under the specified dimensions, and so add 800,000 cubic feet without any partitions. It is certain that this could not have been intended. It seldom happens that the framer of an Act of Parliament or the Legislature has in contemplation all the cases which are likely to arise, and the language, therefore, seldom fits every possible case. Whenever the case is clearly within the mischief, the words must be read so as to cover the case, if by any reasonable construction they can be read so as to cover it, though the words may point more clearly to another case. This must be done rather than take such a case to be a *casus omisus* under the statute. We think that the words may be read as including not only the existing building already constituted, but the adding a new building to an old one, and so uniting them together. The appeal is therefore dismissed, and of course with costs. (a)

Judgment for the respondent.

C. Scott asked for leave to appeal under sect. 45 of the Supreme Court of Judicature Act 1873.

CLEASBY, B.—We have no doubt upon the point, but considering the importance of it, you may take leave to appeal.

Solicitor for the appellants, *William Wyke Smith*.

Solicitors for the respondent, *Loxley and Morley*.

(a) See *Ashby v. Woodthorpe*, 9 L. T. Rep. N. S. 408.

BANK.]

Re BRYANT.

[BANK.]

COURT OF BANKRUPTCY.

Monday, Nov. 6.

(Before the CHIEF JUDGE.)

Re BRYANT. (a)

Writ of fi. fa.—Seizure under—Liquidation—Petition—Injunction—Sale with notice of—Contempt of court.

It is a contempt of court for a sheriff's officer to proceed with a sale after the fact of an injunction having been granted to restrain him from so doing has come to his knowledge, although the order may not have been actually served upon him.

Semble, that it is equally a contempt of court if he have received notice of an act of bankruptcy.

THIS was an application to commit John Orridge, the officer of the sheriff of Hertford, and James Death, his auctioneer, for contempt of court.

On the 31st July, 1876, the sheriff's officer seized the household furniture and effects in the dwelling-house of Thomas Bryant, at Cheshunt, in the county of Hertford, under a writ of *fi. fa.* for 54*l.* 7*s.* 6*d.*, issued by John Walford, an execution creditor, and at the same time instructed his auctioneer, James Death, to sell without delay. The sale was advertised for the 8th Aug.

On the 3rd Aug. Thomas Bryant filed a petition for liquidation, and on the same day his solicitors sent a letter to the auctioneer giving him notice of the filing of the petition, and that an injunction would be applied for early the next morning to restrain the sheriff from proceeding further with the execution. This letter was received by the auctioneer on the morning of the 4th Aug., and about 11.30 a.m. was shown to John Orridge, who thereupon instructed him to have the sale cried as soon as possible, and to proceed to a sale that afternoon, but to stop the sale should he in the meantime be served with an injunction. The same morning an injunction was obtained, and the following telegram was immediately sent by the debtor's solicitor to John Orridge, and also to the auctioneer: "Injunction staying sale and further proceedings granted this morning. Order will be served as soon as possible." The telegrams were sent out about 11.30 a.m., and were received about one o'clock. The auctioneer nevertheless proceeded to a sale at three o'clock the same afternoon until 5.40 p.m., when the restraining order was served upon him. The sale was then stopped, but the majority of the goods had been sold, and had realised about 70*l.*

An application was now made on behalf of the debtor to commit John Orridge and James Death to prison for contempt in proceeding to a sale after they had received notice of the filing of the petition and the injunction.

Finlay Knight appeared in support of the motion.

Lumley Smith, for the respondents, submitted that no intentional contempt had been committed, and that the respondents, who had acted with perfect *bona fides*, were not bound to stop the sale until the restraining order was actually served upon them. Sheriffs' officers were frequently tricked by false telegrams and notices, and it would be very desirable if the court would define

to what extent telegrams were to be recognised by those officers. [The CHIEF JUDGE.—What has become of the proceeds of the sale?] The sheriff still holds the amount, and is ready and willing to hand it over to the trustee appointed by the creditors.

The CHIEF JUDGE.—I asked that question because it relates to the administration of the estate in bankruptcy, and I wanted to be clear upon that point. I have listened attentively to all that Mr. Lumley Smith has said upon the subject, and there can be no kind of excuse for the course which the sheriff's officer has thought fit to pursue. He knew, and ought to know, and does in fact know, that after notice of an act of bankruptcy he ought to have suspended his proceedings, and that it was incumbent upon him not to sell. It was no reason for selling to say that he incurred a liability to the execution creditor. That he knew that an act of bankruptcy had been committed is perfectly clear, because he admits that a telegraphic communication had been made to him before the sale, announcing the fact that an order had been made by the court. He and the auctioneer are both equally to blame. Both violated what they must have known to be the plain law, but notwithstanding that knowledge they proceeded to sell. What may have been the damage to the estate I know not, and have no means of knowing at present; but it is incumbent upon the court to insist, for the sake of justice and regard to the rights of creditors, that when injunctions are granted they must be obeyed. Upon the plain admitted facts the sheriff's officer knew that an injunction had been granted, but he repudiated it and proceeded to a sale. As soon as he knew that the injunction had been applied for, or was about to be applied for, I do not say that he was bound to take any notice of the intention; but when, without any inconvenience to anyone, and without risk to himself, he could have postponed the sale, he chose, in violation of the law, and in contempt of the court, to go on with it, thereby occasioning not only loss but considerable expense to the estate. I am willing to believe what he says, that he did not intentionally disobey the order of the court, but I find that he really did wilfully, and with full knowledge disobey the order of the court. I am not pressed to make an order for a commitment, although that would be the proper order to make, but I order that these two gentlemen, the sheriff undertaking to pay over the proceeds of the sale to the trustee, do pay the costs of this application.

Finlay Knight.—Damage has been done to the estate by the improper sale. Will your Lordship grant an inquiry?

The CHIEF JUDGE.—I cannot do that.

Solicitors for the debtor, *Harper, Broad, and Battock*.

Solicitors for the respondents, *Paterson, Snow, and Burney*.

C. CAS. R.]

REG. v. OXENHAM.

[C. CAS. R.]

CROWN CASES RESERVED.*Saturday, Nov. 18.*(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J.,
POLLOCK, B., and LINDLEY, J.)

REG. v. OXENHAM. (a)

*Larceny—Bailee—Bill of exchange—Fraudulent
conversion—24 & 25 Vict. c. 96, s. 3.*

Prosecutor asked prisoner if he could get bills of exchange discounted, and prisoner replied that if prosecutor was a person of credit he could get his discounted. Three bills were then drawn by prisoner payable to his order, which prosecutor accepted, and delivered to the prisoner to get discounted. The proceeds of the discounting were to be handed to the prosecutor, less the prisoner's commission, or the bills to be returned. The prisoner being pressed by a creditor for a debt, less than the amount of the bill indorsed to him, gave one of the bills in payment, representing it as his own bill, and asking the creditor to discount the balance of the bill. The bill was not indorsed upon the condition of the creditor's discounting the balance; and the jury found that it was the prisoner's intention, when he indorsed the bill, to pass the property in it absolutely to the creditor.

Held, that upon these facts the prisoner might properly be convicted of larceny as a bailee of a bill of exchange under 24 & 25 Vict. c. 96, s. 3.

CASE stated by the Assistant Judge of the Middlesex Sessions.

Herbert Oxenham was tried before me at the Middlesex Sessions, on the 28th July, 1876, on an indictment which charged him with having stolen "a certain valuable security to wit, a bill of exchange for the payment of 200*l.*, the property of Charles Garrett, the said sum of 200*l.* so secured and payable by and upon the said bill of exchange, being then due and unsatisfied to the said Charles Garrett." (See the 24 & 25 Vict. c. 96, s. 3.)

It appeared that on the 3rd Dec. 1875, the prosecutor, Charles Garrett, called upon the prisoner, who is a licensed victualler, at the house of the latter, and asked him if it was true as he had been informed, that he the prisoner could get bills of exchange discounted. The prisoner answered that he had occasionally done so, and if the prosecutor were a person of credit, he had no doubt he could get his acceptances discounted. Three bills of exchange respectively dated the 3rd Dec. 1875, one of which for 200*l.*, became the subject of the present indictment, were then drawn by the prisoner, payable to his order three months after date, and were accepted by the prosecutor, and were by him delivered to the prisoner for the purpose of getting them discounted. Before the prosecutor handed these his acceptances to the prisoner, it was agreed between them that the prosecutor should call again upon the prisoner at the expiration of a fortnight, and then, as to each of the bills respectively either the proceeds obtained upon the discount of it were to be handed over to the prosecutor, or the bill itself returned to him by the prisoner. The prisoner was to be allowed 5 per cent. commission on each of the bills he might get discounted, and a further sum in the event of his getting all of them discounted. The prosecutor received no value or consideration

whatever for either of these acceptances. The evidence was inconclusive as to whether the prosecutor or the prisoner paid for the stamped paper on which the bills were drawn.

On the 10th Dec. the prisoner being then indebted to Messrs. Cutler and Robson, in the sum of 62*l.* for goods which they had sold and delivered to him, and being pressed by Mr. Cutler for a settlement of their account, indorsed to them in payment thereof the bill for 200*l.*, which is the subject of the present indictment.

He then told Mr. Cutler that he had received this bill in relation to some property belonging to his wife, and said nothing as to its having been entrusted to him to get it discounted. He asked Mr. Cutler to discount the balance, and Mr. Cutler promised to consult his partner before determining whether they would do so or not, but that was to be optional with them, and the bill was not indorsed upon condition that they would do so.

The prisoner was credited with the current bill in his account with Cutler and Robson, and they afterwards declined to advance money upon the difference between the 62*l.* due to them and the amount of the bill. After the 17th Dec. the prosecutor called repeatedly upon the prisoner, and made several applications to him for the bills or the cash obtained upon the discount of them, but could on neither occasion obtain any account from him as to what he had done with them. In February the prosecutor summoned the prisoner before a police magistrate, and that proceeding resulted in the prisoner at once returning to him two of the bills, and the summons was withdrawn upon his promising to return forthwith the other bill (the one now in question), which he assured the magistrate was "in the city, but he had not a shilling on it." This, however, he failed to do, and it afterwards came to the knowledge of the prosecutor that the prisoner had previously indorsed this bill to Messrs. Cutler and Robson. The prosecutor dishonoured the bill, and the said indorsees thereupon brought an action upon it and recovered judgment against him for 62*l.* and costs. Proceedings were then taken against the prisoner, which resulted in his being committed for trial upon the present charge.

At the close of the case for the prosecution, The prisoner's counsel objected that there was no evidence that the prisoner had fraudulently converted the bill, and cited in support of his argument *Reg. v. Weeks* (10 Cox's C. C. 224), but I overruled the objection, considering that there were facts in the present case which upon this point distinguished it from that one.

The prisoner's counsel then addressed the jury, and called a witness for the purpose of contradicting the evidence of the prosecutor as to the terms of the alleged bailment; but as the jury expressed their entire disbelief of her evidence, it is unnecessary to refer to it. After summing up the facts, I directed the jury that if they believed the prosecutor's statement, as to what had taken place at the meeting on the 3rd Dec., when he accepted the bill and delivered it to the prisoner, the prisoner was to be treated a bailee of a "valuable security" within the meaning of the Act (24 & 25 Vict. c. 96, s. 3) under which he was indicted; but that it was essential to the maintenance of the indictment that they should be satisfied not merely that

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

had acted contrary to his agreement with the prosecutor and misappropriated the bill, but that he had done so wilfully and knowingly, and that he had in point of fact and practical effect by indorsing the bill to his creditors, Cutler and Robson, converted it to his own use or to theirs in fraud of the prosecutor. Unless they answered all these questions in the affirmative they should acquit the prisoner. The jury found him guilty, and in answer to a question I then put to them, stated that in their opinion it was the intention of the prisoner, when he indorsed the bill, to pass the property in it absolutely to Cutler and Robson in payment of their account.

I postponed sentence. My attention was afterwards drawn by the prisoner's counsel to *Reg. v. Cossier*, the report of which in Cox's Crim. Cas. Vol. 13, Part 3, had in the meantime been published. In deference to the ruling of the learned Judge in that case I respited the judgment, and state this case for the opinion of the Court of Criminal Appeal. I liberated the prisoner upon recognizances to appear when called upon.

The questions for the opinion of the Court are:

1st. Whether upon the facts stated the defendant was a bailee within the meaning of the above enactment; and

2ndly. (If he was) whether there was evidence to go to the jury of a fraudulent conversion.

Oct. 17, 1876.

P. H. EDLIN.

Sine for the prisoner.—The indictment is framed upon the 24 & 25 Vict. c. 96, s. 3: "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." By sect. 1 (the interpretation clause), the term "valuable security" includes (*inter alia*) any bill, note, or order, or other security whatsoever for money, or for payment of money. It is submitted that the document in question was not a security for money at the time it was dealt with by the prisoner within the meaning of sect. 3: (*sup.*) *Reg. v. Cossier* 13 Cox, C.C. 187.) In that case the prisoner drew, and the prosecutor at his request accepted, three bills of exchange on the understanding that the prisoner was to deposit them with a third person as security for the purchase-money for the transfer of a licence of a public house, and not to negotiate them or use them for any other purpose. Instead of depositing them with the third person, the prisoner converted two of the bills to his own use. Upon these facts it was held that there was no bailment within sect. 3. [LUSH, J.—Strike out the words "valuable security to wit," in the indictment, and then the indictment charges the prisoner with having stolen a bill of exchange. Is that not sufficient?] It is submitted that it is not, for the bill was then of the value of the paper only, and the prisoner is not charged with stealing a piece of paper. In *King v. Phipps* (2 Leach's Crown Cases 774), the prisoner, by threats and intimidation, compelled the prosecutor to draw a promissory note on paper, which with pen and ink were supplied by the prisoner, and the prisoner was indicted under the 2 Geo. 2, c. 25, s. 3, which acts that if any person shall "steal or take by robbery" (*inter alia*) any bills of exchange or promissory notes for the payment of money, not-

withstanding any of the said particulars are termed in law a *chose in action*, it shall be deemed and construed to be felony. In that case, Ashurst, J., said the judges were of opinion that, "as the Legislature at the time of passing the 2 Geo. 2, c. 25, s. 3, whereby the stealing a *chose in action* was made felony, could not possibly have had a case like the present in contemplation, it is not within that statute; that it is essential to larceny that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor, and that it was so far from being of the least value to him, that he had not even the property of the paper on which it was written, for it appeared that both the paper and the ink were the property of Mrs. Phipps, and the delivery of it by her to him could not, under the circumstances, be considered as vesting it in him." Here it is submitted that the document was valuable as a piece of paper only. Secondly, there was no conversion of the bill of exchange by the prisoner. For that proposition, *Reg. v. Weekes* (10 Cox, C.C. 224) is an authority. There the prisoner volunteered to get the prosecutor's acceptance for 30*l.* discounted, and thereupon drew a bill which the prosecutor accepted and indorsed and handed to prisoner to get discounted. The prisoner subsequently delivered the bill to a creditor of his, to whom he owed 10*l.*, that the creditor might take 10*l.* out of the proceeds after discounting it. And it was held that this did not amount to a conversion by the prisoner analogous to larceny. So in *Reg. v. Jackson* (9 Cox, C.C. 505), Martin, B., said: "There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute. The determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in case of bailment of an article of silver for use, melting it would be evidence of a conversion. So when money, or a negotiable security, is bailed to a person for safe keeping, if he spend the money, or convert the security, he is guilty of a conversion within the statute." [LUSH, J.—You have the finding of the jury here that the prisoner intended to pass the property in the bill absolutely to Cutler and Robson.]

No counsel appeared for the prosecution.

COLERIDGE, C. J.—I am of opinion that this conviction should be affirmed. The prisoner was indicted under these circumstances. It appears that he, being the drawer of a bill of exchange for 200*l.*, which the prosecutor had accepted and delivered to him for the purpose of getting discounted, instead of getting the bill discounted, took it to Cutler and Robson, creditors of his, to whom he was indebted in the sum of 62*l.*, and indorsed it to them as his own in payment of the 62*l.*, and the jury have found that in their opinion it was the intention of the prisoner when he indorsed the bill to them to pass the property in it absolutely to Cutler and Robson, in payment of their account. Now upon these facts we are asked to hold that the prisoner was not a bailee of a bill of exchange for payment of money, and that he did not convert it to his own use. I should have thought it impossible to doubt that the statute met this very case, and that it was intended to suppress frauds

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of this kind. The case of *Reg. v. Cosser* is inapplicable to the present case. In that case the acceptor of the bills delivered them to the prisoner to be used for one purpose, and the prisoner applied them to another. When the purpose for which they had been given failed, and the acceptor applied for the bills, the prisoner said he had destroyed them, and it was not until the acceptor was applied to for payment that he discovered what had become of the bills. Upon those facts I think it was properly held that there was no bailment of the bills within the statute. The present case is entirely different. As to the case of *Reg. v. Weeks*, that case, in my opinion, was rightly decided. In that case the prisoner Weeks received from the prosecutor Batty a bill of exchange for 30*l.* to get discounted. Weeks, not having got it discounted, handed it to a creditor Bailey, to whom he owed 10*l.*, that he, Bailey, might get it discounted, and keep the 10*l.* Weeks owed him, and hand over the remainder of the proceeds of the discounting to him. And that was held not to be a conversion of the bill of exchange within this statute. But the facts there were not the same as here. Here the jury have found that at the time the prisoner delivered the bill to Cutler and Robson he intended to pass the property in it absolutely to them in payment of their debt. I think, therefore, the conviction should be affirmed.

MELLOR and LUSH, JJ., POLLOCK, B., and LINDLEY, J., concurred. *Conviction affirmed.*

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UNITED STATES DISTRICT COURT,— EASTERN DISTRICT, MICHIGAN.

IN ADMIRALTY.

Saturday, Aug. 12.

THE DOLPHIN. (a)

Marine insurance—Lien for premiums—United States law.

By United States law an underwriter upon ship has a maritime lien for the premiums due to him upon marine policies upon the ship underwritten by him, and can enforce payment by proceeding in rem in Admiralty against the ship insured.

A libel claiming payment of premiums against ship should set out the dates and amounts of the policies, and also the name of the parties insured, and the character and extent of their interest.

THIS was an exception to a libel of the Oriental Mutual Insurance Company. The libellants, in their libel, stated that they were a New York Corporation, that the *Dolphin* was a vessel of more than twenty tons burden, and was used in navigating the great lakes and waters connecting the same, and the waters of the State of Michigan; that on the 6th March, 1875, the master and owners of the *Dolphin* represented to the libellants that the vessel stood in need of insurance, and that, in pursuance of their representations and request, it furnished insurance in the amount of 4000 *dols.*; and that there was due to libellant for premiums the sum of 277.38 *dols.*, for which libellant claimed a lien upon the vessel.

(a) Collated by JAMES P. ASPINALL and F. W. BAINES, Esqrs.,
Barristers-at-Law.

To this libel, Stephen B. Grummond, who also filed a libel against the schooner for salvage, excepted; for the reason, that the matters set up therein were not within the Admiralty jurisdiction of this court; that a claim for premiums was not a lien upon the schooner, such as this court ought to enforce by proceedings *in rem*.

The *Dolphin* had been sold upon other claims, and the proceeds were in court awaiting distribution.

J. J. Atkinson for libellant.

F. H. Canfield for claimant.

BROWN, J.—The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the Supreme Court, in the case of *The Insurance Company v. Dunham* (11 Wall., 1) that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other. The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case nor in any other where actions have been sustained in the admiralty, upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the Supreme Court in the opinion above cited (11 Wall. 30), the lien would follow as a necessary consequence. It is described in the opinion as "a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted), from the port of shipment to the port of delivery and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. . . . The object of the two contracts is in the one case maritime service and in the other maritime casualties." If in the one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight (though for reasons applicable to the character of this property this lien is dependent upon possession), it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium. It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance. In the case of *The Williams* (Brown's Admiralty Reports, 206), perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge

remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did *per se*, hypothecate the ship; and that those of affreightment, insurance, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority: *General Interest Insurance Company v. Ruggles* (12 Wheat., 408), *Foster v. United States Insurance Company* (11 Pick., 85). Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance: *Bell v. Humphries* (2 Starkie, 345), *Finney v. The Warren Insurance Company* (1 Metcalf, 16). The case of *The Williams* (*ubi sup.*) was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of *The Pigs of Copper* (1 Story, 314), he observes, "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding *in rem*; but it quite as fully sustains the broader proposition, soon to be considered, that all authorised maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision." Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime law of this country by the Supreme Court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority it is certainly an authority for the lien of the underwriters. The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the High Court of Admiralty in England at the time of the adoption of our constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction *in rem* of the admiralty over maritime contracts is that of supplies furnished to domestic vessels, established in the case of *The Gen. Smith* (4 Wheat. 434), and recently recognised in the case of *The Lottawanna* (21 Wall.), and that of masters' wages, held not to be the subject of a lien in the case of *The Steamboat New Orleans v.*

Phœbus (11 Peters, 175). Contracts for the construction of vessels which are recognised as maritime by the continental codes and a lien given thereby, were also held by the Supreme Court in the case of *Reach v. Chapman* (22 How. 129) not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favour of the underwriter, it is well to consider the source of the doctrine that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of *The Insurance Company v. Dunham* (pages 31-38), and the court remarks: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material, rules, and incidents therefrom. . . . These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence, and of Antwerp, and the court further observes: "But an additional argument is founded on the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. . . . It is also clear that, originally, the English Admiralty had jurisdiction of these as well as of other maritime contracts." . . . This last remark is corroborated not so much by positive adjudications to that effect as from the language of the commissions issued to the early Vice-Admiralty courts which authorise them to take cognisance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the High Court of Admiralty in England. Tracing, then, the jurisdiction of the Admiralty over contracts of insurance to the continental law, it is pertinent in this connection to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums. Art. 16 of the marine ordinance of Louis XIV., title "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, book 1, lib. 14, sect. 16, says: "If this article has not mentioned them (the underwriters), it is [probably because the ordinance takes it for granted in many articles under the title of 'insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men." A privilege is defined by Art. 2095 of the Civil Code as "a right which the character of the credit gives to a creditor to be preferred to other creditors even mortgagees (*hypothécaires*)." If not analogous in all respects to our "lien," it authorises the like

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THE DOLPHIN.

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preference in payment to claims within its scope from the proceeds in court. Emerigon treats the contracts of insurance as analogous to that of Maritime Loan or bottomry, and observes (Emer. on Maritime Loans, chap. 1, sect. 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit it lies upon the lender, in order to render the contract of maritime loan *executory*, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance it lies upon the assured to prove the loss, capture, or shipwreck of the vessel." . . . "The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts." Again, in his work upon the contract of Insurance, ch. 3, sect. 9, Emerigon says: "The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16 and 17. Title "Seizure of Vessels." From this silence it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is *stricti juris* (droit étroit) it is necessary they be expressly bestowed (déferés) by law, and it is never permitted to extend them from one case to another, because of equal or superior equities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing insured, which by this means is presumed to have an increased value (valoir davantage). Consequently, the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium." In support of this doctrine the learned author cites several decrees of the tribunals of commerce. So, also, Alauzet des Assurances, Pt. 2, Sect. 2, Ch. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called premium notes (*billets de prime*) the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (*quittance*) be not absolute, and the origin of the notes not doubtful." See also Cleisac, P. 237, 318, 323, and 363. Pothier des Assurances, Ch. 3, Art. 3, sect. 2. Boulay Paty, Vol. 1, Tit. 1, sect. 2. If any doubts, however, ever existed in the law of France, with regard to this lien, they are put to rest by Article 191 of the commercial code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed: 1. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price. 2. The charge for pilotage, tennage, hold fees, mooring, and dockage. 3. The wages of the keeper, and the expenses of guarding the vessel from the time of her entrance to port to the sale. 4. The storage of her rigging, tackle, and apparel. 5. The ex-

penses of repairing the vessel, rigging, and apparel since her entrance into port from her last voyage. 6. Wages and pay of the captain and crew employed in the last voyage. 7. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the reimbursements of the price of goods sold by him for the same purpose. 8. The sums due to the vendor, material men, and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labour, and for refitting, victualling, outfits, and equipments before the departure of the vessel, if she has already made a voyage. 9. The sums loaned on bottomry, on the rigging, and apparel for repairs, victualling, outfit, equipment before the departure of the vessel. 10. The amounts of the premiums of insurance effected on the hull, rigging apparel, outfit and equipment of the vessel for her last voyage. 11. The indemnity due to the freighters for not delivering goods laden on board or for the losses which the goods may have sustained from the default of the captain or crew. The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and in case of insufficiency, the price of the vessel shall be divided equally among them (i. e., those of the same class) in proportion to the amount due each." In a recent work upon the commercial code of France, by Edmund Dufour, (Paris, 1859,) in speaking of this article, sect. 215, the author observes, "We see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked after the material men, who are placed two degrees above them in the scale of liens. They are also distanced by tenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For, the truth is, insurance is only a private affair of the insured, it is a very proper act of prudence, it certainly merits, and it possesses, all the sympathies of the law, but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them and its efforts. It is otherwise with the material men, as well as with tenders upon bottomry. It is the labour of the one, and the goods or the money of the other, which permit the vessel to undertake its voyage. There is then in their favour a reason for preference, which is not wholly arbitrary, and the code has done well in recognising it." The nature of this lien is discussed at length, and is applied as well to time policies, as well as to policies, or for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont, Paris, 1867, under the head of marine insurance, sect. 141, the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from Articles 191 and 192 exists wherever there is a policy executed. The insured who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed. Any number of voyages made during the time fixed for

the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the *res*. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of Article 191, the author cites opinions of the Court of Cassation of the Imperial Court of Bordeaux, and Rouen, and Aix, and of the Tribunal of Commerce of Marseilles.

From these authorities I gather the following summary of French law upon this subject:

1. That the Marine Ordinance of Louis XIV. did not expressly recognise the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt.

2. That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage is expressly recognised by Art. 191 of the Code of Commerce, and that such privilege is also extended to time policies.

3. That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged. Now, if the Supreme Court adopted the Continental law in respect of jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal. It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of *The Williams* (Brown's Adm. Rep. 208). It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs, and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver of lien. There is no doubt of the existence of such lien in favour of seamen, although hired by the owner in person; nor in favour of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made by the owner.

In the nature of the contract itself I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognised as maritime until the opinion was pronounced in *The Insurance Company v. Durham* (11 Wallace, 1). Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium, although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens. I think, however, the libel is defective in this case, in

failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter, would be the subject of Admiralty jurisdiction. The above quotation, from Caumont, citing a judgment of the Tribunal of Commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable; and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are badly adapted.

Upon this latter ground, the exceptions to the libels must be sustained, with leave to amend.

House of Lords.

June 22 and 23.

(Before the LORD CHANCELLOR (Cairns) LORDS CHELMSFORD, HATHERLEY, PENZANCE, and O'HAGAN.)

GREEN v. THE QUEEN. (a)

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Private Act of Parliament—Existing rights abrogated by general words—Election of churchwardens—New parishes for ecclesiastical purposes—Stat. 10 Vict. c. iii., sect. 5.

As a general rule existing customs or rights cannot be taken away by general affirmative words in an Act of Parliament, but if the affirmative words of the Act are clear and precise, and the right in question cannot co-exist or stand with them, it may be abrogated without express words.

The parish of D. consisted of four townships, D., W., B., and M. The parish church was in D., and churchwardens were appointed at D. in the usual manner, who acted for the whole parish except M., where there was a chapel, and a special custom that the parishioners should elect two churchwardens to act for the hamlet of M. A private Act of Parliament was passed to divide the parish into three, D. and W. to be one parish, B. another, and M. a third. The Act contained a provision that after the contemplated division had taken effect, two persons should be chosen churchwardens for each of the new parishes, "in the same manner as churchwardens are now chosen and appointed for the said parish of D."

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Held (reversing the decision of the court below), that the object of the Act being to create three entirely new parishes for ecclesiastical purposes, formed upon the model of the mother parish of D., the previous right of the parishioners of M. to elect both churchwardens was taken away.

THIS was a proceeding in error from a judgment of the Court of Exchequer Chamber, which had reversed a decision of the Court of Queen's Bench, upon a return to a writ of *mandamus*. The facts of the case were shortly as follows: The parish of Doddington, in Cambridgeshire, comprised the four townships of Doddington, Wimblington, Benwick, and March. The parish was of very large extent, comprising nearly 37,000 acres, with a population of more than 9000 people. In 1847 a private Act of Parliament (10 Vict. c. iii) was passed, at the instance of the then patrons of the living, to sub-divide the parish into three, Doddington and Wimblington to be one, Benwick another, and March the third. The division was to take effect upon the death of the then incumbent, which took place in 1868. The four townships were quite distinct from one another for all civil purposes, and the Act only constituted them separate parishes "for all ecclesiastical purposes," and contained a clause, sect. 44, preserving all civil rights. By sect. 5, it was provided, that when the division should have taken effect "two fit and proper persons shall be chosen churchwardens for each such parish, at the same time, and in the same manner, as churchwardens are now chosen and appointed for the said parish of Doddington;" and that the new rectors should have "the same powers, privileges, rights, and immunities as the present rector of Doddington." At the date of the Act vestries were held at Doddington, where the parish church was, at which two churchwardens were appointed, one by the rector and the other by the parishioners, in the usual common law manner, under the name of the churchwardens of Doddington, who acted for the whole parish except the hamlet of March. At March there was a chapel, and vestries were held there, in which the inhabitants of the rest of the parish never interfered, in which two churchwardens for the hamlet of March were elected by the parishioners. This right had been the subject of previous litigation, and had been established by a verdict at the Cambridgeshire Assizes in 1782. In 1868 the plaintiff in error, Mr. Green, was appointed to the new rectory of March, and claimed the right of appointing one churchwarden. The parishioners resisted the claim, and writ of *mandamus* was issued commanding him to convene a meeting for the election of two churchwardens by the parishioners. To this writ a return was made, and by consent it was turned into a special case, which is fully set out in the report in the court below.

Upon argument, the Court of Queen's Bench (Blackburn and Archibald, JJ.) gave judgment for the defendant, and against the claim of the parishioners, Quain, J. dissenting, as reported in 30 L. T. Rep. N. S. 255. The case was carried to the Exchequer Chamber, and the decision of the Queen's Bench was reversed by Bramwell, Cleasby, Pollock, and Amphlett, BB., Lord Coleridge, C.J., Brett, and Denman, JJ. dissenting: (31 L. T. Rep. N. S. 543.)

Error was then brought to the House of Lords.

Prideaux, Q.C. and McIntyre, Q.C., for the

appellant, argued that the intention of the statute was to put the three parishes on one footing, making Doddington the model, and that the customs existing in March, while it was a mere hamlet, were put an end to. The Rector of March was to be just in the position that the Rector of Doddington had been in. They referred to

Craven v. Sanderson, 7 A. & E. 880;

Stead v. Heaton, 4 T. R. 689;

Re v. Justices of the North Riding, 6 A. & E. 863;

Re v. Nantwich, 16 East. 228;

Re v. Marsh, 5 A. & E. 468.

and to an indulgence granted by Cardinal Wolsey to the chapel at March, in 1526, which made no mention of separate churchwardens.

Bulwer, Q.C. and F. M. White, for the respondent, contended that the parishioners could not be deprived of an express right by general words in a private Act of Parliament in which they had no part: (Co. Litt. 115a.) They also cited

Bacon's Abridgement, Tit "Churchwardens," A.;

Com. Dig. "Parliament," B. 23.

Prideaux, Q.C. in reply.

At the conclusion of the argument, their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, the appeal in this case arises out of a proceeding by way of *mandamus*, in which the appellant, the rector of a parish in the diocese of Ely called March, contends that he has the right, in the ordinary way, of appointing one of the churchwardens of the parish. Those who have applied for the *mandamus*, on the other hand, claim that the parishioners have the right of appointing both the churchwardens. That question must be solved by reference to a private Act of Parliament, which was passed in the year 1847, and in point of fact to one clause of that Act. The circumstances under which that Act of Parliament was obtained were these [his Lordship then went through the clauses of the Act, and the facts, as set out in the special case, and continued]. Now these being the facts, as to which there appears to be really no dispute, let me ask your Lordships to consider whether they make any alteration in the construction of the Act of Parliament, which, after all, must be the guiding rule by which we have to determine the present case. The learned judges in the court below, who have decided in opposition to the appellant, apply these facts, as it appears to me, in two ways. In the first place they apply them in the positive construction, if I may use the expression, of the 5th section, and that I will consider in a moment. They also apply them in another way. They say: You have here a custom established in the hamlet of March for the parishioners of that part of the parish to choose officers, who are called their churchwardens. That custom they set a value upon to such an extent, that in the middle of the last century they had it established by proceedings at law. You cannot suppose, say the learned judges, that a custom of this kind is to be taken away by an Act of Parliament without express words, and if there be no express words taking away the custom, it must be held to remain. I will say a word upon the second of these arguments first. I have to remark upon it that there is no doubt that, as a general rule, customs, or rights of a similar description are not to be taken away by inference, or without distinct words. But the error, as it appears to me, which the learned

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judges have fallen into upon this point is this: This custom was a custom connected with and attaching to the hamlet or chapelry of March, *quod* hamlet or chapelry. The Act of Parliament does not continue the hamlet or chapelry of March. If it did, it might well be said that incidents of this kind were continued along with it. The Act of Parliament makes, ecclesiastically speaking, a *tabula rasa* of the whole of the ecclesiastical arrangements within the area of the old parish of Doddington, and having made that *tabula rasa* it proceeds to erect and to create three new well-known and clear ecclesiastical divisions, namely, parishes or rectories, within the old area; and, creating these three new ecclesiastical divisions, it enacts that each of them is to be created after the pattern of the old and entire rectory, and that each new rectory is to have the incidents of the old one. It therefore ceases to be a question as to whether a custom attaching to the old chapelry or hamlet of March is or is not taken away by express words. The hamlet itself, as an ecclesiastical division, disappears; the thing is gone, that to which the custom attached is no longer in existence, and therefore that has been done by the Act of Parliament which is much stronger than the abolition of a custom by express words: that is abolished upon which alone the custom could exist, and to which alone it could apply. It only remains to apply the facts thus derived from the special case to the 5th section in the way in which the majority of the learned judges of the court below propose to apply them. This is the mode in which the judges of the court below apply them. I will read again the words of the 5th section. [His Lordship read the section.] Now, say the learned judges who have decided against the appellant, the meaning of that is this: Your new churchwardens, in a new parish, for example, of March, are to be chosen in the same way as churchwardens were appointed in any part of the old parish. In the old parish there were churchwardens appointed at Doddington, and in the old parish there were churchwardens appointed at March, and this is a cumulative expression that new churchwardens are to be appointed throughout the whole area, as former churchwardens were appointed throughout the whole area. If you find that in one part of the old area churchwardens were appointed in one way, and in another part of the old area in another way, when you make your new divisions you are in each new division to appoint your new churchwardens as nearly as possible in the way in which churchwardens were appointed in that particular area. That is the argument of the learned judges. But your Lordships will perceive that the argument proceeds altogether on a fallacy, or rather, I should say, on an interpolation into the Act of Parliament of a word which does not occur there, and the excision from the Act of Parliament of a word which is there. The learned judges substitute for the plain expression, "in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington," the words "in the same manner as churchwardens are now chosen and appointed in the said parish of Doddington." But what says the case? The case, which binds both parties, says, "Separate churchwardens were appointed at the Doddington vestries by the names of the churchwardens for the parish of Doddington." Is it to be said that you ought to alter the

wording of the Act of Parliament in this important way, and that having words describing an office in apposite and proper terms, "churchwardens for the parish," you are to alter that expression, and say that it points to any person who in the parish is appointed a churchwarden, although he be not one of the churchwardens for the parish, but a churchwarden for March? Nothing could be more violent than that construction. But what say the learned judges to the second part of that section? "The rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington now exercises." Say the learned judges: That means that if the rector has no power he is not to exercise any power. But if that had been the intention of the Act of Parliament, the expression ought to have been, "The rector of the new rectory of Doddington retaining the same right and power in the appointment of churchwardens for that rectory as he now exercises." That would have been a clear and distinct way of expressing what would, according to the supposition, have been meant. The learned judges absolutely reduce to silence, *quoad* March, the second part of this section, and make it altogether inapplicable. Looking at the Act of Parliament, apart from the statements in the special case, I feel no doubt that the construction does not give to the parishioners the right of appointing both the churchwardens; and, looking at the statements in the special case, and applying them to the Act of Parliament, I cannot find anything in those statements which should alter the plain and natural construction of the Act. I therefore submit to your Lordships that the decision of the Court of Queen's Bench is correct, and the decision of the Court of Exchequer Chamber erroneous, and that this appeal ought to be allowed.

LORD CHELMSFORD.—My Lords, the case depends entirely upon the meaning of the words of the 5th section of the Act for dividing the parish, and rectory of Doddington into three separate and distinct parishes and rectories. In construing the Act, the object of it must constantly be kept in mind. It was to put an end to the existing parish of Doddington, and to create out of different parts of it three entirely new parishes. It was, of course, absolutely necessary to make provision for the performance of parochial functions, and the appointment of new parochial offices in the new parishes. The Act evidently intended that the three new parishes should be similar in all respects, unless otherwise provided, and that they should be formed upon the model of the parish of Doddington, out of which they were taken. There is nothing throughout the Act to show that the new parish of March was intended to be distinguished in any respect from the other newly-constituted parishes. But it was argued for the respondents, that as before the Act there was a custom in March to choose persons who were called, though improperly, "churchwardens," the rector of Doddington never interfering in such appointment, the words in the 5th section "in the same manner as churchwardens are now chosen and appointed for the parish of Doddington," must be read as not comprehending March, which ought to be regarded as having been intended to be left in this matter *in statu quo*. But, the separate appointment of wardens for March, and the non-interference of

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the churchwardens of Doddington with their functions, have nothing whatever to do with the manner of choosing and appointing churchwardens for Doddington, which are the words of reference to the appointment of churchwardens in the new parishes; they amount, at the utmost, to evidence of the extent of the powers and duties of the churchwardens of Doddington after their appointment. Under the Act the old chapelry and township of March is put an end to, and it appears to me that everything connected with it in this character, its incidents, privileges, and customs, is abolished. And I cannot imagine, if their appointment of churchwardens was intended to be preserved, that this should not have been expressly provided for. A new parish is created instead of the old chapelry, and this must necessarily have the effect of changing its character, in respect at least to parochial officers. A rector, too, is placed over the new parish, who is clothed by the Act with the same powers, privileges, rights, and immunities as belong to, and are exercised by, the rector of Doddington. Now there can be no doubt that the rector of Doddington had a right to intervene in the choice of churchwardens; and the 5th section of the Act provides for the choice of churchwardens in the manner in which they are chosen in the parish of Doddington, the rector of each of the new rectories exercising the same rights and powers in the appointment of churchwardens as the rector of Doddington now exercises. It is said that this provision is obscure, but I confess it is, to my mind, perfectly clear. We are referred by the Act to the manner in which churchwardens are chosen in the parish of Doddington, and the rights exercised by the rector of Doddington in the appointment of them. When these are ascertained, and there is no doubt about them, they are applicable to the new rectories and the new rectors. As I have already observed no separate notice is taken of March throughout the Act, which seems to lead fairly to the conclusion that it was intended to be placed as to the appointment of churchwardens, and in all other respects, on the same footing as the other new parishes, all of them being established upon the model of the parish of Doddington. The argument for the exception of March from the provision as to the appointment of churchwardens is founded merely on implication, which cannot, in my opinion, prevail against the rights expressly and clearly conferred upon the rector in the choice of churchwardens in the same manner as upon the other newly-created rectors by the 5th section of the Act. I agree with my noble and learned friend, that the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord HATHERLEY.—My Lords, I have come to the same conclusion after hearing the very able arguments of counsel at the Bar, and after very seriously considering the opinions of the learned judges who have so remarkably differed in their construction of this clause; for the case depends almost entirely upon one clause, namely, the 5th clause of the Act of 1847. From a very early period of the argument it appeared to me that, looking at the Act alone, and especially at the wording of the 5th clause, without regarding any of what may be called the accompanying circumstances under which the Act was passed, there could scarcely be any doubt as to what the construction of the Act must be, namely, that it in-

tended for the future, after the new parishes were constituted, the election and appointment of churchwardens should be such as took place, and had always taken place, in the parish of Doddington. But I was struck, I confess, during the argument also by the observations of the learned judges to the effect that it was necessary to consider whether any other construction was open, and, if so, whether under the circumstances that attended the passing of the Act of Parliament that other construction ought to take effect. It was urged with considerable force by some of those learned judges who expressed an opinion contrary to that which I now hold, that this being a private Act of Parliament, passed without the usual summoning of the persons who might be supposed to take an interest in the passing of the Act, and there having been a litigation some sixty years before with reference to the election of churchwardens at this very place, March, in relation to the controversy which now exists, it could not be supposed that it was the intention of the Act to alter by indirect means the rights which had been ascertained and declared as between the rector and the inhabitants as to the appointment of churchwardens; and that if another construction, therefore, could possibly be put upon the clause, that construction was the one which we should be justified in placing upon it, in preference to anything which would appear to work an injustice on the part of the Legislature towards persons whose rights had within a comparatively recent period been ascertained after dispute. Now I find in the Act we are construing the usual saving clause which one would expect to find there with regard to all persons interested in the advowson, and in the proprietary right which the patron would have in the advowson. Their interests are all saved. But there is another clause which is important as a saving clause, and which shows the scope and frame of the Act in its entirety. That clause is the 44th, by which it is provided, "that nothing in this Act contained shall make any alteration in the division of the said parish of Doddington into townships or divisions for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of Doddington." The Legislature, therefore, tells you what is intended to be done by this Act, namely, that the Act was passed for what we may call a purely ecclesiastical purpose, and that all civil rights are intended to be in this manner saved, unless, indeed, as might possibly occur, and, as it has been argued before us, it may be said in a sense to occur, with regard to the appointment of churchwardens, it should be found that any civil right was affected by the construction which one felt oneself bound to put upon the Act. And I find in the preamble that which corresponds entirely with the view which I attribute to the Legislature in inserting in the 44th clause a protection of the civil rights of all persons within the parish. Therefore, one sees that being passed for ecclesiastical purposes the object of the Act could not affect prejudicially the civil rights of the inhabitants. It was an Act passed very largely for the benefit of the inhabitants of this unwieldy district, and large benefits are, in fact, conferred. You find that a provision is made in the Act, with the concurrence of the patron and of the bishop, for establishing in this large district of March, which up to that time had

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had only a licensed curate residing within the boundary of the township, and had been separated by a distance of about four miles from the parish church, for establishing in that district, and in a third district, which is also created, a permanent and resident rector instead of a licensed curate. Now, when your lordships look to another clause in the Act, you form some idea of the means which were considered to be required for effectuating these purposes, because although power is given to borrow on the ad-vowson considerable sums of money for the purpose of erecting a church at Benwick and parsonage houses both at Benwick and in March, you find that the Legislature thought fit, by the 29th section, to set a limit upon the expenditure for these purposes, and that limit is mentioned at 1150*l*. What, therefore, was the object of the Act? I think some of the learned judges scarcely had that sufficiently before their minds. The main object of the Act was the better instruction and better pastoral care of the inhabitants of the whole of this large district, comprising four townships, and to provide for that by means of a rector residing in each of the new districts, instead of one rector superintending, as he had done up to that time, the whole of the larger parish, to provide for his residence there by means of a house which was to be built for him. Finding that, you are not surprised when you come to the other clauses of the Act to find that in constituting these parishes the Legislature provides that the parishes should be constituted with a system, and with a staff, if I may so express it, which should place them in the position of wholly independent new parishes. These three districts are accordingly, by means of the Act, constituted into three separate and distinct parishes for all ecclesiastical purposes, without the invasion of any civil rights. That being done, coming to the 5th clause with that view, we must consider in the first place its natural meaning, and see if it should by any means be diverted or explained into a somewhat unnatural construction by having regard to the state of circumstances which existed at the time of the passing of the Act. The enactment itself relates to the time when the division into separate parishes shall have taken effect. The first part of clause 5 does not speak of churchwardens being "chosen and appointed," but says "chosen." But in a subsequent passage the same clause says "in the same manner as churchwardens are now chosen and appointed." I do not think that that difference of expression can be construed as giving any different effect to the first part of the clause as distinguished from the second part. With regard to Doddington township proper there never could be any doubt, and there has been none raised in the course of the inquiry as to the mode of constituting churchwardens, yet that township is included in the phrase "shall be chosen churchwardens." The mode of constituting churchwardens pointed at in the latter part of the sentence was by means of election and appointment, that is to say, that if the rector and the parishioners agreed they would be appointed, but if they differed the rector would have to appoint one of them, and the parishioners to elect the other. The two churchwardens are to be appointed for the new parish "at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington." Now I think upon all the docu-

ments it is quite clear that the churchwardens for Doddington were the churchwardens whom the parishioners elected in concurrence with the rector, if they did concur, or of whom the parishioners elected one, and the rector appointed one, if there was a difference of opinion between him and the parishioners. No other set of people can be taken to have been churchwardens for Doddington. Indeed, I asked the question during the argument, although I felt pretty sure it could be only answered in one way. The natural and original course would be that the mother church would have its own churchwardens as churchwardens for the whole of the rectory, that is to say, the whole of this huge parish of Doddington. By degrees, no doubt, it might well be that it came to pass that they confined their operations to the township of Doddington, because there existed a chapel in another remote part of this large parish in which certain persons were elected to be churchwardens, who appear only to have repaired that chapel, and never to have acted by way of making a rate in the general parish of Doddington. I have no doubt whatever that when you find the words "churchwardens for the parish of Doddington" in the Act, there being nothing to compete with that interpretation, you must take it to mean the churchwardens for the whole parish of Doddington, as far as their name was concerned, and as far as their original functions were concerned, however much those original functions may have been altered subsequently. At all events it is clear that whether you take them to have been churchwardens for the whole parish of Doddington, or churchwardens for the township, they were not churchwardens for March, as separate and distinct from the township of Doddington proper. Nor certainly were the churchwardens of March at any time whatever, either popularly or legally, the churchwardens for Doddington. Therefore, the plain interpretation of the clause is only one, that the churchwardens shall be elected as the churchwardens for Doddington were. That is the plain and only interpretation; and the words which follow appear to me to make it still plainer, because the end of the clause says that the rector of each of the new rectories is to exercise "the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of Doddington now exercises." It appears to me to be plain that that can only point to this, that when the parish is divided into three parts, the rights of the rectors of those new districts shall be the rights now enjoyed by the rector of the mother church in respect of the appointment of churchwardens. It seems to me that any other interpretation would be most strained and forced. It is said, however, that as you can interpret this clause in a different way, you ought, in the circumstances of the case, to do so. Bramwell, B., undoubtedly puts it very ingeniously. He says (31 L. T. Rep. N. S. 546): You are to take all Doddington, when it is divided into its several parts, and say that churchwardens shall be appointed as they have been appointed for the parish of Doddington, and in the parish of Doddington you find two modes of appointment; the way, therefore, to arrive at a construction which will at once reconcile the existing state of the law, as it had been in comparatively recent times determined, with the provisions of the Act, is this: You must construe the Act *reddendo*

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singula singulis; when you are in this part of Doddington, it is to be as the churchwardens are appointed in this part; when you are in another part, it is to be as the churchwardens have been accustomed to be appointed in that other part. It appears to me a very violent construction which requires you to apply the principle of *reddendo singula singulis* in this way, when you find that what you call interpreting on that principle simply strikes out all the last words of the section, which says that the rector is to have all such powers as the rector of Doddington had, and in the case of this large part of the parish you tell the rector that he is to have no right or power in the matter at all. I think it is evident that you are stretching the construction to an extent to which the clause itself is incapable of being extended, and it appears to me that if we were so to read it we should in fact be making a new Act of Parliament instead of construing the enactment which we find before us in the plain language of the clause. But I feel the less scruple in coming to this conclusion because I see no necessity for our endeavouring to strain the construction with reference to the external circumstances to meet this view. A well-known passage from Lord Coke (Co. Litt. 115 a) has been cited by Quain, J. (30 L. T. Rep. N. S. 259)—namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not co-exist or stand together, then I apprehend you are compelled to come to a construction which is sensible in itself, and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words requires, although it may in some degree interfere with what had been done on previous occasions within the same district; the real point of the case being this, that this Act does, for purposes beneficial to all the inhabitants ecclesiastically, sub-divide this great parish into three parishes; it constructs each of these three parishes on the model of the old parish, and, giving them that construction, it gives them a frame of church government, as far as this question of churchwardens is involved, similar to that which existed in the original parish, which was the mother parish of the whole. Coming to the 6th clause, it does not appear to me that any difficulty arises there. That clause not only offers no difficulty in this construction, but in one point of view it seems to me materially to assist us in construing the Act as I propose to construe it. It seems to me to be a saving clause with regard to anything done by the churchwardens anterior to the alteration and the creation of the new parishes. That tends very strongly to show that the Legislature was aware that it was constructing something altogether new, because if the construction of clause 6 was such as is contended for by the learned judges whose view I am now differing from, there would have been no necessity to make any saving about the churchwardens of March at all. The new rector would have had nothing to do with them with reference to their election, and the Act would simply continue the churchwardens of March in their existing position, without any new offices or any new ecclesiastical constitution being framed. But it appears to me to be plain that it was intended to have a full eccle-

siastical constitution in each of the new parishes, and that that ecclesiastical constitution should be according to the common law of the land. That being the case, the churchwardens of March would no longer be in the same position as to election as before; there would be a new form of constituting them, and that being so, it was necessary under the new code to save all such rights as they had until the new system could be arrived at. As regards the statement in the case that the churchwardens of March had acted *ex officio* as overseers of the poor, I apprehend that no difficulty could arise in that respect. The Act saves all civil rights, and if it be necessary to have an election of overseers of the poor, I apprehend that that election will take place in the ordinary way, as it has done hitherto, and no inconvenience will occur. The parishioners may elect the same persons if they like, or they may elect others if they prefer. The question of the election of churchwardens remains untouched by that. I apprehend that the whole scope of the Act remains untouched, the whole scope being to place each of these parishes in a similar position with regard to the election of those officers. For these reasons I concur in the resolution which has been proposed by my noble and learned friend the Lord Chancellor.

LORD PENZANCE.—My Lords, after the full discussion which this case has received, I should not have thought it necessary to say a word upon the subject, if there had not been so exact a division as there was between the learned judges who have considered this matter in the courts below. And I shall confine myself in the observations which I address to your Lordships to one very short and simple point. I may say that I entirely agree with the arguments and statements which fall from my noble and learned friend, the Lord Chancellor, and therefore I shall forbear from dilating on the points on which he has dwelt. The first thing which I wish your Lordships to bear in mind in considering this question is that the scope and intention of this Act was expressly, on the face of it, limited to the creation of three fresh parishes for ecclesiastical purposes. The words in the statute by which that is made apparent are found in the first clause. It describes the division that is to take place, and it says "that the township of Doddington and the hamlet of Wimblington shall form and be one separate and distinct parish and rectory for all ecclesiastical purposes." And then follow similar provisions for the other two divisions into which the original parish is cut up. Then, in two other clauses which have been referred to by your Lordships, clause 42, and especially clause 44, it is distinctly provided in the negative "that nothing in the Act contained shall make any alteration in the division of the parish of Doddington into townships or divisions for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of Doddington." It is therefore plain, both by way of affirmative and negative words, that the scope of the Act is limited to the creation of three parishes for ecclesiastical purposes; and whatever rights the inhabitants of the four townships which existed within the parish had at the time of the passing of the Act in relation to the maintenance of the poor, in relation to choosing officers who should regulate that maintenance, or take an active part in that regulation, whatsoever rights the inhabitants had in any civil purpose or

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office whatever, as attaching to the separate townships, the Act carefully preserved to them. Bearing that in mind, the short question is, what did the Legislature mean when it said that the churchwardens should be chosen in each of the new parishes "at the same time and in the same manner as churchwardens are now chosen and appointed for the parish of Doddington"? On the face of them, these words would not appear to carry with them any ambiguity whatever, because a parish is an old ecclesiastical division of land, and one understands what the meaning of appointing churchwardens for a parish is. One would have thought, therefore, upon the face of the statute, that there would be no difficulty, because one would only have to inquire what was the method which had prevailed in appointing churchwardens for the parish, and at once the description in the Act of Parliament would be satisfied. But in this particular case a controversy arises upon that question, and the difference which has taken place in the court below amongst the learned judges is a difference in the view which they take of the meaning of the words "appointed for the parish of Doddington." Now what are the facts? for it is upon the conclusion to be drawn from the facts as they existed in the parish at the time the statute passed that any difference arises. The case states that there was a mode, which is said to be the common law mode, of electing churchwardens for the parish, and it states that churchwardens were appointed at certain vestries by the name of churchwardens for the parish of Doddington. This, upon the face of it, would seem to satisfy the description we are in search of, in order to give effect to the Act of Parliament. But then it is said these people were appointed by the name of churchwardens for the parish; but in point of fact they were not churchwardens for the parish, they were churchwardens for a limited portion of the parish only. As I understand the argument, it comes to that. Now, this brings me to the point upon which I wish your Lordships' particular attention, because I think sufficient attention has hardly been directed to it. In my judgment, they were not merely in name, but they were in substance and in fact, churchwardens for the whole parish. The church was in the township of Doddington. The inhabitants of that portion of the parish which was called March, being at some little distance from the parish church, had a chapel at which they used to attend, but it is found upon the face of the case that practically the inhabitants of March did occasionally use the church and churchyard at Doddington as parishioners. And whether they did or whether they did not, I am quite unable, from anything which is to be found upon the face of the case, to come to the conclusion that they had lost their legal right to do so. March was within the legal parish of Doddington; the inhabitants of March were parishioners of Doddington; it seems to me that they were entitled to all the services of the church, and to every right of the parishioners of Doddington. If that be so, the persons who were appointed churchwardens for the parish of Doddington, at a vestry held at Doddington, appear to me to have been in fact and in substance, as well as in name, churchwardens for the parish. If so, as I said before, that entirely satisfies the words of the section we have to deal with. Now let me examine whether there

was anyone else who could satisfy that description. The only other mode of election which the case discloses was a mode of electing certain persons as churchwardens for the hamlet of March, and by no stretch of language, as it seems to me, could they be held to be in any sense churchwardens for the parish. There was, therefore, at the time this Act passed, a mode of electing churchwardens who were churchwardens for the parish in substance as well as in name; and there was another mode of electing churchwardens, who were not churchwardens for the parish, but only for the hamlet of March. I say that it is impossible to put these together, and to say that those four persons together are the persons who are meant when the 5th section says that the manner of electing and appointing churchwardens for the parish of Doddington is to become the manner of electing and appointing them in future for the new parishes. The other construction, the one already placed upon the clause, seems to me, upon the face of the Act of Parliament, perfectly to satisfy the provisions of the Act, and I should say to leave it without anything that may be called reasonable ambiguity. Now, why is that to be departed from? The proposition upon which my judgment is founded in respect to construction is this: If you have a thing described in a statute, and you find, upon applying that description to the existing facts, that there is one set of facts or circumstances, one person, or one thing, as the case may be, which amply, fully, and entirely satisfies the description which the statute gives, then you have no right, upon any surmise as to what the Legislature intended, to depart from that simple description, to go away from the words of the description itself, and to amplify them or vary them until you have included some set of circumstances, some other set of persons, or bodies, or things, which, under that amplified form, will come in under the description. I say that it is a principle of construction that no such thing should be done, subject to this, that if, upon the face of the Act of Parliament, you find that giving the ordinary sense and meaning to the words you are involved in some inconsistency in any of the other clauses, it may then be necessary to search about and see whether the palpable and obvious construction which the words point at may not be varied, in order that the inconsistency may be avoided. But there is no such inconsistency here. It is not suggested that this creates any difficulty whatever except this; it is said, if you give this meaning to these words, which is their plain and natural meaning, you will then be depriving the inhabitants of March of some legal right which they had at the time when the statute passed, and that you ought not to do that without express words. It is obvious that that argument does not go far enough, if I am right in the canon of construction to which I have just alluded. But, in point of fact, there is no such right taken away. My noble and learned friend the Lord Chancellor has already pointed out that the right of election was one which attached before to the hamlet of March, for the civil purposes of the township, and that this Act, which is confined to ecclesiastical purposes, really has not, upon the face of it, either expressly or impliedly, taken away that right. Under those circumstances, the plain words of the statute are amply satisfied, in my opinion, by the state of facts

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which existed at the time of the passing of the Act; and the mode of choosing the churchwardens for the parish of Doddington must be intended to mean, and must mean only, that mode which was in existence, of choosing the only persons who satisfied the description of being churchwardens of the parish.

Lord O'HAGAN concurred.

Judgment of the Exchequer Chamber reversed, and judgment entered for the defendant (plaintiff in error), with costs.

Solicitors, Garrard, James, and Wolfe; Meredith and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Thursday, May 11.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and POLLOCK, B.)

EASTWOOD AND ANOTHER v. WARD AND ANOTHER. (a)
Debtor and creditor—Bankruptcy Act 1861 (24 & 25 Vict. c. 134)—Partnership debt—Joint assignment by partners—Liability of separate estate.

Where, in accordance with sect. 192 of the Bankruptcy Act of 1861, and in the form of Schedule D to that Act, two partners had conveyed all their estate and effects to trustees for the benefit of their creditors:

Held (reversing the decision of the court below), that the separate estate as well as the joint estate of the assignors passed under the deed.

THIS was an action of ejectment brought to recover possession of certain houses situate at Islington.

The plaintiffs were trustees under an assignment made by Harriet Oakes and Robert Walter Cockman, for the benefit of their creditors, and the property in question was the separate estate of Harriet Oakes.

At the trial a verdict was entered for the plaintiff, but on the 28th Jan. 1876, the Common Pleas Division made a rule absolute to set aside that verdict, and to enter a nonsuit.

Against this decision the plaintiffs now appealed.

The whole question turned upon the construction that was to be put upon the following deed:

This deed, made the 11th June 1866, between Harriet Oakes and Robert Walter Cockman, of No. 223, Pentonville-road, in the county of Middlesex, bristle sorters, and John Eastwood, of Leeds, in the county of York, brush manufacturer, and William Frederick Howard, of No. 72, Margaret-street, Cavendish-square, in the said county of Middlesex, brushmaker, on behalf and with the assent of the undersigned creditors of the said Harriet Oakes and Walter Cockman: Witnesseth, that the said Harriet Oakes and Walter Cockman hereby convey all their estate and effects to the said John Eastwood and William Frederick Howard absolutely, to be applied and administered for the benefit of the creditors of the said Harriet Oakes and Robert Walter Cockman, in like manner as if the said Harriet Oakes and Robert Walter Cockman had been at the date hereof duly adjudged bankrupt.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

Holl (Mears with him), for the plaintiffs.—The

(a) Reported by A. H. FOYSEE, Esq., Barrister-at-Law.

words, "all their estate and effects," in the deed, must be construed strictly; and under such construction they clearly refer to the separate as well as the joint estate of the debtor. The word "their" means their respective estates. When they convey all their estate they must mean all their joint and several estates. [MELLISH, L.J.—Can a man be bankrupt as to his joint estate without being bankrupt as to his separate estate? JESSEL, M.R.—If A. and B. convey "their estate" and have no joint estate, would any lawyer suppose that nothing would pass by such a conveyance?] The court below decided against me, mainly upon the ground of the decision in *European Railway Company v. Westall* (L. Rep. 1 Q. B. 167), where Cockburn, C.J. says: "The deed is a composition deed between the members of a firm and the creditors of the firm, and in such a case it is impossible to mix up the private debts of an individual member of the firm with the general partnership liabilities. The action then being against a member of the firm for the recovery of a separate debt, the plea which sets up as a defence a composition deed entered into by the members of the firm in respect of their partnership liabilities, affords no answer to the action." But the point decided in that case is not identical with the point to be decided in this case, and the same may be said of the decision in *Clarke v. Williams* (11 L. T. Rep. N. S. 611; 3 H. & C. 508, 1001; 34 L. J. 189, Ex.). Moreover, this court is not bound by the decisions in those cases.

Francois Turner, for the defendants.—If we leave the Bankruptcy Act out of the question, this deed would only convey the partnership property. It is quite possible for partners to convey all their joint estate by such a deed as the above. That being so, *Slater v. Jones* (29 L. T. Rep. N. S. 56; L. Rep. 8 Ex. 186) is in point. That was a case under the Bankruptcy Act of 1869, but in his judgment Kelly, C.B., alluding to the Act of 1861, said: "Under the latter statute, a prescribed majority of creditors could bind all to the provisions of any composition deed to which such majority should agree. The effect of each deed must, of course, be considered by itself; that being so, I think the court rightly decided that in construing those deeds the ordinary rules of law must be applied, and the intentions of the parties be gathered from the words used." Martin, B. was of the same opinion. He says: "By the 192nd section of the Bankruptcy Act of 1861, it was enacted that every deed or instrument made or entered into between a debtor and his creditors upon certain conditions, should bind all; the courts of law came to the conclusion that the deed alone was to be looked at in each case, and interpreted in accordance with the ordinary rules governing the construction of deeds." It is clear, therefore, that the deed in question in this case must be interpreted in accordance with the ordinary rules, and, therefore, the separate estate would not pass under this joint assignment. [JESSEL, M.R.—But why does it not convey all? In law there is no such thing as a joint estate; there are joint tenants, but each has a separate estate in the property; they are said to be seised *per mis et per tout*.] Then I am afraid the cases relied upon by the court below must be wrong.

JESSEL, M.R.—The question for us to determine arises as to the construction to be put upon a deed made under the provisions of the Bankruptcy Act

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of 1861. And that question is, whether certain leasehold property passed by that deed? The deed purports to be between Harriet Oakes and Walter Cockman on the one part, and the plaintiffs on the other part, as trustees for the creditors of the said Harriet Oakes and Walter Cockman, whereby Harriet Oakes and Walter Cockman convey "all their estate and effects" to the said trustees. Now the intent and meaning of those words are plain—they convey what is known in bankruptcy as the joint and separate estate of the parties. I say in bankruptcy, because there is no such thing known to the law as a joint estate which is not also to a certain extent separate estate. Is there any reason to cut down the ordinary legal interpretation of this deed? On the contrary, it is plain that there was an intention to convey the whole property. Is there anything in the Bankruptcy Act of 1861 that should induce us to do so? On the contrary, this deed is in the form given in the Act, "which shall vest all the estate and effects of the debtor in the trustees of such deed" (sect. 200), and as the singular includes the plural, it clearly means all the joint and several estate of the debtor—it is impossible that it can mean anything else than that all the joint and several estates of the partners will pass. I am certain that the court below would not have come to the decision they did unless they had relied upon some dicta in other cases.

KELLY, C.B.—This case is one of the very highest importance. The question is, whether by an assignment under the Bankruptcy Act of 1861, the joint and several estates of partners pass. There are no decisions on cases in which the words in an assignment or deed operating as an assignment for the benefit of creditors have been interpreted on exactly the same point as in the present case; so they must be construed according to their plain and natural meaning, and, therefore, it is clear that the words, "all their estate," will pass their separate estate as well as their joint estate.

MELLISH, L.J.—I am of the same opinion. The court below appears to have based their decision upon the case of *European Railway Company v. Westall*, but in that case the question raised was, whether a debt of a separate creditor of one of the partners was discharged by a deed entered into by the partners with the joint creditors of the firm. The court there considered that it was the intention of the parties that the deed should merely operate as a discharge of the joint debts, and that the debts of creditors against the separate estate could not be discharged, as such creditors had not been called in. It does not, however, show that the separate estate of the partners would not pass under the deed as well as the joint estate. It must be so, for if the separate estate were not included the assignment would be bad, as under the Act of 1861 it must pass all the estate that would be available in case of bankruptcy. We must construe these words, if possible, so that the deed can be held to mean something that would not render it void. The words in question can only take effect under the Bankruptcy Act of 1861, and so they must either pass all the joint and separate estate or the deed is void. I am of opinion, therefore, that the deed must convey all the joint and several estate, or it would not have the effect of an assignment in bankruptcy.

POLLOCK, B.—I am of the same opinion. The words of the deed are amply sufficient to convey all the joint and separate estates of the parties. They might, no doubt, be modified by some Act of Parliament, but on referring to the Bankruptcy Act of 1861, it is perfectly clear that a deed in this form was intended to have the same effect as an assignment in bankruptcy.

Judgment reversed.

Solicitors for plaintiffs; *Nicol, Son, and Jones.*

Solicitors for defendants, *Boulton and Sons.*

SITTINGS AT LINCOLN'S INN.

Nov. 23 and 30.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, J.J.A.)

Ex parte BUTT; Re MAPLEBACK.(a)

Bill of sale—Consideration—Compounding a felony—Past debt—Present advance to enable the forger to take up forged bill—Sale by holder of bill of sale—Subsequent bankruptcy of debtor.

A. gave B. a bill of sale over all his property as security for a past debt of 100l., and also for a sum of 100l. advanced at the time of the execution of the bill of sale, to enable A. to meet a bill to which he had forged B.'s name.

Three weeks afterwards B. took possession under his bill of sale, and sold the property, and in the following month A. was adjudicated a bankrupt, the alleged act of bankruptcy being the giving of the bill of sale.

The trustees applied for a declaration that the bill of sale was void, and for an order that the proceeds of the sale should be paid to him.

Held (reversing the decision of Bacon, C.J.), that the advance of the money to take up the forged bill did not amount to compounding a felony, and that even assuming the transaction to have been a legal misdemeanor, A. was a party to it, and could not, if he had remained solvent, have recovered the proceeds of the sale from B., and that inasmuch as the transaction was not an offence against the bankrupt law, the trustee in A.'s bankruptcy had no better right to the proceeds, which B. was therefore entitled to retain.

Quære, whether B. would have been able to recover the money advanced to enable A. to take up the forged bill, if he were in the position of a claimant.

This was an appeal from a decision of the Chief Judge in Bankruptcy.

The hearing in the court below is reported *sub nomine*, *Ex parte Caldecott; re Mapleback*, ante, p. 172, where the facts of the case are sufficiently set out.

The Chief Judge held that the bill of sale having been given in consideration of a past debt, and with the intention of compounding a felony, was utterly void and an act of bankruptcy, and accordingly ordered the holder of the bill of sale to refund the proceeds of sale of the goods comprised in the bill of sale.

From this decision the holder of the bill of sale appealed.

Müller, Q.C. and F. O. Crump, for the appellant.—The Chief Judge held that the bill of sale was void because it was given with the intention of compounding a felony. There was, however, no

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compounding of a felony here on the part of the appellant. In *Wallace v. Hardacre* (1 Camp. 45), where an indorsee of a forged bill of exchange delivered up the forged bill to the forger and received from him in lieu of it a bill accepted by another person, Lord Ellenborough said: "If any bargaining could be shown here to stifle a prosecution for a criminal act, the action certainly could not be maintained; but otherwise, the mere substitution would not invalidate the plaintiff's (the indorsee's) right to recover against the acceptor of this (the second) bill." In *Keir v. Leeman* (9 Q. B. N. S. 395) Tindall, C.J. says: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra* we should have no doubt on this point. We have no doubt that in all offences which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." But even if this is a case of compounding a felony, the money having been actually repaid to the appellant by means of the sale of the property comprised in the bill of sale, it cannot be recovered. They also cited

Williams v. Bayley, 14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. 200;

Ex parte Arnold; *Re Wright*, 35 L. T. Rep. N. S. 21; L. Rep. 3 Ch. D. 70.

De Gez, Q.C. and *Rolland*, for the respondent. —The bill of sale was void, being a perfect bribe to induce the appellant to compound a felony. This is a clear case of misprision of felony within the definition given by Lord Westbury in *Williams v. Bayley*: "That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, further, converted it into a source of emolument to himself." That is precisely what the appellant did here. See also definition of misprision of felony in 3 Russell on Crimes, 4th edit. 194. They also cited

Collins v. Blantern, 2 Wils. 341;

Ex parte Hibernian Joint Stock Bank, 14 Ir. Ch. Rep. (1868), 116.

Miller, Q.C. in reply. [JAMES, L.J.—Suppose the case of a loan of money to enable a forger to take up a forged bill. Could the lender maintain an action to recover the money?] Perhaps not. But we are not in that position, for we have recovered the money, and the maxim applies, *In pari delicto melior est conditio possidentis*. He cited

Ex parte Reed; *Re Tweddell*, 26 L. T. Rep., N.S. 586; L. Rep. 14 Eq. 586.

Curr. adv. vult.

Nov. 30.—JAMES, L.J. now delivered the following written judgment of the court: The appellant complains of an order of the Chief Judge by which he was ordered to pay to the trustee of the bankruptcy the proceeds of certain goods seized and sold by him. They were so seized and sold under a bill of sale duly registered by which the goods had been assigned. The consideration for the bill of sale was 100l. then advanced, and 100l. pre-

viously due. It is not questioned that the 100l. was so previously due and that there was really and truly advanced the further sum of 100l. The right of the appellant, which on this short statement of facts would seem unquestionable, is impeached on the following ground: Before advancing the second 100l. the lender had received from the bankrupt a letter in the most piteous terms, informing him that a bill was becoming due at a banker's, which bore the signature forged of the lender, and that the banker would, on dishonour of the bill, of course apply to the latter, which would lead to a discovery of the crime with all its consequences of punishment to the forger, and ruin to himself and his family. In the same letter he offered, if the advance were made, to give security for that as well as for the previous debt. Moved by this, the appellant lent the money, which was applied in taking up the bill, and the security was given as promised for that advance and the previous debt. The Chief Judge was of opinion that the lending of the money under those circumstances was such a violation of public policy as to taint and avoid the whole security, and to make it impossible to allow the appellant to retain the proceeds of it, although actually realised and received by him. If the appellant had been plaintiff or claimant, he certainly would have been in a very difficult position. It was not compounding a felony, it might perhaps not have been strictly a misprision of felony, but it was a transaction which was intended to result and did result in preventing the discovery of a felony, and getting into the criminal's own hands the most important piece of evidence. It is, however, not necessary to express any actual judgment on how the case would have stood if the appellant had been plaintiff. But there is another consideration, which appears to us sufficient to dispose of this case. If there was a legal misdemeanour, the bankrupt was a party to it, and *In pari delicto melior est conditio possidentis aut defendantis*. The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt. If the bankrupt had repaid the loan, the trustee could not recover it. If the bankrupt had actually given money as a bribe, or parted with property for any other illegal purpose, his trustee could not recover it back any more than he could himself. This is not one of the cases in which the trustee in bankruptcy stands in a better position than the bankrupt. For, however wrong the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud anyone, and for all purposes of the bankrupt law the bill of sale was a bill of sale for a past debt and a sufficient present advance. And except where there is an offence against the bankrupt law, or against some law in favour of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other.

Appeal accordingly allowed with costs.

Solicitors for the appellant, *J. Lott*, agent for *H. W. H. Bayley*, Basingstoke.

Solicitors for the respondent, *Palmer, Bull, and Fry*, agents for *S. Chandler*, Basingstoke.

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RODEN v. LONDON SMALL ARMS COMPANY (LIMITED).

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HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov. 16, 18, and 21.

RODEN v. LONDON SMALL ARMS COMPANY
(LIMITED). (a)*Deed—Powers hereby granted—Latent ambiguity—
Intention of parties—Equitable relief.*

The plaintiff, in 1868, granted by deed licence and authority to use an invention, of which the patent was vested in him, for breechloading rifles, to the defendants, "yielding and paying unto the licensor the royalty of one shilling for every gun, rifle, or breech action manufactured, produced, or sold under the powers hereby granted."

The exemption of the Crown from royalties for the use of patents, laid down by Feather v. The Queen (6 B. & S. 257), was at that time generally believed to extend to government contractors; but by Dixon v. London Small Arms Company (Limited) (L. Rep. 10 Q. B. 130, afterwards affirmed in the House of Lords) this exemption was limited to the use of the immediate servants of the Crown; upon which the plaintiff brought this action to recover royalties under the deed for the rifles manufactured by the defendants for the government.

The jury found that the defendants intended the deed should not apply to government contracts, and that the plaintiff knew this was the defendants' intention, and purposely abstained from mentioning the subject in order that they might be bound contrary to their intention.

Held, that the words of the reddendum suggested a latent ambiguity which admitted extrinsic evidence to show the intentions of the parties; and that the plaintiff under the circumstances could not recover.

Held also (per Cockburn, C.J., and Lush, J.) that the defendants were entitled to equitable relief from the plaintiff's claim.

THIS action was tried at Westminster before Denman, J., and a special jury on the 17th, 18th, and 19th Nov. 1875. A verdict of 3286l. 5s. was entered for the plaintiff by direction of the judge, leave being granted to the defendants to move to enter the verdict for them if the court should think they were entitled so to do upon the facts and upon the findings of the jury, the court to have power to make any amendment which they should think ought to be made.

The declaration stated that on the 19th May, 1868, a deed was made by and between the plaintiff on the one part and the defendants of the other part, which said deed was and is to the tenor and effect, and in the words and figures following, that is to say:

This indenture, made the 19th May 1868, between Richard Brown Roden, of Usk, in the county of Monmouth, Esq., of the one part, and the London Small Arms Company (Limited), of the other part. Whereas the letters patent mentioned in the schedule hereto are vested in the said Richard Brown Roden, with power to grant licences thereunder, and the said Richard Brown Roden has agreed with the London Small Arms Company (Limited), to grant them a licence upon the terms hereinafter mentioned. Now this indenture witnesseth that be the said Richard Brown Roden hereinafter referred to as the licensor doth hereby grant unto the said London Small Arms Company (Limited), hereinafter referred to

as the licensees, and their successors, licence and authority to use the said inventions, and apply the same to the manufacture of guns, rifles, and breech actions, for all the residue now unexpired of the several terms granted by the said letters patent, yielding and paying unto the said licensor, his executors, administrators, and assigns, the royalty of 1s. for every gun, rifle, or breech action manufactured, produced, or sold under the powers hereby granted. And also yielding and paying for every year (if any) during the continuance of this licence in which the licensees shall manufacture, produce, or sell, under the said powers a less number than 10,000 guns, rifles, or breech actions, a further and additional royalty of 6d. for every gun, rifle, or breech action so manufactured, produced, or sold, in such year, such several royalties to be payable at the times and in manner and subject to the reduction hereinafter provided. And the licensees for themselves and their successors hereby covenant with the licensor, his executors, administrators, and assigns as follows, viz.: That the licensees will during all the continuance of this licence pay to the licensor, his executors, administrators, or assigns, the said yearly rent of 1s., or such reduced sum as may be then payable for every gun, rifle, or breech action, manufactured, produced, or sold under the powers hereby granted, and will make such payments within twenty days after the expiration of every quarter, the first quarter to be considered as terminating on the 31st March 1868; and that the licensees will also during all the continuance of this licence pay to the licensor, his executors, administrators, or assigns for every year, if any, during the continuance of this licence in which the licensees shall manufacture, produce, or sell, under the powers hereby granted, a less number than 10,000 guns, rifles, or breech actions, a further additional royalty of 6d. for every gun, rifle, or breech action so manufactured, produced, or sold in such year, and will make such last named payments within twenty days after the 31st Dec. in any such year; and will during the continuance of this licence furnish the licensor, his executors, administrators, or assigns, within ten days after the expiration of each quarter with a statement to be verified, if required by statutory declaration, of all guns, rifles, and breech actions produced or sold during such preceding quarter, and will keep proper books containing true and correct numbers of all guns, rifles, and breech actions produced, manufactured, or sold under the powers of this licence, and furnished extracts therefrom to the licensor, his executors, administrators, or assigns, and permit him or them at all reasonable times to compare them with the original books, and to have access thereto, and will make all guns, rifles, and breech actions of good materials, and in a good and workman-like manner, and mark the same with such mark and in such manner, as the licensor, his executors, administrators, or assigns may require, and will not question nor dispute in any way the validity of the said letters patent. And that the licensees will on all occasions render all reasonable assistance in supporting the validity of the said letters patent, and will give without delay to the licensor his executors, administrators, or assigns, information of any infringement of the said letters patent which may come to the knowledge of the licensees, and that the licensees will not make any assignment of the licence hereby granted without the consent in writing of the licensor, his executors, administrators, or assigns first had and obtained, and will not, without the consent of the licensor, his executors, administrators, or assigns use or apply any alteration or modification which shall be injurious to any guns, rifles, or breech actions made under or by virtue of the said letters patent. Provided always that if the licensees shall fail to pay the royalties hereby reserved, or to perform the covenants herein contained, it shall be lawful for the licensor, his executors, administrators, or assigns to revoke the licence hereby created by six months' notice in writing, such termination not to prevent the rights of the licensor as respects claim for royalties due, and the licensor for himself, his executors, administrators, or assigns hereby covenants with the licensees and their successors that notwithstanding any act, deed, matter, or thing done or committed by him to the contrary, the licensor has good right to grant the licence hereby created, that the licensees may at all times during the continuance of this licence peaceably and quietly enjoy the same without any disturbance or hindrance by or on the part of the licensor, his executors, administrators, or assigns or any one

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claiming by, through, or under him, and also that he, the said licensor, his executors, administrators, and assigns will, at his and their own expense, commence all necessary actions and suits against any person or companies who shall infringe the said letters patent, and prosecute the same with a view of preventing such infringement, and also that in case the said licensor, his executors, administrators, or assigns shall grant any licence under the said English patents for the said inventions to any other person, firm, or company except the British government and Thomas Wilson, of Birmingham, gunmaker, or shall, so long as he and his executors or administrators is and are the proprietors of any foreign patents or patent for the invention comprised in the letters patent specified in the schedule hereto grant any licence under such foreign patents or patent to any other person, firm, or company, except a licence or arrangement with any foreign government for the use of the patent in their own country, at a smaller royalty or reduce any royalty under any existing or future licence under English or foreign patents to a smaller sum than that for the time being payable by virtue of these presents, then the said royalty payable under this licence shall be (either permanently or for the temporary occasion, as the case may be) reduced to the lowest sum payable under any such licence granted to any other person, firm, or company, the circumstances in all cases being similar. In witness whereof the said London Small Arms Company (Limited) have hereunto affixed their common seal and the said Richard Brown Roden hath hereunto set his hand and seal the day and year first before written.

The schedule above referred to :

Letters patent, dated 21st June 1862, No. 1823, to François Eugene Schneider and Jacob Snider for improvements in the construction of breechloading fire arms.

Letters patent respectively dated 5th Nov. 1864, No. 2741; 22nd Nov. 1864, No. 2912; 21st Jan. 1865, No. 186; 24th Sept. 1865, No. 2275, to Jacob Snider for improvements in the manufacture of breechloading fire arms.

The declaration proceeded to allege the performance by the plaintiff of all conditions precedent necessary to entitle him to the performance by the defendants of the covenants of the said deed, and further alleged the following breaches of covenant: Non-payment of royalties due and payable under the deed; failure to furnish the plaintiff within ten days after each quarter with a statement of all guns, rifles, and breech actions produced or sold during such preceding quarter; failure to keep proper books of guns, &c., produced or sold under the said license; failure to furnish the plaintiff with extracts from such books; and refusal to permit the plaintiff to have access to such books.

The declaration also made a similar claim by money counts.

The defendants pleaded to the first count, except as to 58*l.* 15*s.*, firstly, *non est factum*; secondly, denial of the breaches; thirdly, release and discharge for good consideration; fourthly, as a defence on equitable grounds that before and at the time of the making of the said deed it was intended and agreed between the plaintiff and the defendants that the said deed and the covenants therein contained, and the license to be thereby granted, and the royalties thereby reserved, and the terms and conditions therein set forth should not affect, apply, or extend to any gun, rifle, or breech action to be manufactured or produced for or sold to the British Government by the defendants, and the defendants said that the said deed was by the mutual mistake of the plaintiff and defendants prepared and executed as in the declaration mentioned contrary to the true intent and meaning of the parties thereto, so as to affect, apply, and extend to all and every gun, rifle, or breech action

manufactured, produced, or sold by the defendants, and the defendants said that the defendants' alleged breaches of covenant and the plaintiff's causes of action in respect thereof herein pleaded to related wholly to certain guns, rifles, and breech actions manufactured, produced, and sold by the defendants for and to the British Government, and that, save as aforesaid, and save as regards the last mentioned guns, rifles, and breech actions, the terms of the said deed have been performed and fulfilled by the defendants, and the defendants said that the plaintiff was inequitable in taking advantage of the form of the said deed to maintain this action, and to make the defendants liable in respect of guns, rifles, and breech actions manufactured and produced for and sold to the British Government, and to treat the said deed as applicable thereto contrary to good faith and the true intent of the said parties. The defendants also pleaded to the residue of the declaration, except as to 58*l.* 15*s.*, fifthly, never indebted; sixthly, payment; and to so much of the declaration not before pleaded to, seventhly, payment into court of 58*l.* 15*s.*

The jury were directed upon the evidence and correspondence to find the truth or otherwise of the 4th plea; and in case they concluded that any part of it had not been proved, they were directed to answer certain questions submitted to them.

The jury found the following verdict:—That it was the intention of the defendants that the covenants in the deed should apply only to the manufacturing and conversion of rifles exclusive of those manufactured and converted for the Government; that the plaintiff did at the time of the execution of the deed know that such was the defendants' intention, and purposely abstained from mentioning the subject in order that they might be bound contrary to their intention; that the defendants at the time of the execution of the deed believed that rifles, the subject of the plaintiff's patent, could be manufactured and converted for the Government without license.

They also found that no part of the 4th plea was proved, except that the alleged breaches of covenant by the defendants related wholly to the work done by them for the British Government.

On the 23rd Nov. 1875, Sir H. James, Q.C., on the defendants behalf, obtained a rule nisi calling upon the plaintiff to show cause why the verdict obtained in this cause should not be set aside and a verdict entered for the defendants instead thereof pursuant to leave reserved by the learned judge, on the ground that upon the findings of the jury and the facts, the defendants are entitled to the verdict; the court to have power to order any amendment of the pleadings which may be proper and necessary to raise the defence founded upon such findings and facts; or why a new trial should not be had between the parties on the ground that there was misdirection on the part of the learned judge in telling the jury that the true meaning of the 4th plea was to the effect that the parties intended that the deed should contain a clause excluding the Government rifles, and that such clause had been omitted by mutual mistake; and also in telling them that, in order to establish the allegation in the plea that it was so intended and agreed between the plaintiff and defendants, it was necessary that the plaintiff and defendants should have been *ad idem*, and should have mutu-

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ally intended that the deed should not apply to Government rifles.

The rule was argued on the 16th, 18th, and 21st Nov. 1876.

The *Attorney-General* (Sir J. Holker, Q.C.), *Aston*, Q.C., and *Macrory* for the plaintiff, showed cause.

Sir H. James, Q.C., *Watkin Williams*, Q.C., and J. C. Mathew for the defendants, supported the rule.

The facts as appeared from the evidence and the correspondence and the arguments, sufficiently appear from the judgments of the court.

COCKBURN, C.J.—I am of opinion that our judgment should be for the defendants. The action was brought to recover a sum of money alleged to be due under a deed, in which the defendants covenanted to pay certain royalties for every gun altered by them in a manner patented by the plaintiff, the consideration for the covenant being the plaintiff's licence to the defendants to use the patent. Now, undoubtedly the terms of the licence are general, and *prima facie* they must be taken to include the alteration of all guns, and the payment of royalty for any use of the invention. That is the first presumption on the deed, but upon more detailed investigation of its clauses we find that, although the licence throughout is general, there are words of a more restricted sense with regard to the payment of royalties: "Yielding and paying unto the said licensor, his executors, administrators, and assigns, the royalty of 1s. for every gun, rifle, or breech action manufactured, produced, or sold under the powers hereby granted." Similarly the first covenant of the licensees', which is to pay the said yearly or other rent, is also expressed to be in the very same words. "Under the powers hereby granted" are words which must have some signification, and may well bear a restrictive interpretation upon the general use granted by the licensor. These words must refer to some limitation of the articles manufactured by the defendants, and it does not appear to be required that they should pay a royalty upon all the weapons to which they might apply the plaintiff's patented process. How are we to determine what this restriction was to be, and how are we to explain the words "under the powers hereby granted?" The deed itself does not show what is the limit of the powers granted, and, therefore, I consider that we have on the face of it a latent ambiguity which requires extrinsic evidence to show what was the intention of the parties. We may look to the circumstances under which the deed was executed to explain what use of the licence would be within and what beyond the powers granted by the deed. These circumstances, upon the evidence before us, are simple and incontrovertible. In the year 1868, when the deed was executed, there was a general belief, clearly shared by the parties concerned, that the Government was entitled to use any patent process without payment of royalty, not only in their own workshops but even in respect of goods obtained by them from independent contractors. This was plainly the impression of the parties to this deed; for we find the plaintiff before this time in correspondence with the Government, in order to support his claim, to be rewarded as a matter of bounty, and not of right, for the use of his invention by the government and their contractors, and he subsequently obtained 15,000*l.* accordingly.

It appears also from the commencement of the correspondence between plaintiff and defendants, that the right to use the invention for the government, without payment of royalty, had been already exercised by the defendants, and was admitted by the plaintiff. I do not wish to push this fact further than it deserves, but it seems to me material for the consideration of the footing on which the parties entered into the covenants contained in the deed. In the first letter of the defendants' managing director to the proprietors of the Snider Patents, dated 2nd Oct. 1866, in which inquiries are made as to the terms on which licenses would be granted, the plaintiff was informed that "this company has at present a large contract for converting Enfield rifles for the English Government, but as soon as this is completed, they will be prepared to manufacture breechloading arms on a large scale on the interchangeable principle, and if your terms are moderate, we should hope to do a large and profitable business, to our mutual advantage." As plainly as a man can speak, the defendants here say they are entitled to immunity from royalties, and require no licence for the use of this patent so long as they are carrying out a Government contract, but they are willing to make an arrangement to enable them to manufacture for other purchasers. So the plaintiff fully admits; for his agent writes, in answer to that letter, on the 6th Oct., "We have not yet completed our arrangements as regards the licenses, &c., and as I understand you will not be in a position for some time to come to manufacture, and I conclude will be engaged exclusively in Government contracts for several months, there will be time to consider the object of an arrangement with you." The jury have found as part of their verdict that the defendants entered into the contract under the belief that this was their position, and also that the plaintiff at the time well knew it, and purposely abstained from mentioning the subject in order that they might be bound, if the law would allow it, contrary to their intention. But the plaintiff now says that this belief was not mutual, for he reserved in his own mind an intention that if anybody should again raise the question decided in *Feather v. The Queen* (6 B. & S. 257), and if that decision should be overruled, or limited as it has recently been in *Dixon v. London Small Arms Co. Limited* (L. Rep. 10 Q. B. 130; on appeal L. Rep. 1 Q. B. Div. 384, and in House of Lords not yet reported), then he should avail himself of any further right which such an alteration in what was supposed to be the law might give him, and take advantage of the defendants' mistake in his favour. Can this, however, be done consistently with law or equity? Certainly not according to equity, and I hope not even upon the more stringent principles of law. The true view of this contract I take it is that the deed must be read and construed according to the real intention of the parties at the time, and we must so interpret the defendants' liability as to restrict it to the meaning of the deed which the extrinsic circumstances compel us to give it. There is also a further doctrine well known and recognised in courts of law, that if one man stands by and allows another to undertake a liability or to alter his condition, being induced thereto by a belief in his consent, the first man cannot afterwards turn round and claim an advantage which he could not

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have obtained but for his own conduct in the matter. Here the plaintiff made no objection to the terms upon which the defendants were supplying the Government with rifles, without, as they thought, incurring any royalties for the use of the patent. If they knew they would have had to pay a shilling an arm to the patentee for conversion of Government rifles, they would have protected themselves by some equivalent advantage in their contract. Even, therefore, if the plaintiff knew at the time of their liability to him, he cannot now turn round upon them and claim it. It would be consistent with neither justice nor equity that he should be able to do so, and we are of opinion upon the point reserved that the findings of the jury and the facts of the case constitute a good defence to the action, and the verdict must be entered for the defendants.

MELLOR, J.—I am of the same opinion. When this case was first before us, the reservation of the judge was imperfectly understood, and I thought it was a mere question of the respective knowledge of the parties as to their legal position. But the findings of the jury and the evidence present a very different aspect of the case, and a careful consideration of the deed shows that the question really is whether, as to the arms in respect of which the plaintiffs make this claim for royalties, the process has been used by the defendants under the powers granted by the deed. The licence is worded generally, but the *reddendum* limits the payment of royalty to weapons "manufactured, produced, or sold under the powers hereby granted." Here, then, is a latent ambiguity, and we have to discover what it means. The evidence shows that the parties were contracting on the authority of *Feather v. The Queen*, and believing that decision, which exempts the Crown from requiring any licence for the use of patents, to apply to the use of such patents by contractors for the government as well as by the government itself. The plaintiff applied to the government for a reward for the use of his patent, and actually received a considerable amount on the supposition that no royalties could be recovered from the government or their contractors. That amount was undoubtedly received not merely as a gratuity for the invention, but a price for the use of the patent, so that the plaintiff if he recovered here would be obtaining payment twice over. I think the defendants are entitled to judgment on the intentions of the parties to the deed, and on the proper interpretation of its provision. I rely on this ground only, without saying anything about the application of cases concerning estoppel to which the Chief Justice has referred.

LUSH, J.—I am of the same opinion. The form of the *reddendum* suggests that the parties intended some limitation to the payment of royalty, and as no such limitation is to be found upon the face of the deed, it lets in extrinsic evidence to show the circumstances under which the contract was entered into. It was the general opinion, after the case of *Feather v. The Queen*, that the crown's right to use patents extended to contractors with the various departments, and the government, upon this assumption, paid the plaintiff 15,000*l.* in full satisfaction of such claims as the plaintiff is here making. The deed was carefully worded to fit this very incident, and it is sufficient, when read with the evidence before us, to show that the licence was only thought necessary,

and was only given for the use of the patent in manufacturing or converting arms for foreign governments or for subjects of the crown. The plaintiff, therefore, has no claim for royalties, which he could be entitled to only upon the authority of *Dixon v. London Small Arms Company*. That case put an end to the mistaken belief as to the exemption from royalties of contractors with the crown; but before that the parties were clearly of opinion that no such liability existed, and the deed was never intended to apply to it. I also agree that the plaintiff is estopped from making this claim by the conduct of the parties in the matter; and besides the failure of the plaintiff's claim in law, I think the defendants have a good equitable ground for relief. The rule will be made absolute.

Judgment for defendants.

Solicitors for the plaintiff, Gregory, Rowcliffe, and Rawle.

Solicitors for the defendants, Hollams, Son, and Coward.

COMMON PLEAS DIVISION.

Feb. 10 and 21, and June 14.

KEITH AND ANOTHER v. BURROWS AND ANOTHER. (a)
Mortgage of ship—Omission to register—Rights of mortgagees as against assignees of freight.

A mortgage of a ship transfers the ownership, and the mortgagee is entitled to the whole of the mortgagor's interest as security for his money.

The only effect of the omission to register a mortgage of a ship is to postpone it to a subsequently registered mortgage.

A mortgage of the ship is entitled to freight as against an assignee of freight by an assignment made after the mortgage, but before its registration.

*A ship was mortgaged to plaintiffs. Afterwards defendants advanced money on the security of the cargo without notice of plaintiffs' mortgage. Defendants and the mortgagor then sold the cargo to J., on the terms that 55*s.* a ton freight should be paid. An assignment of freight was made to defendants as security for their advances. The ship was then mortgaged to H., who registered his mortgage. Afterwards plaintiffs registered their mortgage. Defendants, by arrangement, acquired J.'s rights. H. and plaintiffs took possession; H., being satisfied with the ship as security, made no claim to freight.*

*Held, that plaintiffs were entitled to the freight of 55*s.* a ton as against defendants, notwithstanding their omission to register their mortgage.*

THIS was a special case stated for the opinion of the court in an action brought by the plaintiffs as mortgagees of the ship *Stonehouse*, to recover money alleged to be due to them from the defendants in respect of freight. The material facts and the points raised in the arguments are fully stated in the judgment of the court.

Feb. 10.—The case was argued by *Herschell, Q.C.* (*G. Bowen* with him, for the plaintiffs, and by *Webster* (*Thesiger, Q.C.* with him), for the defendants.

The court took time to consider, but afterwards desired that the case should be reargued on the point whether any equity was created as between the plaintiffs and the defendants by the fact that

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the defendants had searched the register, and had found no incumbrance.

Feb. 21.—The case was accordingly reargued.

The following are the authorities which were referred to in the course of the arguments:

Mercantile and Exchange Bank v. Gladstones, 18 L. T. Rep. N. S. 641; L. Rep. 3 Ex. 233; 37 L. J. 130, Ex.;

Liverpool Marine Credit Company v. Wilson, 26 L. T. Rep. N. S. 717; L. Rep. 7 Ch. 507; 41 L. J. 798, Ch.;

Brown v. North, 8 Ex. 1; 22 L. J. 49, Ex.;

Lindsay v. Gibbs, 22 Beav. 552;

Brown v. Tanner, 18 L. T. Rep. N. S. 621; L. Rep. 3 Ch. 597; 37 L. J. 923, Ch.;

Gardner v. Casanova, 1 H. & N. 423;

Dickinson v. Kitchen, 8 E. & B. 789;

Liverpool Borough Bank v. Turner, 1 J. & H. 159;

Wilson v. Wilson, 26 L. T. Rep. N. S. 346; L. Rep. 14 Eq. 32; 41 L. J. 423, Ch.

8 & 9 Vict. c. 89, s. 37 (the former Merchant Shipping Act);

Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 57, 66, 69, 70, 71.

Cur. adv. vult.

June 14.—The judgment of the court (Brett, Alcock, and Lindley, JJ.) was delivered by

LINDLEY, J.—The material facts are these:—1st Dec. 1874, mortgage by Morison to the plaintiffs of a ship for 7500*l.* and further advances. 4th Jan. 1875, defendants advanced Morison 3000*l.* on security of cargo, without notice of the plaintiffs' mortgage. 2nd Feb. 1875, Morison again mortgaged the ship to the plaintiffs for 4000*l.* and further advances. 19th Feb. 1875, sale of cargo by defendants and Morison to Jump and Co. on terms of freight, being paid at 5*s.* per ton. 22nd Feb. 1875, further advance by the defendants of 9000*l.* 26th Feb. 1875, assignment to them of the freight at 5*s.* per ton, as security for their advances. 2nd March 1875, Morison mortgages the ship to Harrold. 3rd March 1875, Harrold's mortgage was registered. 6th March 1875, the plaintiffs registered their mortgage. 13th April 1875, the ship arrived, and Harrold and the plaintiffs took possession; Harrold being satisfied with his security on the ship did not claim the freight; an arrangement was come to by which the defendants acquired Jump and Co.'s rights. Consider, first, how the case would have stood if there had been no mortgage to Harrold. Two questions would then have arisen, viz., (1), would the freight payable to the plaintiffs as first mortgagees in possession have been 5*s.* per ton or only 1*s.*? (2), would the plaintiffs have been entitled to this freight as against the defendants? With respect to the first of these questions, it is to be observed that although a nominal freight of 1*s.* was made payable by the bills of lading, the cargo being bought for the owner of the ship, in the contract with Jump and Co., the freight payable is agreed to be 5*s.* per ton, and the freight assigned to the defendants is likewise freight at 5*s.* per ton. The defendants, therefore, whether they claim through Jump and Co. or under the assignment to themselves, are not in a position to deny that the sum payable as and for freight was to be 5*s.* per ton. It is true that this sum was not made payable when the cargo was put on board, nor when the defendants made their first advances on the cargo, and that it was made payable by an agreement entered into by the shipowner and the defendants and the purchasers of the cargo, after the date of the plaintiffs' mortgage. But there is no reason why the benefit

of this agreement should not accrue to the mortgagee of the ship on his taking possession of her, on taking such possession he is entitled to all freight payable under charter-parties or bills of lading; and there is no difference material to the present case between freight payable under such documents and money payable as and for freight under such an agreement as that which is here to be considered. No authority on this point was referred to on either side, and, on principle, 5*s.* having been fixed by all parties interested in the cargo to be the freight, must be so treated for the purposes of the case. The question whether the plaintiffs as mortgagees of the ship, or the defendants as assignees of the freight, would have had the better title to it but for the mortgage to Harrold turns on the true nature of a mortgage of a ship and on the effect of the omission of the plaintiffs to register their mortgage before the freight was assigned to the defendants. The mortgage to the plaintiffs was in the statutory form, and by it the ship was mortgaged to them. The word mortgage is a well known word, and signifies a transfer of property by way of security: (See 2 Black. Com. 158; *Termes de la Ley*.) A mortgage is a transfer of all the mortgagor's interest in the thing mortgaged, but such a transfer is not absolute; it is made only by way of security, or in other words it is subject to redemption. Unless, therefore, there is any statutory enactment to the contrary, the plaintiffs in this case acquired by their mortgage the whole of the mortgagor's interest in the ship, or in other words the legal title to the ship as a security. Such is *prima facie* the effect of the instrument of mortgage. But the statutes relating to ships must be examined with a view to determine what the consequences of registration or non-registration may be. Under the older statutes relating to merchant shipping all transfers and mortgages were made by a bill of sale, and such bill of sale had no effect whatever either at law or in equity until registration: (See the cases collected in *The Liverpool Borough Bank v. Turner*, 1 J. & H. 159; 2 De G. J. & J. 502; *MacLachlan*, on Shipping, p. 39, 2nd edit.) The Merchant Shipping Acts now in force, however, make a marked distinction between transfers of ships otherwise than by way of security and mortgages; and there are different groups of sections with distinct headings applicable to these two different subjects: (See 17 & 18 Vict. c. 104, ss. 55-65, which relate to transfers and transmissions, and ss. 66-75, which relate to mortgages.) Amongst other distinctions between these two modes of dealing with ships the following are the most noteworthy. A transfer otherwise than by way of mortgage must be by a bill of sale (sect. 55), and must be produced to the registrar for registration (sect. 57), and the transferee, if not a corporation, must make a declaration that he is a natural born British subject: (sect. 56, and schedule Form F.) On the other hand a mortgage must be by a different kind of instrument (sect. 66), and there is no enactment requiring such instrument to be produced to the registrar (compare sect. 66 with sect. 57), and the mortgagee is not required to make any declaration as to his nationality. It is true that in *The Liverpool Borough Bank v. Turner* (*ubi sup.*), Wood, V.C., and Lord Campbell, held that an unregistered equitable mortgage of a ship could not be enforced. But in consequence of

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this decision, 25 & 26 Vict. c. 63, s. 3, was passed, and the validity of an unregistered mortgage as against all persons except registered transferees or mortgagees (see sects. 43 and 69 of the Merchant Shipping Act 1854,) can hardly now be disputed: (See *Stapleton v. Haymen*, 2 H. & C. 918.) It appears from the Merchant Shipping Act 1854 itself, that a mortgagee has an interest in the ship capable of transmission by bankruptcy, death, or marriage (sect. 74), and on payment off of the debt secured by a registered mortgage and entry of the payment in the registry, the estate, if any, which passed to the mortgagee vests in the person in whom the same would have vested if the mortgage had not been made (sect. 68). The mortgagee, however, is not to be deemed the owner of the ship, except so far as may be necessary for making her a security for the mortgage debt (sect. 70). This section was inserted for his protection against liability which might have attached to him by reason of his interest in the ship (see *Dickinson v. Kitchen*, 8 E. & B. 789), and would have been quite unnecessary if the mortgage transferred no interest in the sense of ownership in her to him; or in other words if it created a mere charge on her in his favour. Sect. 72, which protects registered mortgagees of ships from the operation of the reputed ownership clauses of the Bankruptcy Acts, would also be unnecessary if a mortgagee had not such an interest in the ship as might render him her true owner within the meaning of those clauses. Again, the right of a post-registered mortgagee to take possession of the ship is too well settled to be capable of dispute; but the statute confers no such right in express terms, and it only exists by reason of the ownership transferred to the mortgagee by the mortgage itself; a mere charge would confer no such right. But as a mortgagee, unless in possession, would have no power of sale if it were not expressly conferred upon him; and as the mortgage contains no such power, the statute itself expressly confers it on registered mortgagees (s. 71). But this affords no argument against the view that the mortgage itself confers on the mortgagee an interest in the sense of ownership in the ship herself. The conclusion then to be drawn from the mortgage and the statute is that the mortgagee of a ship, like the mortgagee of any other property, acquires an ownership in the ship, viz., such ownership as the mortgagor has to give. A first mortgagee will thus acquire the whole ownership in the ship, but only of course as a security for his money, second and other mortgagees will only acquire the interest left in the mortgagor, or in other words, his right to redeem. That right will be legal or equitable, according as the time for paying off the first mortgage has not yet arrived or has passed. That this is the true nature of a mortgage of a ship appears not only from the above observations, but also from the following decisions: *Dickinson v. Kitchen* (8 E. & B. 789); and *Liverpool Marine Credit Co. v. Wilson* (L. Rep. 7 Ch. 507). The plaintiffs in this case having acquired by their mortgage the ownership of the ship, and that title being prior in point of date to the equitable assignment of the freight to the defendants, such title must prevail against them unless there be some sufficient reason to the contrary (see *Rice v. Rice*; 23 L. J. 289, Ch.). The only reason alleged is the non-registration of the plaintiffs' mortgage before the date of

the assignment to defendants. If an unregistered mortgage of a ship were null and void, or if it had no legal effect before the time of registration, then the title of the plaintiffs would have accrued after that of the defendants, and would have to be postponed to theirs (see *Lindsay v. Gibbs*, 22 Beav. 522). But the present Merchant Shipping Acts contain no enactment to this effect, and, as already observed, an unregistered mortgage is not now void; moreover, sect. 69 of the Act of 1854 enacts in effect that if there is more than one registered mortgage the mortgagees shall be entitled in priority one over the other according to the dates of registration. So far, therefore, as the Act itself is concerned, the only consequence of not registering a mortgage is to postpone it to a subsequent mortgage or a transfer, (see sect. 43), which is registered before it. But it was contended that upon general principles of equity, and apart from any statutory enactment, the plaintiffs had lost their priority by reason of their own negligence in omitting to register the mortgage. The case states that the defendants searched the register before they advanced their money on the freight, and they were therefore really misled by the non-registration of the plaintiffs' security, and it is contended that this is one of those cases which ought to be decided according to the rule that whenever one of two innocent parties must suffer by the acts of a third, the one who has enabled such third person to occasion the loss must sustain it. This rule is a well known rule both at law and in equity; but it is by no means easy of application, owing to the ambiguity of the word enabled. The plaintiffs did not register their mortgage, but they were not themselves party or privy to any fraud on the defendants. The plaintiffs did not know that money was being obtained on the security of the freight, and in truth there is nothing save the mere omission to register which can be urged against them. But the mere omission by a person to do something, which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss nor to deprive him of any rights which he would otherwise have had against that other. There are decisions to this effect both at law and in equity; one at law, *Arnold v. The Cheque Bank* (L. Rep. 1 C. P. Div. 578; 45 L. J. 562, C. P.; 34 L. T. Rep. N. S. 729), decided by this court during last sittings, where the cases at law are fully considered. In equity it is settled now that the mere omission by a first mortgagee to obtain the title deeds from the mortgagor is not sufficient to postpone the first mortgage in favour of a subsequent mortgagee who *bonâ fide* advances his money in the belief that the property is unencumbered, and who obtains the deeds, see *Evans v. Bicknell* (6 Ves. 173, 189); *Hewitt v. Loosemore* (9 Hare, 449). To postpone the first mortgage in such cases there must be either fraud or such gross and wilful negligence as is equivalent to it. In the present case but for Harrold's mortgage the plaintiffs would have had a clear prior legal title to the freight as against the defendants; and although if the plaintiffs had registered their mortgage when it was made the defendants would not have been misled, there was neither fraud nor such gross and wilful negligence imputable to the plaintiffs as is sufficient to deprive them of their prior legal rights. It

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remains to consider the effect of Harrold's mortgage. This although subsequent in point of date to the plaintiffs' mortgage was registered before it, and by sect. 69 of 17 and 18 Vict. c. 104, became entitled to priority over it. By reason of this statutory priority Harrold became first mortgagee of the ship and became entitled to take possession of her and to receive her freight. Having paid himself, he would hold any surplus for the benefit of the subsequent incumbrancers according to their priorities. In point of fact Harrold was content to look to the ship only, and he laid no claim to the freight. But the plaintiffs had also taken possession of the ship, and they claim freight as second mortgagees. The priority gained by Harrold cannot affect the rights of the plaintiffs as against the defendants, and Harrold's claim being satisfied, his mortgage may, for all present purposes, be disregarded. The mortgage of the plaintiffs became as between them and Harrold a second mortgage instead of a first mortgage, but the plaintiffs' mortgage continued to be, as it always was, prior in point of date to the assignment of the defendants. Even therefore if the plaintiffs' mortgage became for all purposes and as against all persons an equitable as distinguished from a legal mortgage, its priority in point of date remained unaffected. It was, indeed, contended that by reason of Harrold's mortgage and its priority over the plaintiffs' mortgage, this last could only be regarded as an equitable mortgage, dating from the time of registration. But this contention is based upon the erroneous supposition that an unregistered mortgage has no validity until it is registered. It was further contended that the plaintiffs having become second mortgagees had no right to take possession of the ship, and that their right to freight was, therefore, never perfected. But although a second mortgagee has no legal as distinguished from equitable right to possession, and although he cannot take possession as against a first mortgagee, yet as against all other persons he has a right to take possession, and can enforce such right if necessary by obtaining the appointment of a receiver, see *Liverpool Marine Credit Company v. Wilson* L. Rep. 7 Ch. 507; 26 L. T. Rep. N. S. 717, where the rights of a second mortgagee of a ship are pointed out. In this particular case the plaintiffs took possession, and it was, therefore, unnecessary to apply for a receiver; if they had neither taken possession nor applied for a receiver, still as the first mortgagee did take possession, it was probably unnecessary for the plaintiffs to do more than give him notice of their claim, for he would, after paying himself, hold all surplus monies received by him in trust for the persons beneficially interested in them according to their priorities. For these reasons our judgment is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Freshfield and Williams*.
Solicitors for the defendants, *Lowndes and Co.*

Friday Nov. 17.

HARRISON (app.) v. CARTER (resp.). (a)

Parliamentary franchise—Receipt of alms—Disqualification—2 Will. 4, c. 45, s. 36.

By 2 Will. 4, c. 45, s. 36, no person can be registered

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

as a voter who within a year before 31st July has "received parochial relief or other alms, which by the law of parliament now disqualify from voting."

Property was devised to trustees for charitable purposes, the overplus of the rents to be "distributed to the poorest inhabitants . . . as my said trustees . . . shall think fit."

The overplus was distributed yearly in small sums according to the discretion of the trustees.

Held, on a case stated by a revising barrister, that persons who had received a grant from this charity were disqualified.

APPEAL from the decision of a revising barrister. The following case was stated for the opinion of the court:

The Borough of Petersfield in the County of Hants.

1. At the court for the revision of the parliamentary list of voters for the above borough, held by me, the revising barrister, this 22nd Sept. 1876, one John Cook, of Weston, in the parish of Buriton, in the said borough, who was on the list of voters as an inhabitant householder in the said parish of Buriton, was duly objected to as not being qualified, inasmuch as it was alleged he had within twelve months next previous to the last day of July in the present year, received alms, which, by the law of Parliament, disqualified him from voting in the election of a member to serve in Parliament. The facts upon which this objection was founded and proved before me are the following.

2. In the year 1864, one John Goodger, by his will, left certain funds for charitable purposes.

The only portion of such will necessary for the consideration of this case is as follows:

I give and devise unto my honoured friend Leonard Bilson, Esquire, and my nephew Edmund Yalden, in the county of Surrey, clerk, and to his heirs and assigns for ever, all my messuage dwelling house, together with all the barns, stables, outhouses, and buildings, and all the gardens and orchard thereunto belonging, situate in Weston aforesaid, called Halfpenny Land, now in the possession of Thomas Jacques, together with the free liberty to water and overflow, the said lands as it is now and heretofore hath been used for the best improvement thereof, to the intent and purpose that they the said Leonard Bilson and Edmund Yalden, and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage lands and premises, with the appurtenances, unto six, able honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit, upon trust and confidence, and to the intent and purpose that all the yearly rents, issues, and profits of the said messuage land and premises shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tything of Weston aforesaid, and the overplus thereof shall be distributed unto the poorest inhabitants of the said tything of Weston aforesaid as my said trustees and their assigns shall think fit.

3. The overplus, after making payments for education, apprenticeship fees, and sundry expenses generally amounts to about 40*l.*, which sum is distributed once in each year (generally in the spring) by the trustees amongst about eighty of the labouring population of the Tything of Weston, in the said parish of Buriton, according to their discretion in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.

4. Personal application is not made to the trustees, who make inquiry by themselves or their agent into the circumstances of the inhabitants of the Tything of Weston, and they decide who are

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fitting persons to receive, and who shall receive a grant from the charity, and of what amount that grant shall be.

5. The money was distributed on the 10th Jan. in the present year, and the said John Cook then received 12s. 6d., the largest sum granted.

6. The said John Cook, who is an agricultural labourer, is a married man with five children, and has from time to time applied for and received parochial relief. He was omitted from the list of voters for the year 1874-75 on the ground of the receipt of parochial relief, but he received no such relief in the electoral year which expired on the 31st July last.

7. That previously to the passing of the Reform Act of 1867 the said John Cook was not entitled to exercise the Parliamentary franchise, the house which he then occupied and now occupies being of insufficient value to confer a qualification under the Reform Act of 1832, and he being not otherwise qualified.

8. The said John Cook was a proper recipient of the charity.

9. The court is to be at liberty to draw inferences of fact.

10. Upon objection taken that this was a receipt of alms, which incapacitated the said John Cook, I decided it was not such a receipt, and I refused to expunge the name of the said John Cook from the said list of voters, and his name was accordingly retained thereon.

11. The question for the consideration of the court is whether or not I did right in retaining the name of the said John Cook on the said list of voters.

There was a similar appeal in the case of Edmund Port, the facts were substantially identical with those in Cook's case, with the exception that Port had never actually received parochial relief; he had applied for it on one occasion but his application had been refused. The two cases were argued together.

Arbuthnot, for the appellant.—The decision of the revising barrister was wrong, and the names of these two persons ought to be struck off the register, for they are disqualified by 2 Will. 4, c. 45, s. 36, by which no person is entitled to be registered in any year who, within twelve calendar months before 31st July in that year, has "received parochial relief or other alms which by the law of Parliament now disqualify from voting," &c. This question was raised as to this same charity in the case of the Petersfield Election Petition, *Stowe v. Jolliffe* (L. Rep. 9 C. P. 734; 43 L. J. 173, C. P.; 30 L. T. Rep. N. S. 795), but it became unnecessary to decide it. The proper rule as to what are such alms as disqualify is that a distinction is to be made between cases where the recipient has a vested right to the proceeds of the charity, and those where the mode of distribution is dependent on the will of the person distributing. The object of the disqualification is to ensure independence in voters, and a person who receives alms which it is in the discretion of another to give or to withhold is not likely to exercise the franchise independently. [Lord COLERIDGE, C.J.—Some of the cases seem to point to the principle that alms which disqualify are those which can be said to be in aid of the parochial relief.] The cases collected in Rogers on Elections, 12th edit., pp. 213-215, are conflicting. *Smith v. Hall* (33 L. J. 59, C. P.), is distinguishable

from the present case, for there the persons whose right to vote was upheld were members of a foundation, and therefore could not be influenced in the exercise of the franchise as the recipients of this charity could. The principle now contended for is supported by the judgments in that case. Here, by the terms of the will, the recipients of the charity were necessarily the most indigent persons in the borough, and therefore the least likely to exercise the right of voting independently.

Anstie, for the respondent.—The true distinction is that alms which form part of or stand in the place of relief from the poor rate disqualify, but alms in the discretion of trustees do not. In *R. v. Mayor of Lichfield* (2 Q. B. 693) where a similar clause disqualified persons who had received "parochial relief or other alms," it was held that the word "parochial" applied to alms as well as to relief. See also *Reg. v. Inhabitants of Halesworth* (3 B. & Ad. 717). The principle contended for on the other side cannot be correct, for parochial relief is given not of grace but as a right to those qualified to receive it, yet the recipients are expressly disqualified. The *Bedford Cases*, *Harpur's Charity* and *Hawes's Charity* (Rogers on Elections 12th edit. 213) are authorities in favour of the respondent, and *Welborn's Charity* (*ibid.*) is distinguishable, because there the alms were distributed by the overseers, and it conflicts with the *Colchester case* (*ibid.*). See also the *Downton case* (*ibid.*). The appellant is attempting to upset the right to vote, and the burden of proof lies on him.

Arbuthnot in reply.—The *Aylesbury case* (Rogers on Elections 213) is in favour of the appellant. *Reg. v. The Mayor of Lichfield* (*ubi sup.*) was decided on a different statute, and is not in point here. [LORDLEY, J. referred to the *Bishop of Hereford v. Adams* (7 Ves. 324)].

LORD COLERIDGE, C.J. (having stated the facts). Now it cannot be disputed that alms have been received; in one of the cases parochial relief had also been received, but not within a year before the last day of July in the present year, and therefore what we have to try is whether the alms which have been received are alms which by the law of Parliament disqualify from voting in the election of members to serve in Parliament. The law of Parliament means the law with regard to the right to vote, as it was administered by Parliamentary committees until the jurisdiction was transferred to the Court of Common Pleas, and the law as administered by the Court of Common Pleas, and, since the coming into operation of the Judicature Acts, by the Common Pleas Division of the High Court of Justice, on appeals from revising barristers and election petitions. We have to try if we can extract a principle which will govern these cases from the decisions of the Committees of the House of Commons, or from the decisions of the court, but, as has been pointed out in the argument, it is very difficult to extract any satisfactory principle from the decisions of Committees of the House of Commons in these cases. It was suggested from the Bench in the course of the argument that the principle might be that alms would disqualify which were part of the parochial relief or in aid of parochial relief, and that view is to a certain extent supported by some of the cases which have been cited; but after all it does not seem to throw very much light upon the

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question, for suppose a person were in receipt of a payment, say of ten pounds a year from a charity, without which he would be unable to support himself, in such a case it would be difficult to say that this was not a payment in relief of the rates, for it would enable the recipient to live without receiving parochial relief when otherwise the expense of his maintenance would be on the rates. Very few cases have been decided on this question in the Court of Common Pleas, but we find in *Smith v. Hall* (*ubi sup.*), though the case is not quite in point here, a principle laid down in argument and to a certain extent adopted in the judgment, which throws some light on the present case. That was a case where the persons whose votes were objected to were the brethren of a hospital, and no doubt in one sense they received alms; but the same might also be said in the case of colleges at Oxford and Cambridge, where persons on the foundation receive the benefit of eleemosynary endowments, and it is quite clear that a fellow of a college would not be disqualified from voting at an election for the city or borough, if he possessed a house or in any other way had the necessary property qualification. The principle striven for by Mr. Welsby in arguing that case was that the brethren of the hospital were not disqualified because they were not dependent on the caprice or goodwill of any person for their share of the benefits of the charity, and in giving judgment Erie, C.J., says, "These persons are entitled to vote unless they are disqualified by the 36th section of the Reform Act . . . if we look to the meaning of the enactment in question, I think it will be evident that the reason why the persons there mentioned are disqualified is because it is considered that from being so situated they are likely to be subservient, and not to have that independence which a workman ought and might be expected to have. But I take it that these persons, having a house of their own, and a share in the proceeds of certain lands for life, would, in all probability, be more independent than many persons who have nothing to subsist on but the profits of their own labour." Williams, J. in his judgment says, "Shepherd, an able and accurate writer, in his work on Elections (2nd edit. p. 5) adopts the very words of Serjeant Heywood. 'A distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn.' (Heywood on County Elections, 2nd edit., p. 278). It seems to me impossible to hold that these persons are in a state of indigence or abject dependence, and that we ought not to hold them to be disqualified." Now as far as one can extract the principle of that case it seems that the persons whose right to vote was in question there were held qualified because they were not in a state of indigence and dependence, and it follows that persons who receive alms of such a nature as to show that they are in a state of indigence and dependence ought to be held disqualified. What then is the case here? Both these persons have, on previous occasions, made application for parochial relief, and one of them has received it; in fact, both of them appear to be on the very verge of the necessity of coming to the parish to keep themselves and their children alive; the

charity by which they have been relieved is a charity for the benefit of the poorest inhabitants, and the distribution of the relief given is in the discretion of the trustees. It is obvious that this is just such a condition of things as the provisions of the Act were meant to apply to, for such a charity as this is capable of being misapplied in the very mode in which parliament thought that charitable relief might be misapplied unless the disqualification were established. Although there is no ground for suggesting that anything of the sort is the case here, still it is obvious that such a charity as this might be used for purposes which neither Parliament nor this court would sanction. I think, therefore, that these persons do come within the disqualifying provisions, and ought not to have votes. It may be that in Chancery the word "poorest" in this will would be construed as "poor" was in the *Bishop of Hereford v. Adams* (*ubi sup.*), but, however this may be, looking at the words of the statute it seems that these persons have been in the receipt of such alms as in the opinion of Parliament would have disqualified the recipients from voting at the time when the Reform Act was passed. The decision of the revising barrister will, therefore, be reversed.

LINDLEY, J.—I am of the same opinion. It is found in the case that these persons possessed the qualification necessary to entitle them to vote, subject to the question whether they were disqualified from having received a payment of 12s. 6d. under the circumstances stated. It turns on the construction of 2 Will. 4, c. 45, s. 36, and the question is, did they receive parochial relief or other alms which would disqualify them? It is found that they have not received parochial relief within a year, and therefore the question is whether they have received "other alms" within the meaning of the section. Suppose the section had stopped at the word "alms," it would then have been necessary that the alms should have been *ejusdem generis* with parochial relief, which would be alms given by reason of the poverty of the recipient, and would include these alms which are expressly directed to be given to the "poorest" inhabitants. But the section does not stop there. It goes on, "which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." We must therefore find out if we can what is meant by such "other alms," and there is the difficulty, for it is not easy to see what the principle was on which the Committees of the House of Commons acted in deciding on this section. We must assume that there was a principle, and try to extract it, but it is not easy to do so, for in the reports of the decisions the reasons are not given, and the decisions themselves are contradictory. But there must be some principle underlying the decisions. First, it is said that the question is whether the alms are distributed by the parochial authorities, but I cannot say that it seems to me to be a sound principle to make the nature of the alms depend on the character of the trustees of the charity. Then the other principle is that the question depends on whether the recipient of the alms is likely to be dependent, and so to be easily influenced as to his vote. The case of *Smith v. Hall* shows that poverty alone will not do, if the person is permanently entitled to the benefits which he receives, and is not dependent for them on the caprice or goodwill

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of any other person. In such a case as that the mere receipt of alms ceases to be a disqualification. In this case all the evidence goes to show that it is exactly such a state of facts as was pointed at by the Act and the decisions. There is poverty, there is the receipt of alms, and there is the absence of independence, and where these three elements exist I think that the disqualification is made out. Therefore, although the burden of proof lies on those who question the franchise, I am of opinion that the necessity for proving the case is satisfied, and that the decision of the revising barrister must be reversed.

Judgment for the appellant in both cases.

Solicitor for appellant, *Soames*.

Solicitors for respondent, *Rogerson and Ford*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Nov. 11 and 16.

SNAILBEACH MINE COMPANY (LIMITED) (apps.) v. FORDEN GUARDIANS (resps.). (a)

Rateability of lead mine—Smelting works—Premises out of union—The Rating Act 1874 (37 & 38 Vict. c. 54), s. 7.

The appellants occupy a lead mine held under a lease, which comprises land and works in a neighbouring union, the mine and most of the works being in that of the respondents. After the ore is crushed and washed, it is taken by a tramway about half a mile to a smelting house, occupied under the same lease, in the neighbouring union, where the ore is converted into lead for sale. The appellants were rated under the Rating Act 1874, sect. 7, for their mine in the respondents' union at the amount of the whole of the dues payable in respect of the mine under the lease during the previous years. They were separately rated for part of the tramway to, and a chimney from, the smelting house, which were situated in the respondents' union; and were also rated by the neighbouring union for the land, works, and smelting house there situated.

Held, that all these crushing, washing and smelting works were included under the definition in sect. 7, as in connection with and for the purposes of the mine; and that a deduction should be made from the gross dues in respect of the rateable premises out of the union, in order to obtain the rateable value of the mine in the respondents' union.

This was a special case stated for the opinion of the court on an appeal against an assessment and supplemental assessment, and a rate in conformity with such assessments made for relief of the poor in the parish of Worthen, in the county of Salop, and in the Forden Union, on the appellants, as occupiers of a lead mine called the Snailbeach Mine, and of certain lands, buildings, machinery, and tramways connected therewith or adjacent thereto.

The said rate was made in conformity with the valuation lists as hereinafter mentioned, which were duly objected to before the assessment committee, who declined to interfere. All notices necessary for appeal to the quarter sessions were duly given by the appellants, the appeal was duly entered and respited, and by the consent of the parties and an order of Master Unthank, dated

20th Jan. 1876, the following case was stated under 12 & 13 Vict. c. 45, s. 11, for the opinion of the court:

1. The Forden union comprises, with others, the parish of Worthen, which adjoins the township of Minsterley, in the parish of Westbury, in the same county, but which township of Minsterley is comprised in the Atcham union.

The appellants occupy the Snailbeach mine as lessees under two several leases, one from the Earl of Tankerville, dated the 25th March 1858, and the other from the Marquis of Bath, dated 1st Nov. 1874. The whole of the lands comprised in the said lease from the Earl of Tankerville are situate in the parish of Worthen aforesaid, but the said lease from the Marquis of Bath comprises lands and works part of which are in the parish of Worthen aforesaid, and part in Minsterley township aforesaid.

3. The particular parts of the underground workings from which ores are at this moment actually obtained are wholly situate in the parish of Worthen, some of them being comprised in the lease from the Earl of Tankerville, and the residue in the lease from the Marquis of Bath.

4. The underground works are connected with the surface by two vertical shafts, worked by means of two steam engines, one of which is used for lifting the ore and spar in which it is found embedded, and the other for pumping the water from the underground workings.

5. The mixed spar and ore when so raised from the underground workings is conveyed to a landing stage situate about 20 yards from the top of the shaft (which is on the hill side), and thence conveyed to the surface in waggons through a horizontal level or tunnel about 154 yards in length to an outlet, also in the parish of Worthen. The spar and ore is then dealt with by the appellants in manner hereinafter described.

6. The steam engines, shafts, tunnel, and outlets therefrom respectively, are situated in the parish of Worthen, and within the land comprised in the lease from the Marquis of Bath.

7. The spar and ore, when brought to the outlet, is conveyed a distance of about 30 yards, by a tramway, to a tip, where the blocks of spar are deposited on a floor. By the operation of tipping a certain amount of breakage results, and some small ore is separated from the mass.

8. The unbroken masses are then conveyed a few yards, by wheelbarrows, across the parish boundary, to a crushing house, situated in the township of Minsterley, and where, by the operation of crushing, the ore is made separable from the spar in which it had been embedded. This crushing is effected by passing the material between iron rollers or wheels worked by steam. It is then taken, together with the small ore, to washing floors, which are situate entirely within the township of Minsterley, in the Atcham union, and by the process of washing the ore is separated from the spar, and so rendered fit for smelting. The ore in point of fact sinks to the bottom, as being the heavier, and the lighter spar is washed away.

9. The great bulk of the ore, when washed, is shot into a receptacle beneath the washing floor by means of a tunnel about 50 yards long; it is conveyed to the "ore bin," also in Minsterley parish, where it is weighed; the water from the washing floors, which still contains minute parti-

(a) Reported by M. W. McKILLAN, Esq., Barrister-at-Law.

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cles of crushed ore is passed through two pits, by which process the dust ore is precipitated and collected, and is afterwards conveyed to the ore bin.

10. After the ore is weighed it is taken by tramway to a smelting house, which is situated in the township of Minsterley, at a distance of about five-eighths of a mile from the bin. The ore is then smelted, whereby it is converted into lead for sale.

11. The whole of the tramway, from the outlet of the mine to the tip, is in Worthen parish, in land comprised in the lease from the Marquis of Bath; part of the floor on which the ore is deposited by the tip is in Worthen parish, in land comprised in the lease from the Marquis of Bath, and part in Minsterley township.

12. The crushing house, the washing floors (three in number), and all the works necessary for the subsequent operations, except portions of the tramway to the smelting house and of the flue of the chimney hereinafter described) are in Minsterley township.

13. The tramway, in its course to the smelting house, enters Worthen parish and traverses it for about a distance of 220 yards through lands comprised in the lease of the Marquis of Bath, when it recrosses the parish boundary into Minsterley township, and during the remainder of its course to the smelting house is situate in Minsterley township.

14. A straight underground flue passes from the smelting house, in the first place, about 748 yards through land in Minsterley township, and then about 484 yards through land in Worthen parish, and comprised in the said lease from the Marquis of Bath, and terminates by a chimney, which is also situate in that parish and in land comprised in that lease.

The flue and chimney are used for the purpose of collecting the small particles of lead which are carried away out of the smelting furnace by the heated air and smoke, and gradually deposited on the sides of the flue, from whence they are removed periodically; and such small particles of lead, when so collected, form what is commercially known as "fine dust."

15. All the works, buildings, and tramways described as in Minsterley township, in Atcham Union, are comprised in the lease from the Marquis of Bath.

16. All the surface works are situated on land comprised in the lease from the Marquis of Bath.

17. The leases under which the mine is occupied are each of them granted without fine on a reservation wholly of dues within the meaning of the Rating Act 1874; the leases were made part of the case.

18. The persons respectively receiving the dues under the leases are not liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues within the meaning of the Rating Act 1874.

19. The amount of the whole of the dues payable in respect of the mine, under the said leases, during the year 1874, was, under the lease from the Marquis of Bath, 3143*l.*, and under that from the Earl of Tankerville, 659*l.*

20. In July 1875, on behalf of the Forden Union, a substantial valuation list was duly deposited, in which the said mine was assessed as follows:—

No. 609. Occupier, Snailbeach Mining Company (Limited); owner, the Marquis of Bath; description, lead mine; situation, Snailbeach; gross estimated rental, 3143*l.*; rateable value, 3143*l.*; former amounts—gross 587*l.*, rateable value 440*l.*

No. 610. Occupier, Snailbeach Mining Company (Limited); owner, the Earl of Tankerville; description, lead mine; situation, Snailbeach and Lordeshill; gross estimated rental, 659*l.*; rateable value, 659*l.*; former amounts—gross 15*l.*, rateable value 12*l.* 10*s.*

The former amounts are those at which the surface works in connection with the said mine were assessed prior to the Rating Act 1874.

21. A supplemental valuation list was afterwards duly deposited on behalf of the said Forden Union, of which the following is a copy:—

Occupier, the Snailbeach Mining Company; owner, the Marquis of Bath; description, tramway from ore bin to smelting house, tunnel or flue from smelting house to chimney; chimney; situation, Snailbeach; gross estimated rental, 120*l.*; rateable value, 96*l.*

The amount of the gross and rateable value therein stated is correct, if the property described is separately rateable.

22. The "tramway" described in the last mentioned valuation list is part of the tramway from the ore bin to the smelting house described in the 13th paragraph hereof.

23. The "tunnel or flue from smelting house to chimney" is so much of the tunnel or flue described in the 14th paragraph hereof as is situate within Worthen parish. The chimney is that described in the said 14th paragraph hereof.

24. The said valuation lists were duly approved and confirmed and delivered to the overseers of Worthen aforesaid, and a poor's rate of 1*s.* in the pound was made by them on the 30th Sept. 1875, and duly allowed and published. The following is an extract from the said rate so far as it affects the said mine, tramway, tunnel or flue, and chimney:

No. 643. Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, tramway from ore bin to smelting house, tunnel or flue from smelting house to chimney, and chimney; situation, Snailbeach; gross estimated rental, 120*l.*; rateable value, 96*l.*; rate at 1*s.* in pound, 4*l.* 16*s.*

No. 644. Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, lead mine; situation, Snailbeach; gross estimated rental, 3143*l.*; rateable value, 3143*l.*; rate at 1*s.* in pound, 157*l.* 3*s.*

No. 645. Occupier, Snailbeach Mining Company (Limited); owner, Earl of Tankerville; description, lead mine; situation, Snailbeach and Lordeshill; gross estimated rental, 659*l.*; rateable value, 659*l.*; rate at 1*s.* in pound, 32*l.* 19*s.*

25. A valuation list was in 1875 duly deposited on behalf of the said Atcham Union in respect of lands and works connected with or adjacent to the said mine, situate within the said Atcham Union, of which the following is a copy:

Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, crushing and dressing machinery, tramways, outhouses, washing floors, offices, timber yard, workshops, part of tunnel, engines, and spoilbanks; situation, Snailbeach mine; gross estimated rental, 600*l.*; rateable value, 450*l.*

Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, smelting houses; situation, Snailbeach mine; gross estimated rental, 350*l.*; rateable value, 262*l.* 10*s.*

26. The crushing and dressing machinery, tramways, washing floors, part of tunnel, and smelting houses are those already described herein in paragraphs 8, 9, 10, 11, and 13, so far as the same are situate within Minsterley township in the Atcham Union.

27. The valuation list deposited by the Atcham

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Union has been appealed against by the appellants, but the decision of the assessment committee of such Atcham Union has not yet been made known to the appellants.

The questions for the opinion of the court are:—First, whether the whole of the land, surface works, smelting houses, and other matters and things hereinbefore described and included in the said supplemental valuation list of the respondents' union, and the said valuation list of the said Atcham Union are to be regarded as part of the mine, and so treated for rating purposes within the meaning of the Rating Act 1874, and as covered by the rate payable in respect of dues payable during the preceding year, or whether they are liable to be separately assessed and rated, as distinct and separate from the mine; secondly, if the answer to question one be that such lands, surface works, matters and things are not to be regarded as wholly included for rating purposes in the Snailbeach mine, then whether any portion thereof, and what portion, ought not to be so included, the court being respectfully requested to state the principle upon which the dividing line between those which ought not to be so included is to be drawn; thirdly, if the answer to question one be that such lands, surface works, matters and things are to be regarded as included for rating purposes within the Snailbeach mine, then are the appellants to be rated to the respondents' union and parish for the whole amount of the rateable value (i.e., the annual amount of the whole of the dues payable during the preceding year) of such mine, or are they entitled to any deduction in the assessment for the respondents' union by reason of part of the works being locally situated as hereinbefore described within the said Atcham Union, and liable to be assessed there also; the court being respectfully requested to state the principle upon which such deduction, if any, is to be made.

It has been and it is agreed that a judgment in conformity with the decision of the court, and for costs as this court shall adjudge, may be entered on motion by either party at the quarter sessions next, or next but one, after such decision shall have been given.

Nov. 11.—*Webster* (with him *Venables*) argued for the appellants.—The mining company are rated in the parish of Worthen at the amount of the whole of the dues payable in respect of the whole mine, although they are also rated in the parish of Minsterley for the proportion of dues in respect of the surface premises in that parish. There is also a separate assessment of the smelting house and premises which must now be taken to be part of the mine. The section of the Rating Act 1874 (37 & 38 Vict. c. 54) which is important for the decision of these questions is the 7th. "Where a tin, lead, or copper mine is occupied under a lease or leases granted without fine on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st Dec. preceding the date at which the valuation list is made in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for

repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable, shall be deducted from the gross value for the purpose of calculating the rateable value. In the following cases, namely: First, where any such mine is occupied under a lease granted wholly or partly on a fine; secondly, where any such mine is occupied and worked by the owner; and, thirdly, in the case of any other such mine which is not excepted from the provisions of this Act, and to which the foregoing provisions of this section do not apply, the gross and rateable annual value of the mine shall be taken to be the annual amount of the dues or dues and rent at which the mine might be reasonably expected to let without fine on a lease of the ordinary duration according to the usage of the country if the tenant undertook to pay all tenant's rates and taxes, and tithe rentcharge, and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of dues or dues and rent. The purser, secretary, and chief managing agent for the time being, of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof. In this section the term 'mine,' when a mine is occupied under a lease, includes the underground workings and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling houses), and works and surface of land occupied in connection with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues or dues and rent are payable or reserved. The term 'dues' means dues, royalty, or toll, either in money, or partly in money and partly in kind; and the amount of dues which are reserved in kind means the value of such dues. The term 'lease' means lease or sett or licence to work or agreement for a lease or sett or licence to work. The term 'fine' means fine, premium, or foregift, or other payment or consideration in the nature thereof." The only case in which this Act has been discussed with respect to a lead mine is *The Van Mining Company (Limited) v. Llanaidloes* (L. Rep. 1 Ex. Div. 310), but no interpretation was there put upon what was to be included under the words "in connection with the mine."

McIntyre, Q.C. (with him *Arbuthnot*) for the respondents.—Nothing can be said to be in connection with and for the purposes of the mine, which is for the purpose of dealing with the material after it has been brought to the surface. If the premises for smelting are to be included in the mine itself, the words of the definition must be read as if they were also "and relating to the manufactory of the ore." The effect of the Rating Act 1874 is to make mines rateable besides the premises connected with them which were rateable before. In *Rees v. Earl of Pomfret* (5 M. & S. 139), a rate was imposed in respect of one-fifth share of the lead to be smelted from the ore raised from some lead mines, of which the appellant was owner of the ore. Lord Ellenborough, in his judgment, said, at p. 143, "But this is not a reservation of any part of the thing demised, it is not a reservation of any part of the ore, or of the mineral, in its natural and primitive

state, but of something of a quality, name, and character entirely different; of a metal produced from that mineral by the laborious and expensive process of smelting, in which the native mineral is mixed with another matter, viz., with coal or charcoal; and by the effect of fire upon both a metal is obtained which is to be considered, for this purpose at least, as entirely different from either of the two, and rather as a manufacture of art and labour resulting from the use and application of these materials than the original earth itself." This is a conclusive authority for the respondents with respect to the smelting-houses and the tramway leading to them; and this being so, where should the line be drawn, except at the arrival of the ore on the surface? In the case of *Talargoch Mining Company v. St. Asaph Union* (L. Rep. 3 Q. B. 478), a watercourse for the purpose of working the machinery connected with a lead mine was held to be rateable apart from the mine, although the mine was not rateable. So with respect to the surface lands, buildings, machinery, workshops, and tramways in connection with an iron mine, in *Guest v. East Dean* (L. Rep. 7 Q. B. 334). [CLEASBY, B.—The definition of mine in the Act of 1874 expressly includes some premises of this kind. MELLOR, J.—These cases, therefore, do not touch the questions we are asked.]

Webster in reply.—There is no reason why under this definition of a mine the whole of the appellants' premises in the parish of Worthen should not be assessed together. But even if there should be a distinction between the dressing and the smelting houses, the whole of the dues payable in respect of the mine under the leases is too high an amount for the assessment of the mine in one parish only. The respondents must abide by the definition in sect. 7, or the whole assessment would under sect. 13 be bad, according to *The Van Mining Company (Limited) v. Llandiloes*.

MELLOR, J.—I think it is not necessary for us formally to answer all these questions reserved for us. The contention in the case depends upon the construction of the definition of a mine contained in sect. 7 of the Rating Act 1874, and we are of opinion that Mr. Webster is right so far that the rateable value of the mine in this parish must be estimated at a reduction from the gross value under the leases by so much of the dues payable in respect of the premises on the surface in the parish of Minsterley, and also by so much of the dues payable in respect of the buildings in the same parish which are separately rated. Whether the smelting house and the tramway are to be taken as works occupied in connection with and for the purposes of the mine is a matter which we will further consider if necessary. The proportional deductions are all questions of fact, and the amount must be settled elsewhere. We are clearly of opinion that there must be a diminution from the gross receipts of the value of the hereditaments separately rated in order to obtain the rateable value of the mine.

CLEASBY, B.—It seems to me that sect. 7 of the Act is conclusive as to our judgment for the appellants. I think it was intended to be a guide for the rating of mines, and it abolishes all principles to be inferred from previous cases on the subject. I certainly see no intention in the section to enable the rating authorities to assess any part of the mine twice over; and if there be any buildings, or other

premises which should be rated separately from the mine itself, either in consequence of their position in another parish, or their not being connected with or for the purpose of the mine, then a deduction must be made in respect of those premises from the gross dues payable under the lease of the mine. And if the gross dues are the right measure of the rateable value, none of the premises for which those dues are payable ought to be rated a second time. This will necessarily involve some reduction of the rateable value, and for myself I may say I see nothing in this case to separate any of the buildings or works mentioned from the mine itself. There must be a deduction from the assessment of the amount of the dues proportional to the buildings in the next parish; in this we both agree. It seems to me that the smelting works are in connection with and for the purpose of the mine, but of this we will consider further.

Nov. 16.—CLEASBY B.—Upon further consideration my brother Mellor and I agree that no distinction can be drawn upon the facts stated in this case between the smelting house and the other parts of the mine. They all, in our opinion, come within the definition of the 7th section of the Rating Act, and are in connection with and for the purposes of the mine. It seems, however, as the case is stated, that it can be no consequence to the appellants whether the smelting works are rated separately or not. We have already decided that a deduction must be made from the gross dues in respect of works otherwise rated in order to obtain the rateable value of the mine itself, and apparently it cannot affect the total rateability whether the separate assessment of the smelting works be struck out, or whether the mine be assessed at a proportional reduction. At all events, if it be of any importance, we are prepared to hold that upon the statement of this case the term "mine" includes these smelting works.

Judgment for appellants with costs.

Solicitors for appellants, *Dean and Taylor*, for *Longueville, James, and Williams*, Oswestry.

Solicitor for respondents, *Charles Francis*, for *W. Wilding*, Montgomery.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

(Before the Right Hon. the President, Sir J. HANNEN.)

Tuesday, June 20.

WHITLEY v. HONEYWELL AND OTHERS. (a)

Probate suit—Service of writ—Order IX., rules 2 and 3—Substituted service—The new practice assimilated to the old—Service by advertisement. Where a writ cannot be personally served upon one of several defendants by reason of his address being unknown and not ascertainable, the court will not dispense altogether with the service, but will direct service of the writ to be effected by advertisement, following the old practice of the Court of Probate in the service of citations.

CHARLOTTE HUNT executed her last will on 31st May 1865, and thereby left all her property to the plaintiff and another upon trust for two of her children, Anne and Henry, but, in case Henry died in her lifetime, then the whole to Anne

(a) Reported by H. B. DRAKE, Esq., Barrister-at-Law.

[PROB.]

In the Goods of ANNA MARIA ROTTON.

[PROB.]

absolutely. To her other daughter, Mary, she left nothing. Shortly after the execution of this will the testatrix became insane, and remained so until her death on 5th Feb. 1876. Henry went to sea many years ago, and had not since been heard of. Mary was married to Thomas Honeywell, but had been deserted by him, and had lived separately for many years. Upon the death of the testatrix Mary announced her intention of opposing the will, on the ground of insanity, and the plaintiff thereupon, as surviving executor, commenced this action in order to get the will proved in solemn form, making the two daughters and their respective husbands defendants in the suit. All the defendants were served personally except Thomas Honeywell, the husband of Mary, who was believed to be abroad, but whose address could not be ascertained. The solicitors who usually acted for Thomas Honeywell declined to give an undertaking on his behalf on the ground that they did not know where he was, and therefore could not communicate with him and obtain his instructions.

Candy now moved the court for an order under Order IX., rule 2, to dispense altogether with service on the defendant Thomas Honeywell, or in the alternative for an order under Order IX., Rule 3 that the wife be served without service on the husband. He argued that no injustice could be done by either order, as the defendant Thomas Honeywell had no interest in the suit except as the husband of another defendant, who took nothing under the will, and who was moreover practically a *feme sole*. Personal service was impossible, as no one knew where Thomas Honeywell, even if he were alive, was now living, and the only persons who had acted as his agents in this country declined to accept service on his behalf. His last address was Victoria, New South Wales, but that was long ago, and there was no ground for believing him to be there now.

The PRESIDENT.—Let service be effected by advertising the writ in the same form and manner as a citation would have been advertised in such circumstances under the old practice, in New South Wales and English newspapers. The details will be settled in the registry.

Solicitors for the plaintiff, Whyte, Collisson, and Prichard, for W. Perkins and Candy, Southampton.

Tuesday, Nov. 7.

(Before the Right Hon. the President, Sir J. HANNEN.)

IN THE GOODS OF ANNA MARIA ROTTON. (a)

Probate of informal documents—Documents not inconsistent with each other—All may be read as one will and admitted to probate.

Where several testamentary papers are found after a decease each consistent in all important respects with the others, the whole will be taken to form one will and will be admitted to probate as such even where one or more may be irregular in form and imperfect in attestation.

ANNA MARIA ROTTON died on the 16th Sept. 1876, and after her death four testamentary documents were found to be in existence. (1.) A will duly executed and attested. (2.) An informal document but signed by the testatrix and two persons,

and without any attestation clause and bearing two dates 31st Jan. and 1st Feb. 1870. (3.) An informal document but duly signed and attested. (4.) A duly executed and attested codicil. The purport of these four documents read together was to give all her property, with the exception of certain legacies, to her son Lieut.-Col. Arthur Rotton. In the first document he and John Radcliffe Battersley were appointed joint executors. In the third, however, he was appointed sole executor, Battersley being omitted. This inconsistency was unimportant as Battersley now renounced the executorship.

C. A. Middleton moved that probate might be granted of all or some or one of these four testamentary documents to Lieut.-Col. Arthur Rotton. The first document was a will duly executed and attested; it was dated 8th Feb. 1868 and was declared the last will and testament of the deceased who therein appointed Arthur Rotton and John Radcliffe Battersley, executors thereof. The next in order of date was a testamentary paper which might be taken to be a codicil to the first document though it did not on the face of it purport so to be. It did not refer in any way to any previous document, but was not inconsistent with the provisions in the first document. The peculiarity in this instrument, however, was that it had on the face of it two dates 31st Jan. and 1st Feb. 1870, and it bore no attestation clause, merely the signatures of the testatrix and of two other persons and possibly the court might not be satisfied that the provisions of the Wills Act had been complied with. The third document was peculiar in many points. First it appointed Arthur Rotton, sole executor, thereby revoking the appointment of Battersley. With this exception the terms of the document were not inconsistent with either of the earlier documents and as bearing on this inconsistency he quoted the case *In the goods of Lowe* (3 Sw. & Tr. 478). The document purported to be the last will and testament of the deceased, was duly executed and attested and bore date 9th Feb. 1870. The last document in order of date was a codicil dated 10th June 1873, "to my last will and testament" thereby expressly reviving a former instrument whether (1.) or (3.) or both it was for the court to say. There were some parts of this document very slightly inconsistent with the other three documents, but the inconsistencies were so slight that the court might fairly read that document harmoniously with the other three: (*In the goods of Petchell*, 3 L. Rep. P. & D. 153.) Generally, all the four documents are sufficiently consistent with each other to form one simple and intelligible instrument, and, Battersley having renounced, it was asked that probate of some or one or all of these four documents be granted to Lieut.-Col. Arthur Rotton.

The PRESIDENT.—Let a grant of probate go to Lieut.-Col. Rotton of all four documents.

Solicitors for the executor, Guscotta, Wadham, and Daw, 19, Essex-street, Strand.

(a) Reported by H. B. DRAKE, Esq., Barrister-at-Law.

ADM.]

THE VIRGO.

[ADM.]

ADMIRALTY BUSINESS.

Nov. 6, 11, and 17.

THE VIRGO. (a)

Damage—Inevitable accident—Inherent defect in machine—Costs.

The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there was an inherent latent defect, in the absence of any negligence in the user of the apparatus.

The *William Lindsey* (L. Rep. 5 P. C. 338; 29 L. T. Rep. N. S. 355) followed.

Where the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay the costs, unless he might have known that there was, apart from the merits, a good legal defence.

This was a cause arising out of a collision which took place in the River Thames at 10 a.m. on 17th June 1876, between the schooner *Gem*, which was lying at anchor, and the screw steamship *Virgo*, which was steaming down the river. There was no material difference between the parties as to the weather, which was described as fine and clear. The *Virgo* struck the *Gem*, which was lying across the river, and head to wind, nearly amidships, with such violence that she sank, and her cargo of ice floated out. It was alleged in the statement of claim, on behalf of the *Gem*, that the collision and damage were caused by, and were wholly attributable to, the neglect, default, or mismanagement of the *Virgo*, or of those on board her, and that no blame in respect of the said collision or damage was attributable to the *Gem*, or to any of those on board her.

The General Steam Navigation Company, owners of the *Virgo*, in their statement of defence, alleged that the *Virgo* was proceeding about six knots an hour, and that the *Gem* was seen at a distance of half a mile, and continued:

4. As the *Virgo* approached the *Gem*, proper measures were taken in due time by starboarding the helm of the *Virgo*, to steer the *Virgo* clear of the *Gem* without danger of collision; but as the helm of the *Virgo* was being starboarded, her steering gear broke, and she could not be made to answer a starboard helm, and although her engines were promptly stopped and reversed full speed, she with her stem came into contact with the starboard side of the *Gem*.

5. The said breaking of the steering gear of the *Virgo* happened without any neglect or breach of duty on the part of the defendants, or of those on board the *Virgo*, and the said collision was not occasioned by any neglect, default, or mismanagement on the part of those on board the *Virgo*, and the said collision was the result of inevitable accident.

On the defence issue was joined, and the case came on before the Judge and Trinity Masters, on the 6th Nov. 1876.

It was proved that the *Virgo* had some short time previously to the accident ported to go ahead of a ketch which was working up the river, and had steadied again after doing so, and that the order was just given to "starboard" to clear the *Gem*, when it was reported to the master that something was wrong with the steering apparatus (a patent one), which would not move; the engines were at once stopped, and the master went aft, before he got aft it was reported to him that the wheel was all right, and thereupon the pilot started the engines on again as before. Almost immediately,

when the engines had only made three revolutions, the master observed that the movement of the wheel produced no corresponding movement of the tiller and rudder, and he at once ordered the engines to be stopped, and reversed full speed, but before the way of the ship was stopped, the collision had happened.

After hearing the evidence and argument on the facts the Judge retired with the Trinity Masters and put the four following questions to them, which he afterwards stated in the course of his judgment:

(1) Was the *Virgo* under the circumstances bound to keep her engines stopped?

(2) Was she bound to anchor?

(3) Was she wrong in crossing the bows of the ketch?

(4) Was she going too fast?

All of which they answered in the negative. The argument of the point of law whether under these circumstances the *Virgo* was liable for the damage was postponed till 13th Nov. 1876, when

Milward, Q.C. and Edward Pollock, for plaintiffs.—It is for the defendant to prove inevitable accident, and they have not done so. The screw of the steering apparatus was not sufficient for its purpose, or it would not have broken with an ordinary strain. If the strain was extraordinary there was negligence on board the *Virgo* in putting her in a position when it became necessary to put on such a strain. There is no evidence to show how it was broken, and therefore negligence of some sort must be presumed to have broken it. After it was broken the accident might have been avoided if the *Virgo* had reversed her engines at once, or anchored, or even continued stopped, but notwithstanding distinct notice that something was wrong with the steering apparatus, the ship was allowed to proceed on a mere suggestion that it was all right again without any steps being taken to ascertain what had been wrong, and this in itself is negligence causing the collision. The cases where an inherent defect in a machine undiscoverable by ordinary means has been held to relieve the party using it from liability for damage done by it are cases of contract: *Redhead v. Midland Railway Company* (L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628). There the passenger carried could not make the carrier of passengers liable for anything outside of the contract, which was to use reasonable care; here there is no contract, it is a tort or trespass, and the defendant is liable for any damage he does. There is no reason why the plaintiff should suffer loss because the defendant uses a machine insufficient for its purpose. It has been laid down by the Privy Council that a plaintiff to avail himself of the defence of inevitable accident, "must take all such precautions as a man of ordinary prudence, and skill, exercising reasonable foresight, would use to avert danger:" (*The William Lindsey*, L. Rep. 5 P. C. 338; 29 L. T. Rep. N. S. 355.) And in that case it was held that those conditions were satisfied; here it has not been shown that they were. Where a machine is under the management of a person, and an accident happens out of the ordinary course by means of the machine, it affords reasonable evidence of negligence in the person using it (*Scott v. London and St. Katharine Docks Company*, 3 H. & C. 596; 13 L. T. Rep. N. S. 143), and that is the present case.

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Butt, Q.C., Aston, Q.C., and E. C. Clarkson, for the defendants.—This case cannot be distinguished from *The William Lindsay* (L. Rep. 5 C. P. 338; 29 L. T. Rep. N. S. 355). That it was done by a jerk or undue strain is a new case entirely and cannot be raised now, it was a question for Trinity Masters: (*The Marpesia*, 1 Asp. Mar. L. C. 263.) We have satisfied the onus of proof by showing that we took reasonable care. To anchor would have been certainly dangerous and probably useless: (*The O. M. Palmer*, 29 L. T. Rep. N. S. 120.) The case is stronger than that of *Readhead v. Midland Railway Company* (L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628). If a carrier of passengers has no liability in such a case to a person whom he has contracted to carry safely, *à fortiori* he has none to a third party. If we get judgment we are entitled to our costs; the plaintiffs knew our defence, and had every opportunity of ascertaining by inspection and otherwise its validity.

The London, B. & L. S. 82; 9 L. T. Rep. N. S. 348;

The England, 5 Notes of Cases 176;

The Royal Charter, L. Rep. 2 Adm. 362; 20 L. T. Rep. N. S. 1019.

Edward Pollock, in reply, and on subject of costs.—Should judgment be against us it will be without costs.

The Marpesia, L. Rep. 4 P. C. 312.

Nov. 17.—Sir ROBERT PHILLIMORE.—In this case of collision, in which the plaintiffs are the owners of the vessel *Gem*, and the defendants the owners of the vessel *Virgo*, the case for the plaintiffs is that on the morning of the 17th June 1876, the *Gem*, a small schooner, was riding at anchor in a proper place near the Deptford buoys in the Thames, that the *Virgo*, a large screw ship, ran into her and sunk her. The defence of the *Virgo* is that she was going up the river with a good look out, at the rate of six knots, that she saw the *Gem* about half a mile off, that having ported for a few barges, which she cleared, she then steadied and afterwards starboarded, which was the proper manœuvre to clear the *Gem*; that at this time there was no danger of collision, if she had answered her starboard helm, but the second mate came to the captain and told him there was something amiss with the wheel, and at the same time the man came from the wheel and reported to the captain that there was something wrong with the helm, the captain ascertained that the rudder and wheel were not acting together and gave, through the pilot, the order to stop and reverse. It appears that very shortly before this time, something wrong had been discovered, but the mate having reported "all right," an unsuccessful attempt had been made to go on. That in consequence of this breaking of the steering gear the *Virgo* did not answer her starboard helm, and ran with her stem into the starboard side of the *Gem*. In these circumstances the contention is that the collision was the result of inevitable accident. It was argued on the part of the *Gem*, first that the accident was not inevitable, and secondly that if inevitable the *Virgo* was still liable for the damages which she had inflicted on the *Gem*. On the part of the *Virgo* evidence of the most conclusive character was produced to show that the steering gear was thoroughly good in every respect when it was put up in the vessel in the proper manner; and that it had been surveyed from time to time, and reported to be in perfect condition; that the accident had happened in consequence of the pis-

ton breaking off under the nut; that on examination of the piece of iron, which was produced in court, two small flaws were discovered in the centre of it which had caused the iron to break, that these flaws were latent, not to be detected by any means, probably formed in the course of use by some severe straining of the helm. The grounds upon which the *Gem* contended that the accident was not inevitable were that it might have been avoided; first, by her stopping dead in the first instance, before the man came from the helm; secondly, by anchoring; thirdly, by having proceeded at a slower rate; fourthly, by having gone astern of the barges, instead of crossing their bows. All these points I submitted to the Trinity Masters, and they advised me, upon a consideration of all the circumstances, that with respect to none of them was the *Virgo* to blame. The advice appeared to me to be sound, and I followed it. There then remained these questions of law: First, Whether the *Virgo* had discharged the burden of proof which lay upon her of showing that the accident was inevitable? I was of opinion that she had. Second, though the *Virgo* was guilty of no negligence, and the accident was inevitable, whether she was not still liable for the damage to the *Gem*? I am of opinion that on this point the case falls within the principle of law laid down by this court, and by the Privy Council in the case of *The William Lindsay* (29 L. T. Rep. N. S. 355; L. Rep. 5 C. P. 338), in aid of the authority of which might perhaps be cited the decision in the case of *Readhead v. Midland Railway* (L. Rep. 2 Q. B. 412), affirmed on appeal to the Exchequer Chamber (L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628), and that the defence of inevitable accident must prevail. With respect to costs I shall make no order. The cases referred to by the defendants' counsel were those in which the plaintiffs must or might certainly have known that the defendants had, apart from the merits, a good legal defence. I am of opinion that in this case the plaintiffs had a right to compel the defendants to prove the facts upon which they relied. The *Virgo* is dismissed from the suit, and no costs on either side.

Solicitors for the plaintiffs, *Harper, Broad, and Battcock*.

Solicitor for the defendants, *W. Batham*.

CROWN CASES RESERVED.

Saturday, Nov. 18.

(Before COCKBURN, C.J., KELLY, C.B., BRANWELL, B., BRETT, J., AMPHLETT, B., ARCHIBALD, J., POLLOCK, B., and FIELD, J.)

REG. v. TATLOCK. (a)

Larceny Act—Broker embezzling proceeds of securities—*Marine policies*—*Chattel*—*Securities* for payment of money—*Valuable security*—24 & 25 Vict. c. 96, s. 75.

An insurance broker was employed by prosecutor to effect three policies upon a vessel, which he did, advancing the premiums. A total loss having occurred the broker received the necessary documents from the prosecutor to collect the moneys insured, and thereupon collected the amounts due upon two of the policies, by cheques payable to his

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

C. CAS. R.]

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order, which he paid into his own bank to his own credit. The premiums advanced by the broker and his commission on effecting the policies and receiving the losses were unpaid to him. The broker on being asked for the moneys after they had been received, said they were not due until a future day, and subsequently made excuses, and did not pay over the sums received on account of the losses to the prosecutor. The jury, in answer to a question left to them, found that the policies had been entrusted to the broker for a special purpose, viz., that he should receive the moneys due on them, and forthwith pay them over to the prosecutor. There was no evidence to support such a finding in the case.

Held, that there was a miscarriage, and as the court had no power to direct a new trial, the conviction should be quashed.

Seems, that a marine policy of insurance upon which a loss has occurred in respect of the perils insured against is a security for the payment of money within the first branch of sect. 75 of 24 & 25 Vict. c. 76.

Quere, whether such a policy is a chattel or valuable security within the second branch of that section.

CASE stated for the opinion of this court by Mr. Commissioner Kerr.

At the session of the Central Criminal Court, held on Monday, the 28th Feb. 1876, the prisoner was tried before me upon an indictment, the second count of which was founded on the second branch of the 75th section of the stat. 24 & 25 Vict. c. 96, and was as follows:

Second Count.—And the jurors, &c., that the said William Ananias Cragge, trading under the style and firm of Overall, Son, and Co., heretofore, to wit, on the 27th Nov. 1875, within the jurisdiction of the said Central Criminal Court, did entrust the said William Thomas Augustus Tatlook, as his broker, attorney, and agent, with certain valuable securities to wit, two policies of insurance for 650*l.*, and 500*l.* respectively for a special purpose, that is to say, that he the said W. T. A. Tatlook should receive the said sums of 650*l.* and 500*l.*, which were then due, and payable on the said policies of insurance; and forthwith pay over to the said W. A. Cragge the said sum of 1138*l.* 10*s.*, without any authority to him the said W. T. A. Tatlook, to sell, negotiate, transfer, or pledge the said valuable securities, and the jurors aforesaid, upon their oath aforesaid, do say that the said W. T. A. Tatlook, being broker, attorney, and agent, as aforesaid, on the day and year aforesaid, and within the jurisdiction aforesaid, in violation of good faith, and contrary to the said object and purpose for which the said valuable securities were entrusted to the said W. T. A. Tatlook, as aforesaid, unlawfully did convert to his own use and benefit a certain part of the proceeds of the said valuable securities, to wit, the said sum of 1138*l.* 10*s.*, contrary to the form of the statute, &c., and against the peace, &c.

The facts adduced in evidence were these:

The prisoner was an insurance broker in the city of London, trading as Tatlook Brothers, and in November 1875, was employed by W. A. Cragge trading under the style of S. Overall, Sons and Company) to effect for him (Cragge) an insurance on the cargo of a ship called the *Agatha* to the

extent of 1650*l.* The prisoner was to pay the necessary premium. He delivered to Cragge the following memorandum:

London, 17th Nov. 1875.

Tatlook Brothers		To Messrs. Overall, Son and Co.
Dr. to insurance for 1650 <i>l.</i> on <i>Agatha</i> :		
at 30 <i>s.</i> per cent.	...	£24 15 0
Duty	...	0 4 3
<hr/>		
Less 10 per cent. discount for cash on		
23 <i>l.</i> 10 <i>s.</i> 3 <i>d.</i>	...	2 7 0
		<hr/>
		£22 12 3

TATLOOK BROTHERS.

On the 27th Nov. prisoner was at Cragge's counting house, and Cragge's clerk said to him, "By the by, Mr. Tatlook, we have an account due to you" (alluding to the above). Prisoner replied, "Oh, never mind that, I shall have to give you a cheque presently." The loss of the *Agatha* was by this time known. The clerk, in consequence of this statement by the prisoner, did not give him a cheque for the amount of the premium. On the 27th Nov. 1875, Cragge having heard of the loss of the *Agatha*, gave the prisoner directions to obtain the money on the policies, and wrote to him as follows:

London, 27th Nov. 1875, 102, Lower Thames-street.

Messrs. Tatlook and Brothers.

Gentlemen,—Herewith we hand you the necessary documents for recovering the amount insured on *Agatha*, Lerwick, and list of same, which please sign and return per bearer.—We are, gentlemen, yours truly, S. OVERALL, SON AND COMPANY.

With that letter Cragge sent to prisoner, and prisoner received three policies of insurance for the sums of 650*l.* in the Archangel Office, 500*l.* in the Imperial Office, and 500*l.* by underwriters, the captain's protest, and bill of lading, and a letter from Lloyd's agent.

On the 17th Dec. the prisoner received from the Imperial Office the 500*l.* on their policy by a cheque payable to his order, and he paid that cheque into his own bank, the Union, to his own credit, and it was cashed and credited to him.

On the 31st. Dec. the prisoner received from the Archangel Office the 650*l.* on their policy, by a cheque payable to his order, and he paid that cheque into his own bank, to his own credit, and it was cashed and credited to him.

On the 11th Jan. 1876, prisoner wrote and sent to Cragge the following memorandum:

London, 10th Jan. 1876.

From Tatlook Brothers.		To Messrs. S. Overall, Son and Co.
Cr.—By total loss per <i>Agatha</i> ...		
£1650 0 0	...	
Less commission receiving	...	16 10 0
		<hr/>
		£1633 10 0

Due 17th Jan. 1876 subject to payment by underwriters.

TATLOOK BROTHERS.

Cragge called on prisoner twice for the money, and the prisoner said it was not due until the 17th Jan. Again on the 18th, Cragge called upon him and asked for the money, and prisoner said he could not let him have it at present, but should be able to let him have it on Saturday, or some of it.

On the 19th, prisoner went to Cragge and said he could not get the money till Saturday, and would let Cragge know on the following Thursday how much he (prisoner) could get by Saturday. On the 20th Jan. prisoner wrote and sent to Cragge the following memorandum:

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London, 20th Jan. 1876.

From Tatlock Brothers.

To Messrs. S. Overall, Son and Co.
Agatha.

Dear Sirs,—We fear that we shall be unable to exceed 1000*l.* upon the loss for the above-named vessel on Saturday next.—Yours truly, TATLOCK BROTHERS.

Upon the receipt of that memorandum Crage called upon prisoner for the money, who said, "It would be impossible for a broker to carry on his business if he had to pay immediately." Crage replied, "Having had the money, as I presume you have, you should pay it at once. You have no business to withhold it. Let me see the policies." Prisoner thereupon went to a safe and rummaged it and then said, "I have not the policies, the office has kept them." Crage replied, "The office would not have kept them unless they had paid for them." The prisoner said, "Two of the offices have settled with me in account;" and prisoner then handed to Crage one of the three, viz., the underwriter's policy for 500*l.*, and Crage himself obtained the money on that policy.

The prisoner never paid Crage any money, and on the 27th Jan. 1876, he filed his petition for liquidation, with a statement of debts 2500*l.*, and returned Crage as a creditor for 1112*l.* 5*s.* 11*d.* The trustee under the prisoner's liquidation received the balance (about 600*l.*) standing to the credit of the prisoner at the Union Bank; and five creditors only having proved under the liquidation, the prisoner's discharge under the liquidation was granted. Mr. Crage did not prove but repudiated the liquidation altogether.

It was contended by Mr. Straight, on behalf of the prisoner, that the facts as proved did not show the prisoner to have committed the offence mentioned in the statute, and that I ought so tell the jury. I, however, laid the facts before the jury, and asked them the following questions, viz.:

1. Did Crage intrust the prisoner with the two policies of insurance?
2. Did he intrust him with them for a special purpose?
3. Was that special purpose that he should receive the moneys and forthwith pay over the moneys when received to Crage?
4. Had the prisoner any authority to sell, negotiate, transfer, or pledge them?
5. Did he, in violation of good faith, and contrary to the purpose for which they were intrusted to him, convert any part of the proceeds to his own use?

The jury answered questions 1, 2, 3, and 5 in the affirmative, and No. 4 in the negative, and under my direction they found the prisoner guilty, and the verdict was so recorded.

The question reserved by me for the consideration of the Court above, is whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether I ought to have directed the jury to find a verdict of not guilty.

The prisoner is in custody awaiting judgment.—
R. MALCOLM KERR, Commissioner, &c.

June 24.—*Straight*, for the prisoner.—The prisoner was indicted under the second branch of sect. 75 of the 24 & 25 Vict. c. 96, for unlawfully converting in violation of good faith, and contrary to the purpose for which the same were entrusted to him, the proceeds of certain valuable securities intrusted to him for a

special purpose, that is to say, that he should receive the sums payable thereon and forthwith pay over the same to the prosecutor. The 75th section provides for two distinct offences. The first branch provides for the case of an agent "intrusted with money, or a security for the payment of money," with a direction in writing as to the application thereof, who shall in violation of good faith and contrary to the terms of such direction convert the same or any part of the proceeds to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted. The second branch provides for the case of an agent intrusted with "any chattel or valuable security, or any power of attorney for the sale or transfer of stock" for safe custody or any special purpose without any authority to sell, negotiate, transfer or pledge, who shall in violation of good faith and contrary to the purpose for which the same shall have been intrusted, sell, negotiate, transfer, or pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security or the proceeds of the same or any part thereof." Upon this indictment under the second branch the conviction was wrong, for there was no dealing by the prisoner with the policies of insurance contrary to the purpose for which the same were intrusted to him. It will not do to say the offence is divisible into two parts, (1) converting the security, (2) converting the proceeds, for it is contended that to render the agent liable for converting the proceeds he must first convert the security contrary to the terms of the provision. The case of *Reg. v. Cooper* (12 Cox, C. C. 600; L. Rep. 2 C. C. R. 127) is in favour of the prisoner. In the present case the prisoner was intrusted with the policies of insurance to collect what was due upon them. He was entitled to hand them over to the underwriters; and the cheques he received for the losses were payable to his order, and there was nothing wrong in his paying them in to his own bankers. Then at what moment was there any fraudulent conversion within the meaning of the section? According to the course of dealing the prisoner was entitled to deduct what was owing to him by the prosecutor for premiums and commission. There was no evidence in the case of any fraudulent conversion at the time he paid the cheques into his bankers. He was entitled to hold the cheques according to the usage of business among insurance brokers.

Beesley, for the prosecution.—First, as to the construction of the statute. The second branch of sect. 75 comprehends two cases, (1) where the agent fraudulently converts the valuable security, (2) where he fraudulently converts the proceeds of a valuable security correctly dealt with. That this is the right construction would appear to be so from the course of legislation on this subject. The first statute, 52 Geo. 3, c. 63, s. 1, did not contain the words "or the proceeds of the same." They were introduced into the 7 & 8 Geo. 4, c. 29, s. 49, apparently to meet cases like the present, and the 24 & 25 Vict. c. 76, s. 75, follows the words of that enactment. The case of *Reg. v. Cooper* may be reviewed. Secondly, as to the facts stated in the case. [COCKBURN, C.J.—What evidence was there to show that the prisoner was bound to pay over the proceeds by a certain day?] The broker's month had elapsed when he was asked to

pay over the proceeds. Besides, after verdict the court will assume that there was evidence to support the finding of the jury: (*Hayman v. The Queen*, L. Rep. 8 Q.B. 102). *Our. adv. vult.*

Nov. 18.—COCKBURN, C.J.—The defendant was indicted under the 75th section of the 24 & 25 Vict. c. 96. The facts are as follow: Having negotiated as broker certain policies of insurance on a ship belonging to the prosecutor, and the ship having been lost, the defendant was intrusted with the policies for the purpose of collecting the amounts due upon them. These he received in cheques payable to his own order, which he indorsed and paid into his bankers to his own credit; but he failed, either then or at any time afterwards, to pay the amount to the prosecutors, and two months later filed a petition for liquidation. The jury, in answer to questions specifically put to them by the learned commissioner before whom the case was tried, found expressly that the prisoner was intrusted with the policies for a special purpose, namely, that he should receive, and when received, forthwith pay over the moneys to the prosecutors. They further found that the prisoner had no authority to sell, negotiate, transfer, or pledge the policies; and that, in violation of good faith, and contrary to the purpose for which they were intrusted to him, he converted the proceeds to his own use. Upon which they were directed by the learned commissioner to find the prisoner guilty. The question submitted to us is, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the jury should have been directed to find a verdict of not guilty. It appears to me plain that there has been a miscarriage in this case. But I scarcely know in what position we are placed as to the decision we can pronounce, whether our opinion is asked upon the facts as found by the jury, or on the facts as proved by the evidence; it being to my mind perfectly plain not only that the right questions have not been put to the jury, but also that the answers to the questions as put are directly contrary to the evidence. The proper remedy would be a new trial, but that we have no authority to direct. I think, however, that the form in which the question is put leaves it open to us to say whether the learned commissioner, instead of putting any questions to the jury, should not upon the evidence have directed them to acquit the prisoner; and this, I think, would have been the proper course, the evidence being, in my opinion, insufficient to warrant a conviction. The case turns on the construction of the second branch of the section referred to, which enacts that "whosoever having been intrusted either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or funds, whether of the United Kingdom or of any Foreign State, or any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall

have been so intrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanour." I entertain very serious doubt whether a policy of insurance comes within this section. The term "chattel" is intended, I think, to apply to objects which can be sold, bartered, or pledged, and a policy of insurance cannot be said to be a "valuable security" any more than a contract of sale or any other contract. It is simply a contract whereby, in consideration of a premium, one party insures another against a given loss. Unless the loss occurs nothing is payable. A valuable security is one on which money is payable irrespective of any contingency. Moreover, a policy of insurance upon which money is received is neither "sold," "negotiated," "transferred," or "pledged," in any sense of the word. The money due on it is paid, and the contract comes to an end, just as when money is paid on a contract of sale. I likewise entertain very serious doubt whether this enactment extends to a case in which a person intrusted with any of the instruments enumerated in the section for the purpose of disposing of it or receiving money on it, having done so embezzles the proceeds. The enactment, if the words are carefully followed, appears to me to apply, and, indeed, to be intended to apply solely to the dealing with securities without authority, and contrary to the purpose for which they were intrusted, and in so doing converting the instrument or the proceeds of it to the use of the party so violating his trust. But here the party uses the instrument for the very purpose for which it was intrusted to him, namely, that of receiving the money due on it. Let us assume, for the purpose of the argument, that he afterwards embezzled the money. He still cannot be said to have dealt with the policy "without authority," which by the express terms of the statute is an essential element of the offence. It may, however, be said, that if an instrument is intrusted to a person for the purpose of his receiving money upon it and handing over the money so received to the principal he receives it for a "special purpose," and that if the agent receives such money with the intention of applying it to his own use instead of handing it over to the person employing him, the authority being violated by the intended fraud, he is acting without authority as well as in violation of good faith. Assuming this to be so, and that a party receiving money on an instrument intrusted to him for the special purpose of his receiving the money due upon it, and forthwith handing such money over in specie, and who at the time he receives the money intends in violation of good faith, to apply it to his own use, commits the offence created by the statute, I doubt exceedingly whether that would be so, where the money having been received with an honest intention, the fraudulent design of misappropriating it afterwards arose. If this doubt be well founded, it would be a question for the jury whether the defendant at the time he received the money intended to appropriate it to his own purposes, a question which was not submitted to the jury in the present case. At all events, it is to my mind perfectly clear that unless there was at the time the money was received the fraudulent intention of keeping the money, in which case the statute may possibly

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apply, it cannot apply to a case in which, by the understanding of the parties, the person receiving the money is not to hand it over at once to the principal, but is to carry it to an account between them and to pay it only in settlement of such account. That such was the understanding between the prosecutors and the defendant whether as arising from the general custom of trade as between insurance brokers and their principals, or from the course of dealing between these immediate parties appears to me to result from the evidence. No evidence having been given as to any general custom, I do not think we are at liberty to take notice of the statement of such a custom occurring in any work on insurance law; but sufficient evidence of the understanding between the parties is to be found in the fact that when the defendant is applied to for the money received on the policies, he answers, while acknowledging the receipt, that it will not be due to the prosecutor for a month, and this is acquiesced in; affording, as it seems to me, at all events *prima facie* (and no evidence was offered on the part of the prosecution to rebut the presumption) good ground to infer that the defendant either by the custom of business, or the course of dealing between himself and his principals, was entitled, instead of paying over the money at once, to hold it and treat it as his own for a time, settling for it only in account when the time for settlement came. If such were not the terms on which the defendant was employed, it was for the prosecution to rebut the inference which arises from the facts I have referred to. Assuming such a case to be within the statute, it would be a question for the jury whether the defendant at the time the money was received intended to embezzle it. Possibly proof that a party receiving money under such circumstances was and knew himself to be hopelessly insolvent, and being aware that his account at his bankers was heavily overdrawn, paid the money in to the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that two months after the receipt of the money the defendant filed a petition for liquidation. At the time he received it he may have been solvent. It was for the prosecution to give evidence as to the state of his circumstances, if it could be shown that he was insolvent when the money was received, so as to raise the inference that in paying it into his bankers, he intended to defraud the prosecutor of the amount. No such evidence having been given, I think that even supposing the case to be within the statute, as to which I entertain great doubt, the learned Commissioner should have held that there was no case to go to the jury, and should have directed an acquittal. I am therefore of opinion that the conviction was wrong, and should be quashed.

KELLY, C.B.—I think it is so far doubtful whether a marine policy of insurance upon which a loss has occurred and a sum of money has become payable is a chattel or a valuable security within the meaning of the 75th section of the Act, that I do not feel justified in dissenting from the judgment of acquittal upon which the other

members of the Court have agreed. In addition, however, to the judgment of Baron Pollock, in which I entirely concur, I would observe that I cannot accede to the doctrine that because a man whose duty it is to pay over a sum of money to another, pays it into his bankers, and afterwards draws it out by cheques, and then goes into liquidation or becomes bankrupt, he may not have been guilty of a criminal offence within this statute, or of what under other circumstances, would have amounted to embezzlement. It appears to me that if the prisoner after he had received the money and ought to have paid it to the prosecutors, and after paying it into his bankers drew it out again, knowing that he was insolvent, and applied it to his own use, knowing that he could never make it good, he was guilty of fraudulently converting the proceeds of the policy to his own use, and that if the policy had clearly been a chattel within the statute, the conviction would have been right. But for the reasons already stated, I agree that it should be quashed.

BRAMWELL, B.—I am of opinion for the reasons given in my Brother Amphlett's judgment, that these policies were not valuable securities entrusted to the prisoner for a special purpose within the meaning of the second part of sect. 75, but were securities for money within the first part of the section, and were entrusted to the prisoner for such purpose as to make the case within the first part had there been a direction in writing, and as there was none, the conviction cannot be sustained.

AMPHLETT, B.—I am of opinion that the conviction must be quashed. The indictment is framed upon the second branch of the 75th section of the 24 & 25 Vict. c. 96, and the case alleged against the defendant is, that being entrusted as a broker with certain ship policies for the special purpose of receiving the monies due thereon and paying over the same forthwith to the prosecutor, he fraudulently converted the same to his own use. Now looking at both branches of the section which we ought to do for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities sold or converted into money without authority, and does not embrace in its provisions policies like these which were entrusted to the defendant for collection. For we must observe that the section only relates to certain classes of agents whom the Legislature has not thought fit to make amenable to the ordinary law of embezzlement, and it is only therefore under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities entrusted to them. The general scheme appears to be this. If moneys or securities which they are authorised to convert into money, are entrusted to agents of this character, they are only answerable criminally for a fraudulent misappropriation if a direction in writing as to the disposal of such monies was given. That is provided for by the first branch of the section, which embraces the case we are considering, for I cannot doubt, having regard to the Interpretation Clause that the policies were securities for the payment of money within the meaning of the section. There remained the case (which was supposed also to require the protection of the criminal law) of chattels or securities entrusted to

such agents for safe custody, or for some special purpose without authority to sell or convert into money, and that is provided for by the second branch of the section, which makes such agents criminally liable for a fraudulent misappropriation of such last mentioned chattels or securities, or of the proceeds of the same. It has been argued that these last words can have no meaning unless they are held to refer to securities other than those which they had no authority to convert into money. I think this is a mistake; these words are not to be found in the first Act (52 Geo. 3, c. 63) on this subject, but were inserted in the subsequent Acts for the obvious purpose, as it appears to me of meeting the case, which may well happen, of such agent selling or at all events alleging that he had sold honestly though without authority, and afterwards yielding to temptation and fraudulently converted the proceeds to his own use. Without these words the agent in such a case would escape, & it might at all events be more difficult to convict him. The irrational consequences that might occur if securities dealt with by the first were also held to be comprised in the second branch of the section are numerous, and, as it appears to me, afford a strong argument that it was not so intended by the Legislature. For instance, if you gave such an agent money for a particular purpose, but not expressed in writing, he would not be criminally responsible; but, if you had given him a cheque and told him verbally to get it cashed and apply the proceeds in the same way, he would. What is the sense or meaning of such a distinction? Is he not as soon as he cashes the cheque, entrusted with the amount exactly in the same way as if it had been handed over to him directly by his principal? Again it is admitted on all hands that a debenture or other security be entrusted to a broker with authority to sell, negotiate, transfer, or pledge, the case would not be within the second branch of the section; and that, in the absence of written direction as to the disposal of the proceeds, he would be civilly, only not criminally, responsible; but according to the argument if the security were intrusted to him for the purpose of collecting the moneys due upon it, he would be criminally responsible for the misapplication of the proceeds. I confess I cannot see any reason why he should be criminally responsible in one case but not in the other. It is certainly difficult to bring a broker so authorised to collect moneys due on a security within the description of an agent authorised to sell, negotiate, transfer, or pledge, although, I think, there is little doubt but that the framers of the section by the use of the latter words imagined that they had exhausted every means of converting securities into money. I do not, however, think it necessary to deal with this difficulty, since my judgment is based not upon subtleties of language, but upon the broad ground that according to the true construction of the section, cases which, if there had been a written direction would have fallen within the first branch, & not in the absence of such written direction fall within the second branch of the section. In fact, I think that the cardinal principle of the section is that such an agent is only in the absence of a written direction to be criminally responsible for moneys which may come into his hands by him unauthorised act of his own. This construction of the section was adopted and formed the ground of an unanimous decision of the Court of

Appeal consisting of five judges, in *Reg. v. Cooper* (L. Rep. 2 C. C. 127), and I think we are bound by that authority, even if it be the fact, as is alleged, that there was another ground unnoticed by the counsel who argued, or the Judges who decided the case, which might have supported the decision. Upon the other point argued before us as to the sufficiency of the evidence in point of fact to support the conviction, I will only say that I find it very difficult to understand what, if anything, the learned judge has referred to us beyond the legal question on which I have already expressed my opinion. If he meant to ask us whether the facts stated in the case justified the findings of the jury, I should say they did not, for I can find in the facts as stated no evidence at all of the special purpose stated in the indictment, and consequently none of the alleged conversion.

BRETT, J. and FIELD, J. acquiesced in the judgment of AMPHLETT, B., and ARCHIBALD, J. died during the Long Vacation.

POLLOCK, B.—In so far as the decision of this case depends upon the proper construction to be put upon the section of the statute under which the prisoner was indicted, the 24 & 25 Vict. c. 96, s. 75, I entertained during the argument, and still entertain, considerable doubt. I have had, however, the advantage of seeing the judgments which have been prepared by my learned brothers, and thinking as I do that the conviction was unsatisfactory for reasons to which I will presently refer, I am not prepared to differ with the view which has been taken by the majority of the court upon the construction of a statute which is undoubtedly capable of more than one interpretation. If it could be assumed that the construction of the statute which was insisted upon by the prosecution was correct, it appears to me that having reference to the duty of the prisoner to pay over to the prosecutors the sums of money which he had received in payment of the policies, and also to the false statement made by the prisoner to the prosecutor after he had received these sums, there may have been evidence which might and ought to have been submitted to the jury with a view to their finding whether or no the prisoner, who undoubtedly had the money, had converted it to his own use or benefit within the meaning of the statute. But the prisoner was not a mere clerk of the prosecutors, he was an insurance broker carrying on an independent business. It must be assumed that he had many other principals for whom he acted besides the prosecutors, and it does not appear what had been the previous course of dealing between the prosecutors and the prisoner as to the payment of or accounting by the latter for money received by him on the settlement of losses. These are matters having an essential bearing upon the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evidence or brought to the attention of the jury, who, by their answer to the third question, appear to have assumed that the duty of the prisoner was to pay over the money forthwith; without having their attention called to or having entered on the consideration of the facts from which such a duty could be properly inferred. Under these circumstances, when I have to answer the question which has been submitted to us by the learned Commissioner, I cannot say that I consider the facts as proved were sufficient to constitute the offence

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mentioned in the statute, and therefore, in my judgment the conviction should be quashed.

Conviction quashed.

Saturday, Nov. 25.

(Before COCKBURN, C.J., Lord COLERIDGE, C.J.,
CLEASBY and POLLOCK, BB, and FIELD, J.)

REG. v. GALE. (a.)

Embezzlement—Proceeds of cheque—For or on account of master—Indictment—24 & 25 Vict. c. 76, s. 68.

The head office of an insurance company was at L., and there were branch offices at M. and G. The local managers at M. and G. having moneys to remit to the head office, paid them into local banks, obtaining cheques thereon for the amount payable to the order of the prisoner (the chief manager, at the head office), and forwarded the cheques by letter to the head office. It was the prisoner's duty to open the letters at the head office, receive the remittances, and hand the same over to the cashier. The local managers at M. and G. remitted by letter two such cheques for 200l. and 400l. respectively to the head office, which the prisoner duly received. He indorsed the bills, got them discounted by friends of his own, instead of handing them to the cashier to pay into the company's bank, and converted the proceeds to his own use:

Held, that the prisoner received the proceeds for and on account of his masters, and that he was properly indicted for embezzling the money.

At the quarter sessions for the borough of Liverpool, James Edward Gale was tried before me upon an indictment consisting of two counts, in the first of which the prisoner was charged with having, on the 19th May 1874, when a clerk and servant to the London and Lancashire Fire Insurance Company (Limited), embezzled 400l., the property of his said masters, and in the second of which he was charged with having, when in the same capacity and on the same day, embezzled 200l., also the property of his said masters.

The evidence in support of the charge, so far as the same is material, was as follows:

The said company's head office is in Liverpool. There are branch offices at Manchester, Glasgow, and elsewhere. The prisoner was the head manager of the company, and was their clerk and servant. In ordinary course he opened all letters and received all remittances sent to the head office, and handed the remittances to the cashier, who kept the ordinary books under the superintendence of the prisoner as manager, and those books were from time to time submitted to and checked by Mr. Blenham, the company's accountant at Liverpool.

It frequently happened that the managers of the provincial offices remitted cash or cheques to the prisoner as chief manager, which it was the duty of the prisoner to hand on receipt to the cashier, and in the case of cheques it was the duty of the prisoner to indorse them, if they were payable to his order, and they were then paid into the company's bankers by the cashier, and accounted for in the books.

On the 19th May 1874, the prisoner received on account of the company, by post from Glasgow, a

cheque dated the 18th May 1874, for 400l., drawn by the manager of the Glasgow branch upon the Commercial Bank of Scotland, payable to the prisoner's order. On the same day the prisoner also received on account of the company, by post from Manchester, a cheque for 200l., dated the 19th May 1874, drawn by the manager of the Manchester branch upon the Manchester and County Bank (Limited), payable to the prisoner's order.

The prisoner did not hand over either of these cheques to the cashier, or inform him or anyone else of their receipt, except that he acknowledged the receipt of them to the Glasgow and Manchester managers respectively.

On the same day, the 19th May, the prisoner indorsed and cashed both the cheques through private friends of his own, who gave him the cash and paid the cheques into their own banks. Later in the day the prisoner paid 600l. in bank notes and gold, which was probably the produce of the cheques, to the cashier of the company, saying that he wished it to go against his salary, which was then overdrawn to that amount. The cashier, supposing the money to be the prisoner's own, received it from him, and handed back to the prisoner I.O.U.s for the amount which he had received from the prisoner in respect of the overdraft.

Shortly after sending the cheques, the Glasgow and Manchester managers, according to their usual practice, sent to the prisoner financial statements, which among other things contained entries of the sending of these cheques. These statements should have been handed to the accountant by the prisoner, who, however, suppressed them both.

The prisoner's salary was 1500l. a year.

The fact of the prisoner having received the cheque for 200l. was not known to the company or the accountant till about a month later. The prisoner, when questioned, said he would put it all right, and nothing was done in respect of it at that time. The remittance of the cheque for 400l. was not known to the company or the accountant till about four months afterwards, when the prisoner was no longer in the company's service. The prisoner became bankrupt, and the company proved upon his estate for the amount of the cheques. The prisoner never accounted for either the cheques or the money.

At the close of the case for the prosecution, counsel for the prisoner submitted that the prisoner could not be properly convicted of embezzling either of the sums charged in the indictment, inasmuch as the cheques were sent to the prisoner payable to his order, and required his indorsement, and the prisoner was entitled to cash the cheques and receive the cash which was paid to him in respect of them, and, therefore, there was no embezzlement by him of the said sums or either of them. It was also submitted that there was no embezzlement, because the identical money received for the cheques was paid to the cashier, although it was so paid as the prisoner's own money and in discharge of so much of his own overdraft.

I ruled that there was evidence of embezzlement, but consented to reserve the questions for the consideration of the Court for *Case Reserved*.

The jury convicted the prisoner. I did not

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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sentence him, but remanded him until the decision of the Court to the borough gaol at Liverpool.

The question for the Court is, whether there was evidence of embezzlement which I was justified in leaving to the jury.

JOHN B. ASPINALL, Recorder of Liverpool.

14th Nov. 1876.

Torr, Q.C. (Kennedy with him) for the prisoner. —The prisoner was improperly convicted of embezzlement. There was no embezzlement here, but it was a mere transference of the cheques from the master to the prisoner, and like the case where a master hands money to one servant to give to another for a specific purpose, and that other applies the money to his own use. [COCKBURN, C.J.—No; here the prisoner receives a piece of paper from his master, which he is to convert into money.] The cheque was not payable until the prisoner put his name on it. [LORD COLERIDGE, C.J., referred to *Reg. v. Keena*, 11 Cox C. C., 123; *L. Rep. 1 C. C. R. 113*, to show that where a servant has embezzled a cheque and converted it into money, he may be indicted either for embezzling the cheque or the money.] The contention is that this was not a case of embezzlement, but, if anything, one of larceny, and the prisoner was not indicted or convicted for larceny. In the present case, the prisoner indorsed the cheques, and got cash for them from his own friends, not from the banks on which the cheques were drawn. This cash was not paid to the prisoner for or in the name or on account of his masters within the meaning of the stat. 24 & 25 Vict. c. 76, s. 68. The cheques were sent by the local managers as a means of forwarding money which was constructively in possession of the masters through them. [COCKBURN, C.J.—How does this case differ from that of a servant who gives a receipt before a customer will pay?] The following cases were then referred to:

Reg. v. Wilson, 9 Car. & P. 27;

Reg. v. Beaumont, 6 Cox C. C. 280; 23 L. J. 54, M. C.;

Reg. v. Harris, 6 Cox C. C. 363;

Reg. v. Thorp, 8 Cox C. C. 29; 27 L. J. 264, M. C.;

Reg. v. Cullum, 11 Cox C. C. 469; *L. Rep. 2 C. C. R. 28*.

Again, the money in this case was received on the prisoner's own account, and not, in the language of the statute, "for or on account of masters." The cheques may have been received by him by virtue of his employment, but the money was received on his own account.

Reg. v. Masters, 3 Cox C. C. 178; 2 Car. & Kir. 930.

No counsel appeared for the prosecution.

COCKBURN, C.J.—I entertain no doubt that this conviction must stand. The principal facts appear to be these: The prisoner was the chief manager at the head office of a Fire Insurance Company, at Liverpool, which had branch offices at Manchester, Glasgow, and elsewhere, and when money was to be remitted from the branch offices to the principal one under the management of the prisoner, the mode of remittance was by paying the money into a local bank and obtaining a cheque upon that bank payable to the prisoner's order, and then forwarding the cheque in a letter to the principal establishment. It was the prisoner's duty to open the letters and receive all remittances sent to the head office, and hand the remittances to the cashier. That being his duty, the prisoner opened the letters containing the two cheques remitted by the managers of the Manchester and Glasgow branches, and he then indorsed them and

got them discounted by intermediate parties, and then paid the amount to the cashier to go against his salary, which was then overdrawn to that amount. Upon these facts there can be no doubt that the prisoner was intrusted with the cheques with a knowledge of the purpose for which they had been received, and that he might have been found guilty on an indictment for embezzling the cheques. But instead of that he has been found guilty of embezzling the money, the proceeds of the cheques. The only difficulty in the case, which however is a superficial one, is that the cheques were cashed not by the banks on which they were drawn, but by intermediate persons. It was ingeniously argued that inasmuch as the cheques were discounted for the prisoner's convenience by intermediate persons with a knowledge that they were not his cheques, the money so obtained was not paid on account of his masters. That is not the right way to construe the matter. The question is whether the prisoner received the proceeds on account of his master? The case may be illustrated thus: A man, intrusted with a cheque to cash, meets a friend in the street and says to him, it is not convenient for me to go to the bank, will you cash this cheque for me? and the friend does cash it. That is like the present case. The moment the prisoner got the cash for the cheque it was his duty, both morally and legally, to take and hand it over to his masters. That is the common sense view: and I entertain no doubt that the money was received by the prisoner in this case on account of his masters, and that the conviction for embezzlement was right.

LORD COLERIDGE, C.J.—I am of the same opinion. I will only add that the words of the statute "for or in the name, or on account of his master," seem to refer to cases where it is the known duty of the servant to pay the money received over to the master.

CLEASBY, B.—I am of the same opinion. If the prisoner had received the cash from the banks there could have been no doubt that he received it for and on account of his masters, and I think it can make no difference that instead of receiving it from the banks he got it from another person. In both cases the money was obtained for his employers.

POLLOCK, B.—I am of the same opinion. The words "or by virtue of such employment," which were in the previous statute of embezzlement, the 7 & 8 Geo. 4, c. 29, s. 47, were omitted in the recent statute, with the view of meeting cases where the money was obtained not by virtue of the employment, but as here, on account of the master.

FIELD, J.—I am of the same opinion.

Conviction affirmed.

Saturday, Dec. 2.

(Before COCKBURN and LORD COLERIDGE, C.JJ.,
CLEASBY and POLLOCK, BB., and FIELD, J.)

REG. v. LANGTON. (a)

Evidence—To refresh memory—Document not written by witness—Limited Joint Stock Company.

It was the prisoner's duty, as a timekeeper, to give to a clerk (not the pay clerk) a list of the number

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of days on which each workman had worked, and it was the clerk's duty to enter these times in the time book, and the amount of wages due to each workman according to such returns; and from the time book at the time of paying the wages it was the prisoner's duty to read out aloud the number of days each man had worked, and the wages were then paid to the workman by the pay clerk. The prisoner had wilfully falsified the list by overstating the time one of the workmen had worked, and the false statement was entered in the time book by the clerk, and wages calculated accordingly. On the pay day the entries were read out aloud by the prisoner, and the amount of wages so represented paid to the workman. On an indictment against the prisoner for false pretences, the pay clerk was called as a witness, and not remembering the particulars of the entries, he was allowed to refresh his memory by reference to the time book, because he saw the entries at the pay time when they were read out by the prisoner, and knew that the prisoner then read the entries correctly, and that he, witness, had paid the sums mentioned in those entries, although the entries were not made by himself.

Held, that the time book was properly admitted to refresh the witness's memory.

Parol evidence that a Joint Stock Company Limited has acted as an incorporated company is sufficient evidence of its incorporation as a limited company on an indictment for false pretences in which the property obtained is alleged to be the property of the A. B. Company, Limited.

THE prisoner, Edward Langton, was tried before me at the adjourned Quarter Sessions of the Peace held at Kirkdale, in the County of Lancaster, on the 11th July last past, upon an indictment charging him in the first and second counts with obtaining by false pretences from Thomas Chitson certain money of the Tawd Vale Colliery Company, Limited, with intent to defraud; and in the third count with obtaining by false pretences from Samuel Higginbottom certain other money of the said company with intent to defraud.

A copy of the indictment accompanies and is to be taken as part of this case.

The prisoner was in the service of the said company as one of their time keepers, and it was his duty to give in to another clerk fortnightly a list of the number of days on which the workmen in the employ of the company had worked during the preceding fortnight. It was the duty of the clerk to enter in the time book these numbers and the amount of the wages due to each workman according to the number of days worked, and from this time book at the time of paying the workmen's wages it was the prisoner's duty to read out aloud the number of the days each man had worked, and the wages were then paid to the workmen by the pay clerk accordingly. Robert Aspinwall, a workman in the employ of the company, kept a provision shop on his own account, at which the prisoner dealt, and at the time when the prisoner made the false pretences charged in the indictment, he was indebted to the said Robert Aspinwall. The 14th April last past was the day on which the wages earned during the fortnight preceding the 11th April became payable. During that fortnight Aspinwall had worked twelve days and no more, and there was due to him in respect of his said work the sum of 2l. 11s., and no more, his wages, being 4s. 3d. a

day. At some time between the said 11th and 14th April the prisoner asked Aspinwall how many days he had worked during the fortnight. Aspinwall told him as the fact was, that he had worked twelve days. The prisoner then asked Aspinwall how much money he, the prisoner, owed Aspinwall in respect of provisions bought of him by the prisoner, and on Aspinwall telling him the amount, the prisoner said, "I will put it down to your time." There was no evidence of the time list handed in by the prisoner in respect of that fortnight; but the time book was made up apparently according to the same course, and in the time book the number of fifteen days and a half day was entered as the time which Aspinwall had worked during that fortnight, and the sum of 3l. 5s. 10d., being at the rate of 4s. 3d. per day for fifteen days and a half day, was entered as the amount of the wages due to him. These entries the prisoner read out aloud at the pay time on the said 14th April, and the pay clerk, the said Thomas Chitson, then handed to Aspinwall, in the presence of the prisoner, the sum of 3l. 5s. 10d. accordingly. The 12th day of the following month of May was the day on which the wages earned during the fortnight preceding the 9th May became payable. During that fortnight Aspinwall had worked twelve days and no more, and there was due to him in respect of such work, at the same rate of 4s. 3d. a day, the sum of 2l. 11s., and no more. On the said 9th May the prisoner asked Aspinwall what time he had worked during that fortnight, and how much he, the prisoner, owed Aspinwall. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and that the prisoner owed Aspinwall the sum of 18s. 6d., which he had paid for the prisoner at his request. The prisoner then said that he would put the said sum of 18s. 6d. to Aspinwall's time. At the pay time on the said 12th May, the number of days' work entered in the time book to the credit of Aspinwall was sixteen days and a half day, and the sum of 3l. 10s. 1d. was entered as the amount due to him in respect of such work. These entries the prisoner read out aloud at the said pay time, and the said pay clerk then handed to Aspinwall the sum of 3l. 10s. 1d. accordingly.

The 9th day of the following month of June was the day on which the wages earned during the fortnight preceding the 6th June became payable. During that fortnight Aspinwall had worked twelve days, and no more, and there was due to him in respect of such work, at the same rate of 4s. 3d. a day, the sum of 2l. 11s., and no more. On the said 6th June the prisoner asked Aspinwall what time he had worked during that fortnight, and what the prisoner owed Aspinwall for provisions. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and the amount which the prisoner owed Aspinwall for provisions, upon which the prisoner said to Aspinwall that he, the prisoner, would put down to Aspinwall's time the amount so owing by the prisoner to Aspinwall. On the said 6th and 9th June, Samuel Higginbottom, the secretary of the said company, was acting as and for the pay clerk, and made up the time book for the wages which became payable on the said 9th June, and the prisoner gave in the number of fourteen days and three quarters of a day as the time which Aspinwall had worked during the said fortnight. The time

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book was then made up by Higginbottom according to the usual practice, and on the said 9th June the prisoner, at the pay time read out from the said time book fourteen days and three quarters of a day as Aspinwall's time, and 3*l.* 2*s.* 8*d.* as the sum owing to Aspinwall in respect of such work. As to all the charges against the prisoner, Aspinwall proved the sums of money he had received on the said pay days and the number of the days for which he had been so paid wages, but in respect of the charges mentioned in the first and second counts Thomas Chitson, the pay clerk, was called as a witness before Aspinwall gave his evidence. The prisoner's counsel objected to Chitson being allowed to refer to the time book to enable him to say for how many days work and what amounts of money he had paid Aspinwall on the said 14th April and 12th May. The counsel contended that as Chitson had not made the entries in the time book he ought not to be allowed to refer to it to refresh his memory, but as Chitson proved that he had seen those entries whilst the prisoner was reading out aloud at the pay time, and that though at the time of the trial he did not remember the particulars of the entries without referring to the book, yet he knew that at the pay time the prisoner read the entries correctly, and he, Chitson, had paid the sums which were mentioned in those entries.

I allowed his evidence to go to the jury, reserving the point for the opinion of this court.

As to all the counts the prisoner's counsel contended that it was necessary in support of the indictment to prove that the Tawd Vale Colliery Company (Limited) was an incorporated company; that this could not be proved by parol evidence only, and that as there was only the parol evidence of witnesses, who swore that the company was incorporated, I ought to direct an acquittal of the prisoner.

To this the counsel for the prosecution, replied that as by virtue of sect. 88 of the statute 24 & 25 Vict. c. 96, the indictment would be sufficient without alleging any ownership of the money, that the references to the company might have been omitted without vitiating the indictment, and that the allegations as to the company might, therefore, be rejected as surplusage.

I declined to direct an acquittal, and left the evidence to the jury accordingly, but I reserved a case on this point also for the opinion of this court.

The jury found the prisoner guilty.

The court sentenced him to twelve months' imprisonment with hard labour, subject to the opinion of this court as to whether I was right in overruling the objection raised on behalf of the prisoner by his counsel.

EDWARD GIBBON, Chairman.

No counsel appeared on either side.

COCKBURN, C.J.—As to the first point, whether under the circumstances the time book could be looked at by the pay clerk to refresh his memory, it appears to me that it could. It would be very dangerous to allow such a course where the entry has only been seen by the witness in the absence of the prisoner, but in this case the witness had actually seen the entry at the time it was read out aloud by the prisoner, and knew that the prisoner had read it correctly, and that he had paid the wages according to the entry. The witness was,

therefore, properly allowed to refresh his memory from the time book. As to the second point, it was not necessary to prove strictly that the company was a limited company under the Joint Stock Companies Act. Evidence that the company had acted as such was sufficient.

LORD COLERIDGE, C.J., CLEASBY, B., POLLOCK, B., and FIELD, J. concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, Nov. 9.

(Before JAMES, L.J. and BAGGALLAY and BRAMWELL, JJ.A.)

Ex parte AUSTIN; *Re* AUSTIN.(a)

Bankruptcy—Compromise between trustees and claimant—Examination of claimant—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 27.

*A mortgagee of property of a bankrupt, who had foreclosed before the bankruptcy, sent in a claim three years after the commencement of the bankruptcy to prove for 21,000*l.* as the balance of his debt after giving credit for the value of his security, treating the foreclosure as reopened. The trustees in the bankruptcy, believing that the claimant's right to reopen the foreclosure could only be decided by a very expensive litigation, effected a compromise with him with the assent of the creditors, by the terms of which compromise his claim was to be admitted for 20,000*l.*, all the other creditors were first to receive 18*s.* in the pound, then the claimant was to receive 18*s.* in the pound, and afterwards he and the other creditors were to share pari passu in the remaining assets. But for this claim the estate would have been sufficient to pay all the other creditors in full and to leave a large surplus for the bankrupt.*

The bankrupt disputed the validity of the claim altogether, and applied to the Court of Bankruptcy for an order for the examination of the claimant in respect of his claim:

Held, that the bankrupt was entitled to the order asked for, as the compromise was one which was only detrimental to the bankrupt, and was not such a one as the trustees could effect under sect. 27, sub-sect. 3 of the Bankruptcy Act 1869.

This was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

The facts of the case were as follows:

Henry de Brune Austin, who carried on business as a builder at Ealing, was adjudicated a bankrupt in July 1872.

In 1875 an arrangement was made to sell part of the bankrupt's property for 40,000*l.*, which it was supposed would pay all his creditors in full, and leave a considerable surplus for the bankrupt.

In Nov. 1875, however, a claim was sent in by one Henry Gibbon to prove for 21,015*l.*, alleged to be due to him as administrator of one G. Durant, deceased, who had held a mortgage upon certain property of the bankrupt, and had obtained a foreclosure decree in 1869. Assessing the value of

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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the security at 36,000*l.*, the balance of the mortgage debt, with interest and costs, amounted to 21,015*l.*, and Gibbon offered upon payment of the full amount of his claim to reconvey the mortgaged premises.

The trustee and committee of inspection, having taken counsel's opinion, questioned Gibbon's right to prove, being advised that it was a very doubtful point of law whenever the foreclosure decree could be opened, as leases had been granted of part of the mortgaged property, and part of it had been sold by Durant.

Ultimately, on the 10th April 1876, an agreement for a compromise of Gibbon's claim was made between the trustee, the committee of inspection, and Gibbon. By this agreement it was provided that the equity of redemption of the mortgaged property should be released to Gibbon, that he should be admitted to prove for 20,000*l.*, but that he should not claim any dividend on his proof till all the other creditors should have received 18*s.* in the pound, after which Gibbon should receive 18*s.* in the pound on his proof, and then all the creditors, including Gibbon, should be entitled to receive dividends *pari passu* till they had been paid in full.

This compromise was ratified by a meeting of the creditors on the 19th May 1876.

In the following month the bankrupt, being advised that Gibbon's claim was unfounded, or, at any rate, excessive, applied to the Court of Bankruptcy to appoint a private sitting for the examination of Gibbon with respect to his claim.

Mr. Registrar Murray refused this application on the ground that the court had no power to set aside a compromise which had been approved by the committee of inspection, and by a meeting of the creditors.

From this decision the bankrupt appealed.

De Gex, Q.C. and *Bremner*, for the appellant.—We are entitled to object to this compromise, and as a preliminary to taking steps to set it aside, we are entitled to an order for the examination of Gibbon. This compromise is not such a one as the trustee has power to make. It really amounts to giving away money which, if, as we say, the claim is unfounded, would come into our pocket.

They referred to

Ex parte Alexander, Re Thin and Flett's Trust Deed, 1 De. G. J. & S. 316;
Bankruptcy Act 1869, s. 96;
Bankruptcy Rules 1870, rr. 166, 171.

Davey, Q.C. and *Yale Lee*, for the trustee.—This compromise is good, as it was made with the sanction of the committee of inspection under the 27th section of the Bankruptcy Act 1869, the 3rd sub-section of which authorises the trustee with such sanction to "make such compromise or other arrangement as may be thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the bankruptcy." There was no collusion between the trustee and the creditor, but it was a *bona fide* compromise made to avoid the wasting of the estate in the settlement of a doubtful question of law which would involve an expensive litigation. It was made with the sanction of the committee of inspection and of a meeting of creditors. The debtor has no right to interfere with such a compromise. But if he has any right, this is not the way in which he should have proceeded to enforce his right. This is a mere roving inquiry. He

should have proceeded under the 20th section of the Act which provides that "the bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the court, and the court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just."

Hamming, Q.C., for Gibbon, was held to have no right to be heard on this appeal.

Without calling for a reply,

JAMES, L.J., said: I am of opinion that the order ought to go for the examination of the witness in this case. The case is really one of the most extraordinary cases I have ever heard of. I think it is a kind of case that has never been before the court before. The creditors have the power of compromising a hostile debt against themselves, that is to say, on someone making a claim they may agree to give him something less by way of settling a doubt. Such a compromise as that would no doubt be binding. But this is not a compromise of that kind. They say to the claimant, "we will take something less, a great deal less as to you, and a great deal more as to the debtor." Therefore, they are entering into a compromise by which they agree to pay that which, if the creditor is not entitled to prove at all, would leave a surplus for the debtor. If he is entitled to prove for the whole amount which he claims, that would affect both the creditors and the debtor. But they say, "We will compromise it upon terms which affect us as creditors in one way, and upon terms which will affect the debtor in another way," that is, to sell the debtor's right to impeach it, to settle the claim in such a way that they get all the benefit, and that the debtor can receive no benefit in any way. That being so, it seems to me a transaction so very singular in its form, that I think the debtor has a right to say, "Let me inquire into the circumstances; let me inquire from the mortgagee what he has been doing with the property, and whether he was entitled to make a proof or not." I think the trustee cannot be prejudiced by such an inquiry. The investigation may be a little annoying, or may be a little inconvenient to the creditor, just as it is to any other witness who is examined for any other purpose under a bankruptcy, but he will be simply dealt with as a witness. He will be subpoenaed to answer questions with regard to the property, and if it is found that there can be no possible good in disturbing the compromise as to the creditor's debt, the matter will stop there. If otherwise, then proper proceedings will be taken. Under these circumstances, and having regard to the nature of the compromise, I do think the debtor is entitled to have the matter fully investigated.

BAGGALLAY, J.A.—I am of opinion that although the debtor could, if he had thought fit, have availed himself of the provisions of the 20th section of the Bankruptcy Act 1869, by following the mode pointed out there, it was within the jurisdiction of the registrar sitting as Chief Judge to make an order in accordance with the summons which was taken out by the debtor in this case requiring Mr. Gibbon to attend for the purpose of being examined. I say I think it was within his jurisdiction to make such an order, but I think the making of the order was discretionary, and if I had felt satisfied with regard to what has been

brought before us, that the compromise which is alleged to have been made was one which was clearly within the 27th section of the Act of Parliament, I should have thought the registrar had exercised a wise discretion in declining to make an order for the examination; but I am in no way satisfied, from what I have heard, that the compromise was one which could be supported under the 27th section.

BRAMWELL, J.A.—I have nothing to add.

Solicitors for the appellant, *Tilley and Soames*.

Solicitors for the respondent, *Anderson and Sons*.

Thursday, Nov. 9.

(Before JAMES, L.J. and BAGGALLAY and BRAMWELL, JJ.A.)

Ex parte TATE; Re TATE. (a)

Bankruptcy—Fraudulent transfer of property—Past debt—Pressure—Fraudulent preference—Payee in good faith—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 6 subs. 2; s. 92.

The burden of proof is on the person who claims the protection of the proviso at the end of the 92nd section of the Bankruptcy Act 1869 as "a payee in good faith."

Seem, that that proviso applies not only to cases of fraudulent preference under the 92nd section of the Act, but also to cases of "a fraudulent conveyance, gift, delivery, or transfer of the debtor's property or any part thereof" under sect. 6. subs. 2. Decision of Bacon, C.J. affirmed.

This was an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the Judge of the Bristol County Court.

The facts of the case were as follows:

On the 8th May 1875, David Tate, who had formerly for a short time carried on the business of a miller at Radipole Mills near Weymouth, filed a petition for the liquidation of his affairs by arrangement, and Mr. James Collins, of Bristol, was appointed trustee of his property.

In Feb. 1872, the debtor and his father, Mr. Robert Tate had been appointed trustees of the will of Mr. David Simpson, who was the debtor's maternal uncle, and amongst other things a sum of 1918*l.* Consols had been transferred into their joint names. Under the will, the debtor's mother was entitled to the income of the fund for her life, and after her death it was to go amongst her children as she should appoint, and in default of appointment to all her children equally.

In the course of the years 1872 and 1873 the whole of the sum of Consols was sold out by the debtor and his father, with the knowledge and consent of the mother, and the debtor was permitted to retain the proceeds of the sale of 1415*l.* of the Consols for his own purpose.

In Oct. 1874, the mills at which the debtor carried on his business were stopped by the Corporation of Weymouth for the purpose of certain sanitary improvements, and the debtor then gave up business and went to live with his father and mother at Bath.

On the 21st April 1875, the debtor received from the Corporation of Weymouth, as compensation for the loss caused by the stoppage of his mills, a cheque for 300*l.*, for which he received cash the

same day. He also, on the same 21st April, drew from his banking account 210*l.*, leaving a balance of only 2*l.* odd standing to his credit.

Between the 21st April and the 1st May writs were issued against the debtor by several creditors, and on the 5th May a debtor's summonses for 25*l.* odd was served upon him.

On the 28th April, Mr. Bartrum, a solicitor at Bath, who was acting on behalf of the debtor's mother, wrote a letter to the debtor demanding the immediate replacement of the 1415*l.* Consols, and threatening to file a bill in Chancery against him, if the sum was not replaced at once.

Mr. Bartrum wrote other letters to the debtor to the same effect on the 30th April and the 3rd May, and on the 6th May the debtor invested the sum of 400*l.* in the purchase of 424*l.* Consols in the name of his father and himself as trustees of the will.

When the debtor made that purchase, his debts amounted to 2064*l.*, and his only assets consisted of book debts of which the value was estimated at only a few pounds, and a small reversionary interest under his grandfather's will, which was of hardly any present value.

The trustee under the liquidation petition sought to impeach the replacement of the 424*l.* Consols as being either a fraudulent preference under the 92nd section of the Bankruptcy Act 1869, or a fraudulent transfer of substantially the whole of the debtor's property under sect. 6 subs. 2 of the Act, on the ground that it was a transfer in consideration of an antecedent debt, and therefore an act of bankruptcy.

The Judge of the Bristol County Court held that the transfer was made under pressure and could not be impeached.

The trustee appealed from this decision to the Chief Judge in Bankruptcy, who held that the pressure for payment on the part of the mother was a mere sham, and ordered that the debtor and his father should transfer the 424*l.* Consols to the trustee under the liquidation.

From this decision the debtor and his father appealed.

Ince, Q.C. and Finlay, for the appellants.—The fund was replaced under pressure; it was also received in good faith, and, therefore, the transaction cannot be impeached as a fraudulent preference, but is protected by the proviso at the end of the 92nd section of the Bankruptcy Act 1869, which provides that that section "shall not affect the rights of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration." They cited

Ex parte Tempest, Re Craven and Marshall, 23 L. T.

Rep. N. S. 650; L. Rep. 6 Ch. 70;

Butcher v. Stead, 33 L. T. Rep. N. S. 541; L. Rep.

7 E. & I. 839.

De Gez, Q.C. and Finlay Knight, for the respondent.—This transaction was an act of bankruptcy under sect. 6, sub-sect. 2, of the Act, as a "fraudulent conveyance, gift, delivery or transfer of his property, or any part thereof" (*Ex parte Simpson*, De G. 9), and therefore it is void as against the trustee. [BRAMWELL, J.A.—A conveyance, gift, delivery or transfer of a debtor's property may be fraudulent in two ways, either by reason of actual fraudulent intent, or by construction of law. Why does not the principle of *Butcher v. Stead* apply to either of those two cases as much as to a fraudulent preference?] This case does not come

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within the 92nd section of the Act at all, but within the 2nd sub-section of the 6th section, and in *Ex parte Lückes, re Wood* (26 L. T. Rep. N. S. 113; L. Rep. 7 Ch. 305-6), Mellish, L.J., held that the omission from that clause of the words "with intent to defeat or delay his creditors," which had appeared in the corresponding provision of the old Act, did not make any difference, or narrow the effect of the clause. [BRAMWELL, J.A.—Do not the words, "with intent to defeat or delay his creditors," give a meaning to the word fraudulent, which it would not otherwise have had?] Lord Justice Mellish said in the case just referred to, that those words were mere surplusage. We say that this case comes within sect. 6, sub-sect. 2, and not within sect. 92, and therefore the proviso at the end of the latter section protecting payees in good faith, can have no application. The 6th section contains no such proviso. [BRAMWELL, J.A.—Would the appellant be protected here, even if the proviso in question applied to the 2nd sub-section of the 6th section of the Act?] No, for he knew perfectly well that the debtor was insolvent. There was no real pressure; the whole thing was a sham. [JAMES, L.J., referred to the words "with intent to defraud," &c., used in the 80th section of the 24 & 25 Vict. c. 96.] The money was really intended to be given to the debtor as an advancement, and he paid it back to save it from his creditors.

Ince, Q.C., in reply.—This was not an advancement, for the will contains a restraint on alienation. It was simply a loan in breach of trust. The circumstances are very similar to those in *Ex parte Kewan, re Crawford* (L. Rep. 9 Ch. 752), where the repayment was held to be good.

JAMES, L.J.—I am of opinion that the judgment of the Chief Judge in this case ought to be affirmed. Beyond all question, as it seems to me, but for the proviso at the end of the 92nd section of the Act, the transaction in question could not be sustained in the Court of Bankruptcy. The real point we have to consider, therefore, is whether, under the circumstances of this case, the transaction in question is protected by the proviso at the end of the 92nd section. In *Butcher v. Stead* (*ubi sup.*) it was laid down by the House of Lords, affirming a decision of this court, that a person who received money from a debtor by way of fraudulent preference, but in good faith, could not afterwards be compelled to repay it. This was a novelty introduced into the law of bankruptcy by the Act of 1869, and the object of it was well expressed by Lord Cairns, in his judgment in *Butcher v. Stead*. Lord Cairns there (L. Rep. 7 E. & I. 847) says: "I think it was the intention of the Legislature, in defining, for the first time, the law as to fraudulent preference, and changing the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months, to accompany and temper this enactment by a proviso of great convenience in mercantile dealings, and giving a protection, where it is obviously much required, to those who, in good faith, take money that ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors." Therefore the person receiving the money must show that he took it in good faith, and that he did not know that the person paying the money was doing anything injurious to his other creditors. The burden of proof is on

the person receiving the money. In the present case I do not think that that burden is discharged. Indeed, I am satisfied that the father knew perfectly well that his son was insolvent, and that, in purchasing this sum of Consols in their joint names, he was doing something that he ought not to do, and which was injurious to his other creditors. I am, therefore, of opinion that this case does not come within the protection of the proviso at the end of the 92nd section of the Act, and that the order made by the Chief Judge was perfectly right. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, J.A.—I am of the same opinion. I agree with the Lord Justice that the burden of proof that he received the money in good faith must be on the recipient who seeks the protection of the proviso at the end of the 92nd section of the Act. But in this case I am of opinion that the money was not received in good faith.

BRAMWELL, J.A.—I am of the same opinion. I think, when the facts of the case are fully appreciated, that it becomes clear that it is impossible that this transaction should stand. [His Lordship stated the facts as to the amount of the debtor's property, and continued:] As a matter of fact, I have come to the conclusion that in placing this sum of Consols in the joint names of his father and himself, the debtor parted with what was substantially all his property. He did this for a past debt, and for no present consideration. He has done that which the Act has prohibited, and he has done it to the knowledge of his father, and his mother, or his mother's agent. It seems to me impossible that that transaction can be protected by the proviso at the end of the 92nd section, which provides that "this section shall not affect the rights of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration." Therefore this case does not come within that proviso, whether the proviso be confined to cases coming within the 92nd section, or be applicable also to cases coming within sect. 6, sub-sect. 2. It appears to me, therefore, that this appeal should be dismissed.

Appeal accordingly dismissed with costs.

Solicitors for the appellants.—*Edward Doyle and Son*, agents for *J. K. Bartrum*, Bath.

Solicitors for the respondent.—*Whites, Renard, and Co.*, agents for *Brittan, Press, and Inkip*, Bristol.

Friday, June 2.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Ex parte THORNE; Re JONES. (a)

Bankruptcy—Trader—Keeper of hotel—Lodging-house keeper—Professional nurse—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), sect. 1.

A professional nurse who keeps a lodging-house for invalids, and nurses and boards them at a profit is a "keeper of an hotel," and therefore a trader, within the meaning of schedule 1 to the Bankruptcy Act 1869.

Decision of Mr. Registrar Pepys affirmed.

THIS was an appeal from a decision of Mr. Re-

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

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Ex parte JAMESON; Re BALBIRNIE.

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gistrar Pepys sitting as Chief Judge in Bankruptcy.

The facts of the case were shortly as follows :

On the 7th March 1876, Messrs. Atkinson and Co., obtained a judgment and issued execution against Miss R. Jones, a professional nurse, who kept a lodging-house for invalids in Wimpole-street, for 176l. in respect of furniture which they had supplied to her.

On the following day Miss Jones filed a petition for liquidation of her affairs by arrangement, describing herself in her petition as a "lodging-house keeper and nurse," and on the 24th March resolutions were duly passed in favour of a liquidation by arrangement.

The evidence showed that the debtor was a trained professional nurse, and that she kept a house for the reception, almost exclusively, of invalids, who were recommended to her by medical men, and that she nursed them and supplied them with provisions at a profit.

The trustee in the liquidation applied to the Court of Bankruptcy for an order that the goods seized by the execution creditors were the property of the trustee, and that an interim injunction which had been granted against the execution creditors might be made perpetual.

The registrar held that the debtor was a trader within the Bankruptcy Act 1869, and that therefore the execution was an act of bankruptcy, and accordingly he made the order prayed for.

From this order the execution creditors appealed.

H. M. R. Pope for the appellants.—The registrar's decision was based upon *Smith v. Scott* (9 Bing. 14), where it was held that a lodging-house keeper who supplied his lodgers with provisions was an hotel keeper and a trader, but the present case is distinguishable from that case, for here the lodgings were intended only for invalids, and the board was merely ancillary to the nursing. The debtor is a professional nurse, and the fact that she makes a profit by supplying her invalid lodgers with provisions does not make her a trader any more than boarding his pupils at a profit makes a schoolmaster a trader. They also cited

Es parte Bowers, 3 Mont. & Ayr. 33;

Ex parte Cleland: Re Cleland, 16 L. T. Rep. N.S. 403; L. Rep. 2 Ch. 466.

De Gez, Q.C. and *H. W. Lord*, for the respondent, the trustee, were not called upon.

JAMES, L.J.—I think the Legislature must be taken to have adopted the interpretation put upon the words "keepers of hotels" by the Court of Common Pleas, in *Smith v. Scott*, by deliberately using the very same words in the first schedule to the Act of 1869. We are, therefore, bound to hold that a lodging-house keeper, who supplies board, is a keeper of an hotel, and therefore a trader within the meaning of the Act. The fact that the debtor in the present case had a connection among medical men, and took in for the most part invalids requiring to be nursed, does not make any difference. This is quite different from the case of a schoolmaster who supplies his pupils with board. The debtor in her petition describes herself as a lodging-house keeper and nurse, and her occupation as a nurse was evidently auxiliary to her business of a lodging and boarding-house keeper. The appeal must therefore be dismissed with costs.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J. A., also concurred.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Paterson, Son and Garner*.

Solicitors for the respondent, *Barnard and Co.*

Thursday, Aug. 3.

(Before *JAMES and MELLISH, L.JJ.* and
BAGGALLAY, J.A.).

Ex parte JAMESON; Re BALBIRNIE. (a)

Composition—Judgment creditor—Delivery of writ to sheriff before filing of petition—Creditor voting for composition without deducting value of security—Seizure after registration of resolutions—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), ss. 12, 126.

A judgment creditor delivered a writ of fi. fa. to the sheriff before the judgment debtor had filed a liquidation petition. The creditors duly passed resolutions accepting a composition of 2s. 6d. in the pound. The judgment creditor proved for the whole amount of his judgment debt, and voted in favour of the composition. After the registration of the resolutions the sheriff seized under the writ:

Held (affirming the decision of Bacon, C.J.), that the judgment creditor, not having seized before the composition was accepted, had no security upon the debtor's property, and could not enforce the writ after the resolutions were registered,

Held also (affirming the decision of Bacon, C.J.), that the judgment creditor, having voted as an unsecured creditor, could not afterwards be allowed to set up his security.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The hearing in the court below is reported, *sub nom.*, *Ex parte Balbirnie; Re Balbirnie*, in 34 L. T. Rep. N.S. 857, where the facts of the case and the judgment of the Chief Judge are fully set out.

The execution creditor appealed.

F. Q. Crump, for the appellant, relied upon *Ex parte Jones, Re Jones* (33 L. T. Rep. N.S. 116; L. Rep. 10 Ch. 663), where it was held that the goods were bound from the time of the delivery of the writ to the sheriff.

Channell, for the sheriff.

B. Vaughan Williams, for the debtor, was not called upon.

Their Lordships affirmed the decision of the Chief Judge, and dismissed the appeal with costs.

Solicitor for the appellant, *G. B. Wheeler*, agent for *R. Jameson*, Liverpool.

Solicitors for the sheriff, *Milne, Riddle, and Mellor*, agents for *J. Tallock*, Chester.

Solicitors for the debtor, *Ashurst, Morris, and Co.*

(a) Reported by *H. PRAT, Esq., Barrister-at-Law.*

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REG. v. STEEL AND OTHERS.

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SITTINGS AT WESTMINSTER.

(Before COLERIDGE, C.J., MELLISH, L.J., BRETT,
and AMPHLETT, JJ.A.)

Tuesday, Nov. 7.

REG. ON THE PROSECUTION OF HARGRAVES AND
OTHERS v. STEEL AND OTHERS. (a)*Appeal in criminal cases—Proceedings on Crown side of Queen's Bench Division—Order for costs on a criminal information—Judicature Act 1873 (36 & 37 Vict. c. 66), ss. 19, 47; Judicature Act 1875 (38 & 39 Vict. c. 77), s. 19, Order LXII., 6 & 7 Vict. c. 96, s. 8.**The Judicature Acts of 1873 and 1875 have not changed the practice and procedure in criminal cases; there is therefore no appeal in such cases unless there is error of law upon the record, or unless a point has been reserved for the consideration of the Court of Crown Cases Reserved. An order for costs made on the trial of a criminal information is a procedure in a criminal cause, and therefore such an order made on the Crown side of the Queen's Bench Division cannot be the subject of an appeal.*

This was an appeal from an order made by the Queen's Bench Division (on the Crown side), discharging a rule calling on the defendants to show cause why the taxation of the defendant's costs should not be reviewed. A criminal information had been filed against the defendants for an alleged libel, and the trial had resulted in a verdict of not guilty. The defendants were accordingly entitled under the provisions of 6 & 7 Vict. c. 96, s. 8, "to recover from the prosecutors the costs sustained by the defendant by reason of such information," and the master had allowed the defendants certain items to which the prosecutors had objected; they had accordingly obtained the above rule, and on its being discharged they appealed to this court. On the appeal being called on

O. Russell, Q.C. with him Crompton, for the respondents, objected to the jurisdiction of the court. This case is a criminal case, and in such a case there is no appeal, therefore the Court of Appeal has no jurisdiction to entertain this case. The order discharging the rule is an order made on the Crown side of the Queen's Bench Division, and is therefore an order in a criminal cause. A criminal information is the alternative given in the statute (6 & 7 Vict. c. 96 s. 8), for an indictment, and as on an indictment there can be no appeal save for some matter of error on the record, so on this order there can be no appeal. [MELLISH, L.J.—If there is an appeal in this case, would there not also be an appeal if the court were to refuse a rule for a criminal information?] It would seem so. The contention for the appellants would seem to be that sect. 19 of the Judicature Act 1873, gives a general right of appeal and that there is no provision in either of the Judicature Acts limiting that right, but it will be found that sect. 47 of the Act of 1873 expressly provides that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law upon the records," and sect. 19 of the Act of 1875 provides that the practice and procedure in criminal cases shall be the same as it was before the passing of the Judicature Acts.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

Aspinall, Q.C., with him Sutton, for the appellants.—It is submitted that the general right of appeal given by sect. 19 of the Act of 1873, is not limited by sect. 47 of the same Act, nor by Order LXII., for they only apply to cases reserved for the Court of Criminal Appeal, and not to criminal proceedings in any other court. Further, this is not a criminal matter, it is merely a question of costs; a question which arises on the conclusion of all criminal and penal proceedings. The criminal proceedings were between the Crown and the defendants, whereas this is a civil right between the prosecutors and the defendants.

The following are the sections of the Acts of Parliament referred to in the argument:

Judicature Act, 1873, sect. 19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof subject to the provisions of this Act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act. For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

Sect. 47. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench, and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intitled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign.

Judicature Act 1875, sect. 19. Subject to the first schedule hereto and to any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice, and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar cases in matters before the commencement of this Act.

Order LXII. Nothing in these rules shall affect the practice or procedure in any of the following causes or matters:

Criminal proceedings.
Proceedings on the Crown side of the Queen's Bench Division.

COLERIDGE, C.J.—I am of opinion that there is no jurisdiction in this court to entertain this appeal, and I am of this opinion on the ground that upon the true construction of sections 19 and 47 of the Judicature Act 1873, taken with the sect. 19 of the Judicature Act of 1875, there is no appeal from an order made on the Crown side of the Queen's Bench division. Section 47 of the Act of 1873 dealt in its earlier part with the court of Crown Cases Reserved alone, and it then goes on to enact as follows: "The determination of any such question by the judges in manner aforesaid shall

be final and without appeal, and no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the judges." Now this latter clause applies to the present case, as this is a case where no question is reserved for the consideration of the judges, and doubtless it was inserted in order to save any right of appeal which did at the time of the passing of the Act exist, but it does not destroy the distinct enactment contained in the preceding sentence which is to the effect that no appeal shall lie from any judgment of the High Court in any criminal case. I asked during the course of the argument whether the words of the latter portion of section 47 must be held to be simply a repetition of, and in no way an extension of, the words which had been inserted just above, and it did not appear that any sufficient answer could be given to the question. I also observe that it is expressly provided by Order LXII. of the Rules of Court that nothing in the rules is to change the course of proceedings on the Crown side of the Queen's Bench Division, and that adds force to the intention that it was not the intention to give any appeal in criminal cases where there was not, prior to the Judicature Act, any right of appeal. When it is argued that this is not a judgment in any criminal cause but that this is merely an order which follows on a side bar rule drawn up on a judgment. I am, however of opinion that the word "judgment" in section 47 of the Act of 1873 includes such an order as this, and it appears to me that section 19 of the Act of 1875 confirms this view. That section enacts that the practice and procedure in all criminal causes and matters including the practice and procedure with respect to Crown Cases Reserved shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act. This is, as I think, a criminal matter, for although it is a criminal information and not an indictment, it, speaking generally, such an information differs from an indictment only in the absence of certain forms, such as sending the bill up before the grand jury and the like, and it remains equally a criminal matter. I am of opinion that this is an early part of a proceeding in a criminal cause or matter, that is of a cause as to the practice and procedure of which it is especially enacted that no change shall be made, and from which, by section 19 of the Act of 1873, no appeal can lie.

MELLISH, L.J.—I am of the same opinion. I think that the clause in the latter part of section 19 means that there is now no appeal in criminal matters unless where there is error of law upon the record, in which case alone was there, prior to the Judicature Act, an appeal. If the contention of the appellant before us to-day were right, it must follow that there would be an appeal from every order made on the Crown side of the Queen's Bench Division. Then is this an appeal in a criminal matter? I am of opinion that if the subject-matter of the proceeding is criminal, that then the matter is a criminal matter in all its stages and that there is no appeal. It seems to me that this is the effect of section 47 of the Judicature Act of 1873, confirmed as it is by section 19 of the Act of 1875, and by Order 62, all of which when construed together show that there is not now, just as there is not before the Judicature Acts, any appeal

in criminal cases unless there is error on the record.

BRETT, J.A.—The argument that an appeal has been given in criminal matters might *prima facie* gain some support from section 19 of the Judicature Act of 1873, but the doubt, if any, is cleared up by section 47 of the same Act. The earlier portion of this section is confined to cases which come before the Court for Crown Cases Reserved, while the latter part deals with criminal matters other than those which come before that court, and then it in general words declares that there shall be no right of appeal. Now, as to whether this order is a "judgment," it may be observed that although in the interpretation clause of the Act the word "judgment" is to include decrees, still it does not expressly state that it is to include such an order as this; but as according to the provisions of 6 & 7 Vict. c. 96, s. 8, the costs, the subject of this order, are the inevitable result of the judgment of the court, I am of opinion that that which enforces this inevitable result of a judgment in a criminal matter is itself a proceeding in a criminal matter, and that no appeal can lie upon it now, just as no appeal could have been brought before the passing of the Judicature Acts.

AMPHLETT, J.A.—I am of the same opinion. Solicitors for appellant, James, Curtis and James.

Solicitors for respondent, Carter and Bell.

(Before COLERIDGE, C.J., MELLISH, L.J., BRETT and AMPHLETT, JJ.A.)

Friday, Nov. 10.

ROBSON v. NORTH EASTERN RAILWAY COMPANY. (a)

Liability of railway company—Station with insufficient platform—Evidence of negligence.

Where the conduct of a railway company's servant is such as to lead a passenger to think that he is intended to alight, and it proves to be dangerous to alight, there is, in the absence of evidence of contributory negligence on the part of the passenger, evidence of negligence on the part of the company for a jury to consider.

The plaintiff, a female, arrived by defendants' railway at a small station, as the part of the train in which she was riding reaching beyond the end of the short platform. The only servant of the company being engaged, the plaintiff attempted, after waiting until she feared the train would move on, to descend without assistance, and, in so doing, she slipped and was injured.

Held (affirming the judgment of the Court of Queen's Bench) that there was evidence of negligence on the part of the company, which ought to be left to a jury.

THIS was an appeal by the defendants from a judgment of the Court of Queen's Bench in favour of the plaintiff, reported 32 L. T. Rep. N. S. 551.

The trial resulted in a nonsuit, leave being reserved to the plaintiff to move to enter the verdict for him, and a rule having been obtained, was afterwards made absolute, whereupon the defendants brought this appeal. The material facts were as follows. The plaintiff, a woman, was travelling by the defendants' railway to a small station called Benton, and it appeared that, on the arrival of the train at that station, the car-

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ROBSON v. NORTH-EASTERN RAILWAY COMPANY.

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riage in which the plaintiff was riding was driven past the end of the platform, the door of the plaintiff's compartment being, when the train stopped, beyond the end of the platform. The plaintiff then rose, and opened the door, and stepped on to the iron step, looking at the same time to see whether there were any railway servants about. She saw that the station-master was engaged with the luggage; but she did not see the guard or any other railway servant, and, after standing on the step looking for somebody to help her, until she became afraid that the train would move away, she tried to alight by getting on to the footboard, and, in doing this, she slipped and fell down by the carriage side, and thus sustained the injury for compensation for which the action was brought. She had hold of the door with her right hand, and had got one foot on to the footboard, and it was then that she lost her hold of the carriage door, and slipped and fell, with two small articles in her left hand. Benton station is a very small one, the platform is short, and the station-master is the only servant kept there.

Herschell, Q.C. and *Crompton*, for the appellants.—The mere overshooting the platform is not in itself negligence; the plaintiff ought to have waited for assistance. *Siner v. Great Western Railway Company* (L. Rep. 4 Ex. 117) is in point, although the circumstances of that case were if anything less favourable to the defendants, as in that case there were no porters in sight, whereas here there was the station master. [*BRETT*, J.A.—Does not *Bridges v. North London Railway Company* (L. Rep. 7 H. L. 213) decide that in all these cases the jury and not the court is the proper tribunal to investigate points such as these?] That case did not overrule *Siner v. Great Western Railway Company* (*ubi sup.*), and *Adams v. Lancashire and Yorkshire Railway Company* (L. Rep. 4 C. P. 739) shows that where the passenger has to choose between a slight inconvenience and taking a dangerous step he is not at liberty to fix the company with the consequences of his dangerous act.

Kny, Q.C. and *Gibbs*, for the respondent.—The circumstances of the case of *Siner v. Great Western Railway Company* (*ubi sup.*) differ from those of this case, as there the passenger jumped down and so contributed to the injury received. [They were stopped by the court.]

Crompton in reply.

COLERIDGE, C.J.—In all cases connected with accidents on railways it is easy to cite, out of the number which have been reported, decisions or dicta some of which support the argument of the plaintiff, and some that of defendant, for in all such cases each separate decision depends on the special facts of each separate case. The question which we have to decide, and the only question with which we have to deal is, whether there was any evidence upon which the jury could, as men of ordinary reason act, and therefore this case must stand entirely on its own facts. There has doubtless been a considerable difference of opinion amongst learned judges as to the liabilities of railway companies in actions brought by passengers for accidents caused by alleged negligence such as is charged against the appellants in the present case. Some judges have held opinions favourable, and other judges opinions unfavourable, to the railway companies. That difference of opinion has, however been set at rest by the case of *Bridges v.*

North London Railway Company (L. Rep. 7 H. L. 213), for although the judgments delivered in that case were confined to the particular facts of that case, still if the judgments of the learned judges who were summoned to the House of Lords on that occasion, and whose opinions are referred to by Lord Cairns, when addressing the House, be studied, it will be seen that the general view taken in this case is that where there is any evidence of negligence at all, a case should not be withdrawn from the jury, but that it is the duty of the jury and not of the court to inquire into that negligence. The case which has been pressed on our notice to-day is the case of *Siner v. Great Western Railway Company* (L. Rep. 4 Ex. 117). Now without doubt that case is in some respects like the one before us, the train was too long for the platform, and the carriage in which the plaintiff was riding was driven beyond the end of the platform; but the case now before us differs from that case in this, that here there was what was held in *Cockle v. South-Eastern Railway Company* (L. Rep. 7 C. P. 321) to be an invitation to alight, and if after such an invitation to alight has been given, it should prove that there is danger in so alighting, that is, in my opinion, evidence of negligence on the part of the company. I will read from the judgment of the Lord Chief Justice of England in that case some words which seem to me applicable to the present case. "It is" (he says at p. 326) "established that an invitation to passengers to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence, and it appears to us that the bringing up of a train to a final standstill for the purpose of the passenger's alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at that particular station." Now the facts of the present case seem to bring it within the principles laid down in *Cockle v. South-Eastern Railway Company* (*ubi sup.*), and as in that case *Siner v. Great Western Railway Company* (*ubi sup.*) was referred to and at the same time distinguished, I am of opinion that both on authority, and on the principles of common sense, there was in this case evidence of negligence for the jury, and that the judgment of the Court of Queen's Bench ought to be affirmed.

MELLISH, L.J.—I am of opinion that a railway company is bound to provide the passengers travelling over its line with reasonable means of alighting from the train, and if there is evidence of an invitation to alight and of injury received in alighting after such an invitation, that there is a *prima facie* case of negligence for the jury. The facts of this case show that there was an invitation to alight, that the door of the carriage in which the plaintiff was beyond the end of the platform, that the plaintiff opened the door and stepped on to the iron step, that the only attendant at the station was busy with the luggage, that she could not alight without assistance, that there was no one to assist her, and that at length becoming afraid that the train would move away she attempted to descend by herself and so received the injuries for which this action was brought. I, therefore, think that there was evidence for a jury, inasmuch as a jury was entitled to bring the

ordinary knowledge of reasonable men to bear in order to determine whether the plaintiff might not have had such assistance as would have saved her from being injured. The evidence was distinct that the plaintiff waited for assistance and that none came, there was also evidence that she might reasonably fear that the train would move on, and that she would be carried on with it, and I, therefore, think that there was evidence for a jury to take into consideration, and that such a case ought to be left to a jury.

BRETT, J.A.—I think that the decision of the House of Lords in the case of *Bridges v. North London Railway Company* (L. Rep. 7 H. L. 213) ended a long controversy as to the way in which judges should deal with railway cases; some judges having thought that the courts should settle what was reasonable conduct on the part of railway companies and passengers, while other judges have taken a different view of their duty. The case of *Siner v. Great Western Railway Company* (*ubi sup.*) was decided in the height of the dispute by judges who inclined to the former view. The case of *Bridges v. North London Railway Company* (*ubi sup.*) shows that if there are any facts on the reasonable consideration of which a jury can say that there has been on the part of a railway company a want of care that then there is evidence for a jury to consider, and that the case is one that they must decide. In the present case the passenger waited so long that there was reasonable ground for supposing that she must either get out or be carried on, and if so she had, I think, a right to alight unless the danger of getting out was so great and apparent as to prevent any person acting with ordinary prudence or taking reasonable precaution getting out at that place. The danger of descending was not great here, and it was quite reasonable for a passenger to attempt to alight, it is, therefore, now settled that in such case the court cannot hold that there is no evidence to go to a jury.

AMFLETT, J.A.—I agree with the judgments which have been delivered.

Judgment affirmed.

Solicitors for the appellant, *Williams, Hill, and Co.*

Solicitors for the respondents, *Brownlows.*

Saturday, Nov. 18.

(Before MELLISH, L.J., BRETT, and AMFLETT, JJA.)

TURNER v. SAMSON AND OTHERS. (a)

Accommodation bill—Notice of dishonour—No effects—Bemedy over against prior parties.

An indorser of an accommodation bill has a right to notice of dishonour, unless it be shown that he would, if he paid the bill, have no remedy over against any other party to the bill.

THIS was an action on a bill of exchange drawn by the defendant Horne, accepted by the defendant Samson, indorsed by Horne to the defendant Martinez, and indorsed by him to the defendant Sherwood, who again indorsed it to the defendant Turner.

Judgment went by default against all the defendants except Martinez, who alleged, amongst other things, in his statement of defence,

First, that there was no consideration between any of the defendants, or that the bill of exchange was an accommodation bill only; secondly, that he had not received any notice of the dishonour of the bill.

Demurrer.

The demurrer came on for argument in the Queen's Bench Division, and as no one appeared for the defendant Martinez, judgment was *pro forma* given for the plaintiff.

The defendant Martinez accordingly appealed.

Cooper Wyld, for the appellant.—This is an action by a holder of an accommodation bill against an indorser, and the defence set up is that no notice of dishonour was given. It is contended that to render the defendant liable without notice he must have no remedy over against any other person.

Philbrick, Q.C. and *Petheram*, for the plaintiff, the respondent.—All these plaintiffs are really co-drawers, and, therefore, the rule as to notice does not apply, and as the appellant never had any effects in the hands of the acceptor, he cannot be prejudiced by want of notice. [MELLISH, L.J.—To avail himself of want of notice, must not the defendant be the person who would have to pay the bill himself?] They cited

Byles on Bills, 11th edit. p. 293;

Bickerdike v. Bollman, 2 Smith's Lead. Cas. 50;

Carter v. Flowers, 16 M. & W. 743.

MELLISH, L.J.—The question in this case is, whether, considering the relative positions of the parties to this action and the facts, which are admitted, the defendant was entitled to notice of dishonour. The defendant was indorsee, and all the parties whose names appear on the bill seem to have become parties to the bill for the benefit and accommodation of Sherwood. The defendant alleges that, as the indorser of an accommodation bill, he is entitled to notice of dishonour. Now it is clear that the defendant was not bound to take up the bill himself, and that he was entitled to assume that the person for whose benefit it had been drawn would at the proper time provide funds to meet it. This being so, and the bill having been met, the defendant was called on to pay the amount of the bill. He was surely then entitled to have notice of the dishonour, that he might have recourse to those rights which he undoubtedly had against other parties to the bill. It is said that the defendant never had any effects belonging to him in the hands of any of these parties, and that he is therefore in no way damaged by want of notice, but in fact he is damaged, because he is entitled to have his remedy over against those who were parties to the bill before he, for Sherwood's accommodation, indorsed it. As, owing to the circumstance of there being no argument in the court below, the judgment was given to the plaintiff, this appeal must be allowed.

BRETT, J.A.—The holder of a bill of exchange sues the indorser, and it is alleged by way of answer to the action that the defendant never had any notice of dishonour. Now, *prima facie*, it is the duty of the holder of a dishonoured accommodation to give notice of the dishonour to the antecedent parties, unless he can show some facts which will excuse him from doing this. Then, are there in this case any facts which will excuse the plaintiff from giving the notice here? I do not think that there are, because there are no facts to

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show that the defendant would, if he were to pay the value of this bill, have no remedy against any other person, so that it is by no means clear that the defendant may not have been prejudiced by the want of notice. This appears to be what the general rule comes to, and as in the case of *Bickerdike v. Bollman* (*ubi sup.*), it was not shown that the drawer had any reason to expect that the acceptor would pay it, therefore the case did not fall within the principle of the general rule, whereas in *Carter v. Flower* (*ubi sup.*), it was consistent with the facts alleged, that the note was, as here, an accommodation note, and that the defendant might, as here, have his remedy against some prior party, and it was held that he was, therefore, entitled to notice of dishonour. For my own part, I am well content to cite the words of that great judge, Lord Tenterden, and to say, that I regret that any distinctions were introduced into the law on this matter, and that knowledge was ever substituted for notice; but, however that may be, the facts of this case do not bring it within any exception to the general principle, which requires that a defendant should in such a state of facts as this have notice, and I hold that the defendant not having had notice, is entitled to our judgment.

AMPHLETT, J.A.—I also think that the appellant is entitled to our judgment. Sherwood was here the principal debtor, and all the other parties may for the purposes of this case, be called co-sureties. What had the appellant Martinez, who indorsed the bill to the plaintiff, a right to expect? In an ordinary course he would assume that funds would be provided by the acceptor Samson, to meet the bill when due, and if Samson failed to do this, and the bill was dishonoured, the defendant Martinez had a right to have notice of the dishonour, as then he might have sued Sherwood, or put in force his remedy against the other parties to the bill. The appellant was not primarily liable, and was entitled to be made aware that by the default of other parties he was about to be called on to supply funds to meet the bill.

Judgment for appellant.

Solicitor for appellant, *Smith and Howard*.
Solicitor for respondents, *Philbrick*.

Friday, Nov. 24.

APPEAL FROM QUEEN'S BENCH DIVISION.

(Before MELLISH, L.J., BRETT and AMPHLETT, J.J.A.)

REG. v. FLETCHER; *Ex parte* BIRNIE. (a)

Court of Appeal—Jurisdiction—Right of appeal in criminal cases—36 & 37 Vict. c. 66 (Judicature Act 1873) s. 47—38 & 39 Vict. c. 77 (Judicature Act 1875) s. 19—First schedule, Order LXII.

An application to the Court of Queen's Bench for a certiorari to bring up a conviction to be quashed, on the ground of want of jurisdiction in the convicting justice, is a "criminal cause or matter" within the meaning of the above sections of the Judicature Acts of 1873 and 1875, and there is consequently, no appeal from the decision of the Queen's Bench Division.

The appellant, Birnie, had been summoned before he respondent, one of the justices of the peace for he county of Cumberland, for an offence against

the game laws. On the hearing of the summons he had asserted, as an objection to the jurisdiction of the justice, the existence of a *bonâ fide* claim of right to the land in question in himself. That objection was, however, overruled, and the appellant was convicted. Subsequently a rule nisi was obtained in the Queen's Bench Division, calling upon the respondent to show cause why a writ of certiorari should not issue to bring up the conviction to be quashed, on the ground of want of jurisdiction in the justice who tried the case. The rule, however, was discharged on the hearing by Lord Coleridge, C.J., and Quain, J., sitting to hear cases on the Crown side of the Queen's Bench Division. This appeal was from that decision.

Before counsel for the appellant proceeded to state his case,

Ford, for the respondent, took a preliminary objection that the court had no jurisdiction to try this appeal, as it was an appeal from a decision in "a criminal cause or matter," within the meaning of sect. 47 of the Act of 1873, and sect. 19 of the Act of 1875.

Bompas for the appellant.—The case lately decided in this court of *Reg v. Steel*, ante p. 534, may be said to be against me, but that case is distinguishable. That only decides that there shall be no appeal from the decision of a court of the High Court of Justice, where that decision is in a criminal proceeding. But here the decision in the Court of Queen's Bench was an application for a writ of certiorari to the justices on the ground that they had no jurisdiction to convict. The conviction itself was no doubt a criminal proceeding, but not the application for the prerogative writ of certiorari. The only question before the Queen's Bench Division was whether a claim had been set up *bonâ fide* or not. That was not a criminal proceeding in any sense, no more than a motion in the High Court with respect to the subpoena of a witness in a criminal case would be in itself a criminal proceeding. The writ of certiorari relates to Fletcher and not to Birnie.

MELLISH, L.J.—The question is, whether we have jurisdiction to hear an appeal from a decision of the Court of Queen's Bench refusing a writ of certiorari to be issued against the defendant, a justice of the peace for Cumberland. Now was that decision of the Court of Queen's Bench a decision "in a criminal cause or matter," within the meaning we gave to these words, in the case of *Reg. v. Steel*, ante, p. 534, which was before us a few days ago. We there held that those words were not confined to cases referred to the Court of Criminal Appeal, but went to criminal cases in the Court of Queen's Bench itself. Now a further and somewhat different question arises, whether there is an appeal from a proceeding in the Queen's Bench, which is not a criminal proceeding in that court, but arises out of a proceeding before the justices, which was a criminal proceeding. Under those circumstances was that proceeding in the Queen's Bench a proceeding in a criminal matter? In my opinion it is clear that, subject to the few exceptions specified, criminal procedure was intended to remain unaltered by the Judicature Act. The words of sect. 19 of the Act of 1875 are very wide, and relate to everything substantially a "criminal cause or matter." These words must be construed according to their natural meaning.

(a) Reported by W. APFLETON, Esq., Barrister-at-Law.

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Is this "a criminal cause or matter?" Before the magistrate it is, in the Queen's Bench it is not. If any appeal lies, it must lie on both sides. Suppose, here, the *certiorari* had been granted and the conviction had been brought up and quashed by the court of Queen's Bench. If there is an appeal here, there must be one also under those circumstances, and so a simple question of a small fine or a few days' imprisonment might ultimately get into the House of Lords. I think that cannot have been intended to be allowed. I think this is such a criminal cause or matter as is there intended. Sect. 19 of the Act of 1875 throws light on sect. 47 in the previous Act, and it assumes that the procedure has not been altered in criminal matters. It was not the intention of the Judicature Act to enlarge the jurisdiction of the Court of Appeal in this respect.

BRETT, J.A.—I am of the same opinion. It all turns on the 47th section of the Act of 1873. The 19th section of the later Act can only be used as it was in *Reg. v. Steel* (*ante*, p. 534), that is, as interpreting the 47th section, criminal practice is to remain as before, unless altered by Rules of Court. The Rules of Court do not alter it, and, further, Order LXII was put in for the sake of caution, to show that none of the rules should apply to proceedings on the Crown side of the Queen's Bench, and that is all. The 19th section, therefore, shows that criminal practice, inasmuch as it is not altered by the rules, remains the same. In *Reg. v. Steel* (*ante*, p. 534) it was argued that s. 47 was confined to cases before the Court of Criminal Appeal, but the court said the scope of the words was much larger. It is said here that those words do not apply where the question before the Queen's Bench was not a "criminal cause or matter." Now, what is this case? There has been a conviction, and there is an application for a writ of *certiorari* to bring it up to be quashed. Is that not a "criminal cause or matter?" It is to decide whether a man is to be kept in prison or fined or not. The proper construction is that there is no appeal where there was not one before, therefore, this case follows *Reg. v. Steel* (*ante*, p. 534).

AMPHLETT, J.A.—I am of the same opinion. To oust the jurisdiction of the justices there must be a *bona fide* assertion of right. Before the Court of Queen's Bench what was the question? Not whether there had been poaching or not, but whether there was a *bona fide* assertion of right. That is whether the plea to the jurisdiction was a good one or not. The same sort of question as there was in the *Franconia* case. Therefore this case comes under sect. 47 of the Act of 1873, under the exact meaning of its words. And, if we are to look at the public convenience, would it not be most inconvenient that this case should go through all the courts, not to try a civil right, but whether there was a *bona fide* objection or not?

Appeal discharged with costs.

Solicitors for appellant, *Bischoff, Bompas, and Bischoff for Waugh.*

Solicitors for respondent, *Helder, Roberts, and Gillett for Webster, Whitehaven.*

Wednesday, Nov. 22.

(Before MELLISH, L.J., BRETT, and AMPHLETT, JJ.A.)

LLOYD v. LEWIS. (a)

Order of reference before award after, the Judicature Act—Practice as to signing judgment on—Motions for judgment—References under and outside the Judicature Act 1873 (36 & 37 Vict. c. 66), s. 22—Rules of Court, Order XL., rules 1, 3.

The old law and practice in connection with arbitration still exist as to references to arbitration made under the old system, and such references are not governed by the Judicature Act or the rules of court made under that Act. An order of reference was made prior to, but the award after, the passing of the Judicature Act:

Held, that the successful party was entitled to sign judgment on the award, and that as the rules of court did not apply to such a case, he was not bound to set down the case on motion for judgment.

APPEAL from an order of Field, J. and Huddleston, B. sitting as a Divisional Court, setting aside the judgment signed by the plaintiff in the action.

The action was tried in July 1875, and a verdict entered for the plaintiff, subject to a reference. The arbitrator made his award in the following year in favour of the plaintiff, and the defendant took up the award; as, however, there was some difficulty experienced in procuring the postea, the plaintiff took out a summons for leave to sign judgment, and the Master made the order accordingly. The defendant appealed against this order to a judge at chambers, and he rescinded it. The plaintiff then appealed to the Divisional Court to set aside the order of the judge, and also moved the court for judgment.

The Divisional Court affirmed the order of the learned judge, and declined to hear the latter part of the plaintiff's motion as to entering judgment for him, whereon the plaintiff brought this appeal.

B. T. Williams, Q.C. and Anstie for the appellant.—The contention for the plaintiff is that judgment was rightly signed by the plaintiff on the award of the arbitrator, and further, that even if this is not so, still that the Divisional Court should have ordered it to be so entered. As the order for reference was made before the Judicature Act came into force, there was no need to move for judgment; but the old practice of signing judgment on the arbitrator's certificate is in force and applies to this case. It will be contended for the defendant that Order XL., rules 1 and 3, render the judgment signed by the plaintiff informal; but the same objection arises to this contention, for those rules cannot apply to an arbitration entered on before Nov. 1875, even though the award was not made till 1876. The Judicature Act does not prevent arbitrations being held under the old system (*Cruikshank v. Floating Swimming Baths Company*, 1 C. P. Div. 260); so that all the proceedings in this case were outside the Judicature Act, and therefore the note at the head of the rules, that "where no other provision is made, the present procedure and practice remains in force," applies, and therefore, although there may be no section authorising the plaintiff to sign judgment,

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still the old practice which enabled him to do so remains. If, however, it be said that this cause is within the Judicature Act, then the plaintiff is entitled under sect. 22 to sign judgment, as this was a cause heard but not concluded, and therefore one which would remain unaffected by the Act.

Bucknill, for the defendant.—The award was not made till after the Judicature Act, it is, therefore, a proceeding under that Act, and the arbitrator is a referee under the provisions of that Act, and the proper way for the plaintiff to obtain judgment was by motion in the form provided by Order XL.; the latter part of sect. 22 of the Judicature Act 1873 shows that causes partly heard may be concluded according to the ordinary course of the High Court, and this the plaintiff has omitted to do. It was competent for the plaintiff to take out a summons for leave to proceed under the old system, or he might have applied at Chambers for directions how to proceed, but he cannot now without leave on a reference of this nature sign judgment without any motion or any leave of the court. The following sections of the Judicature Act were referred to on the argument of the appeal:

Judicature Act 1873, s. 22. Provided, that in all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule, or order of any court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded as follows (that is to say): in the case of proceedings in error or on appeal, or of proceedings before the Court of Appeal in Chancery, in and before her Majesty's Court of Appeal; and, as to all other proceedings, in and before her Majesty's High Court of Justice. The said courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be), down to the point at which the transfer takes place; and so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded in and before the said courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable hereto), as the said courts respectively may think fit to direct.

Order XL., r. 1. Except where by the Act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the court shall be obtained by motion for judgment.

3. Where, at the trial of an action, the judge or referee abstains from directing any judgment to be entered, the

plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment and give notice thereof to the other parties.

MELLISH, L.J.—The question now before us arises out of an action which was tried in the month of July 1875, when a verdict was entered for the plaintiff, subject to a reference on the usual terms. The arbitrator having undertaken the reference, gave his award in favour of the plaintiff in 1875, after the passing of the Judicature Act. The plaintiff accordingly signed judgment for the amount for which the verdict was entered, but on this the defendant took out a summons to set aside the judgment, and an order to this effect was made by a judge at chambers, and his decision was affirmed on appeal by a divisional court. Was the plaintiff then entitled to sign judgment? It is said that he was not, because of the provisions of Order XL., rules 1 and 3, which say that judgment shall be obtained by motion, so that either party may set down the action on motion for judgment. Now it is clear that these rules do not apply to the present case; they have nothing to do with an order of reference made before the Judicature Act was passed, or with a reference which comes under the provisions of the Common Law Procedure Act. Then it is said that sect. 22 of the Judicature Act 1873 governs this case, and that, therefore, every stage of this case must be governed by the law and practice as it now stands, since the passing of the Judicature Acts. Doubtless, if this case came within the provisions of that section, this contention might prevail; but it is clear that sect. 22 distinguishes cases which have been fully heard from those which have been only heard in part. I think that here the question really is, what is the effect of the order of reference? I am of opinion that the effect of that order is to make this a reference under the old system, and that it therefore entitled the plaintiff to sign judgment in the way in which he has signed it. The principle on which my decision rests is this, that when an award has been made under the old system, the party in whose favour it has been made is in the same position as if he had obtained a verdict at the trial; and that on an order for a reference being made, it must be taken that the parties to such an order as this have in fact agreed that the party who ultimately succeeds shall be in the same position as if the Judicature Acts had not come into force between the time of the trial and the date of the award, and that the plaintiff was entitled in this case, on the *postea* having been signed and all the forms having been duly observed, to sign judgment without any delay or any further motion or proceeding.

BRETT, J.A.—I am of opinion that the canon of construction which we have to apply to the present question and the Acts which govern it is that the law and the administration of the law is to be preserved, and that all crotchets are to be ruthlessly swept away. It is said that the plaintiff ought to have taken out a summons at Chambers for directions how to proceed, or that he should have set the case down in a list on the paper of motions for judgment, and this in the vacation, when there was no list and no motion paper. I do not at all draw back from what was laid down in the case of *Cruikshank v. The Floating Swimming Baths Co.* (1 C.P. Div. 260). I hold that there

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are different kinds of references now; but the old law and practice with regard to references are not abolished, and the Judicature Acts do not prevent references being conducted under the old system, by which the arbitrator's decision was final. The reference, the subject of the present motion, was not a reference under the Judicature Act; it was entered into before that Act was passed, and it is a reference in every way governed by the practice and law as it existed prior to the Judicature Act. The suggestion made that the plaintiff should have taken certain steps is, in my opinion, crotchety, useless, and technical; if he had applied for an order or moved for directions, that order and those directions could have been made but in one way, inasmuch as the arbitrator's decision was final both in law and fact. The proceeding would therefore have been futile, and, if so, then it ought not to be taken. This case is clearly not within Order XL., and we have therefore to recur to the practice of the old arbitrations; on the awards under that practice the successful party signed judgment, and therefore it is clear that the parties have in this case really agreed to judgment being signed on this award; this is a necessary implication, and it is to be contended to the contrary, some words to that effect can easily be, for the future, inserted in orders of reference such as this; but I think that it is implied, and implied in all reason and common sense.

AMPHLETT, J.A.—I agree.

Judgment for the appellant.

Solicitors for the appellant, *Vizard, Crowder, and Anstie.*

Solicitor for the respondent, *Stretton.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Thursday, Nov. 16.

BOUCICAULT v. CHATTERTON. (a)

Drama—International copyright—First representation—Publication—Injunction—3 & 4 Will. 4, c. 15, s. 1; 5 & 6 Vict. c. 45, s. 20; 7 Vict. c. 12, s. 19.

The plaintiff, a naturalised American, was the author of a drama which had been first represented in America, and, subsequently, with the plaintiff's consent, at the defendant's theatre in England. The drama had not been printed for publication. The defendant afterwards having proposed to represent the play again in London without the consent of the plaintiff, the plaintiff brought an action against him to restrain him from so doing. Held, on the authority of Boucicault v. Delafield (9 L. T. Rep. N. S. 709; 1 Hem. & Mill. 597), that the drama had, within the meaning of 7 Vict. c. 12, s. 19, been first published out of Her Majesty's dominions, and that the plaintiff had no exclusive right of representing it in England. Injunction refused.

This was a motion by the plaintiff, a naturalised American, that the defendant might be restrained from representing, or causing to be represented,

at the Adelphi Theatre, in London, or elsewhere, without the previous consent of the plaintiff, a drama or dramatic work called the "Shaughraun," and from infringing the plaintiff's copyright in the said work.

The facts of the case were as follows: The "Shaughraun" was a play written by the plaintiff in 1874, and was first performed at Wallack's Theatre, New York, in the latter part of the year 1874. In pursuance of arrangements between the plaintiff and the defendant, who was the proprietor of the Drury Lane and Adelphi Theatres in London, the play was in the month of Sept. 1875, produced at the Drury Lane Theatre, and was performed there until the month of December following, after which it was transferred to the Adelphi Theatre, where it was represented until the month of Jan. 1876. After the termination of these representations the plaintiff returned to America, and subsequently a correspondence took place between the plaintiff and defendant, the defendant wishing to obtain the permission of the plaintiff to reproduce the play in London. The plaintiff, however, refused his permission, whereupon the defendant determined, notwithstanding such refusal, to bring out the play himself at the Adelphi Theatre, and accordingly issued advertisements stating that the "Shaughraun" would be produced at the Adelphi Theatre on Saturday, 18th Nov. 1876.

The drama was registered on the 4th Nov. 1876 at the Stationers' Hall, under the name of the plaintiff as the proprietor of the copyright. There was some question as to the validity of this registration, but the decision of the case did not turn upon this point.

The action was commenced on the 7th Nov. 1876, and the plaintiff now moved for an injunction as above.

It appeared from the evidence given on the motion, that the drama had not been printed for publication.

Glassey Q.C. and Romer for the plaintiff.—This is a pure question of law. It is admitted that the plaintiff is the author of the play, and we submit that the case comes within 3 & 4 Will. 4, c. 15, s. 1, which enacts "That the author of any tragedy, drama, comedy, play, opera, farce or any other dramatic piece or entertainment composed, and not printed and published by the author thereof or his assignee, or the assignee of such author shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain. . . . any such production as aforesaid not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof." [*Higgins, Q.C. for the defendant, referred to 5 & 6 Vict. c. 45, s. 20, and intimated that he relied on Boucicault v. Delafield (9 L. T. Rep. N. S. 709; 1 Hem. & Mill. 597) as showing that the first representation of the drama in New York was a publication of it within 7 Vict. c. 12, s. 19, and that the plaintiff, therefore, had no exclusive right of representation.*(a)]

(a) By 7 Vict. c. 12, s. 19, it is enacted "That neither the author of any book nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any

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In *Boucicault v. Delafield* the play had been printed. Here it must be taken to be a manuscript play only. We submit that that case does not decide that the representation of the "Colleen Bawn" was a publication. The only Act on which the defendant can rely to take away the natural meaning of the word "published" is 5 & 6 Vict. c. 45, sect. 20, which confines that meaning to the purposes of that Act. [The VICE-CHANCELLOR.—I do not think that Wood, V.C. in *Boucicault v. Delafield* rests his decision on the fact of the printing, but the representation of the play.] We are, at least, entitled to an interim order. The defendant has not all along denied the plaintiff's title. He did not deny it when the play was previously acted in London. They cited—

Macklin's case, Amb. 694;

Dalmaine v. Boosey, 1 Ex. Ca. 299;

Low v. Routledge, 13 L. T. Rep. N. S. 420; 1 L. Rep. 1 Ch. 42;

Higgins, Q.C. *Poulter* (of the Common Law Bar), and *Terrell* for the defendant, were not called upon.

MALINS, V.C., after stating the nature of the case, said.—Mr. Boucicault is the acknowledged author of this piece. It has been successful before; in fact, so successful that I presume that is the reason Mr. Chatterton wishes to represent it again, and I find by correspondence between them that Mr. Chatterton asked Mr. Boucicault's permission to perform it. I am glad to find that, although I have no doubt Mr. Chatterton's advisers knew the state of the law, at that time Mr. Chatterton, greatly to his honour, did not desire to avail himself of the technical point of law, but wanted to obtain the permission of Mr. Boucicault, and, I presume, pay the usual fees for leave to produce the play; but Mr. Boucicault, having peculiar views, would not give his permission. Mr. Chatterton, finding Mr. Boucicault would not give his permission, has taken the law into his own hands, and proposes to present the piece for representation in defiance of the remonstrances of Mr. Boucicault, his solicitor, and his brother, whom he has left in this country as his representative. I am now only to decide the point of law. The right of a dramatic author to a piece is secured to him by the 3 & 4 Will. 4, c. 45, the substance of which is stated in the marginal note: "The author of any dramatic piece shall have as his property the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment." Therefore Mr. Boucicault has the property in it. He has the same property in it, although it is not published, which he would have in any dramatic piece which he had printed and published. This Act of 3 & 4 Will. 4 having given this copyright, and as the copyright in books is only for a certain period, it is only reasonable that the same limit should be given to dramatic authors. Therefore, the 5 & 6 Vict. c. 45, s. 20, prescribes that the first public representation shall be the date of publication, and, as if it were a book, the twenty-eight years is to commence from that period. Then

article of sculpture, or of such other work of art as aforesaid, which shall, after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, or otherwise than (such (if any) as he may become entitled to under this Act."

comes the Act of Parliament which, I am sorry to say, is fatal to the author, according to the view I am bound to take of Mr. Boucicault's case. The 7 & 8 Vict. c. 12, is an Act to amend the law relating to international copyright; I need not refer to the general provisions of that Act, it is only necessary to refer to one section, which is this: [His Lordship read sect. 19, and continued.] Therefore, can anything be more clear than that if the author of a dramatic piece first published that piece abroad, he by this section is absolutely deprived of any exclusive property in it in this country? Then comes the question, what is publishing a work abroad? If that had not been the subject of judicial decision, I should have considered it open to very great doubt as to what really does amount to publication. No one would have the slightest doubt that if it has been printed and published abroad this section deprives the author of any right in this country; but the question I have before me now is with regard to a dramatic piece which has not been printed and published, but only acted. Ought that to be considered publication? That originally did admit of considerable doubt. What is publication? For myself I should certainly have thought that when a man is the author of a dramatic piece, which he does not publish, and which he does not intend to print and publish, but which, as far as he can, he intends to retain as his own property during the period which the law secures it to him, and only allows it to be acted by his permission, then, publicly representing the piece would be publication, and I think I should have come to that conclusion; but it is unnecessary for me to go further into the question, because the principal points in the case arise in a suit in which Mr. Boucicault was plaintiff, and which came on before Wood, V.C., in 1863, with regard to another dramatic piece better known than even this piece is, and which was called the "Colleen Bawn." Mr. Boucicault filed a bill against Mr. Delafield, the proprietor of a theatre in the provinces, to restrain his performing the "Colleen Bawn." It turned out that the "Colleen Bawn," like the present piece, had been performed in New York. Then came the question as to publishing it abroad. If he had published it abroad, then it is clearly admitted he would have no exclusive right. Now what had he done? He had not published it in the sense that he had printed and published it, but he had publicly performed it. Wood, V.C., decided that the public performance in New York was a publication, and that having published it in that way, under the 19th section of the 7th Vict. c. 12, he was absolutely deprived of the exclusive right in this country. Mr. Glasse contended that the Vice-Chancellor proceeded under this section on the ground of printing; but it is perfectly clear to my mind, on considering the whole case, that Wood, V.C. never having referred to the printing, but to the representation, did decide it on the ground that the public acting of it in New York was a publication, and that deprived the author (Mr. Boucicault) of exclusive right in this country. I think that is clearly shown by the concluding remarks of the judgment: "The bill was filed by Mr. Boucicault to restrain the original defendant from representing a dramatic piece composed by the plaintiff called the 'Colleen Bawn,' which it was alleged the defendant had produced in derogation of the plaintiff's rights. The defence was twofold:

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In the first place it was said that there was no such representation; but upon the evidence I have no doubt that the representations given by the defendant were a distinct piracy of the plaintiff's composition. The attempts made to disguise the fact have made the matter rather worse than better. The other defence raised a question of serious importance. It appeared at the hearing that the plaintiff had caused the same piece to be represented in New York prior to any representation in this country; and under these circumstances the question is whether the plaintiff is not, by force of the International Copyright Act denuded of the right (if any) which he might otherwise have had. The 19th section of this statute enacts, that no author of any book or dramatic piece, which shall after the passing of the Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act. Now this Act is an Act enabling Her Majesty, by a certain course of procedure pointed out in the Act, to extend to authors of certain works first published in foreign countries, including dramatic works, the same rights and privileges which are enjoyed in similar cases by authors of works first published in this country." Then he goes on to say, "That being so, if Mr. Boucicault had first represented his piece in this country he would have been entitled to the copyright given by the earlier statutes. So, also, if he had given his first representation in any country with which a convention had been made under the International Copyright Act, he would have been entitled under that Act to all the same privileges. But in no case is any person to enjoy any right conferred by the old Acts concurrently with those created by the International Copyright Act. This is the effect of the 19th section." Then he goes on to say, "The plain purpose of the statute is to secure for this country the benefit of the first publication of new works, and certain conditions are made without which works first published abroad are not to be entitled to copyright. These conditions have not been complied with. The plaintiff, therefore, fails in his demand, and the bill must be dismissed." Plainly, therefore, showing that if Mr. Boucicault had first represented the play in England he would have been entitled to the copyright, but, as he published it in America, by acting it there, Wood. V.C. dismissed the bill. That decision is binding on me. It is a decision from which I do not dissent; on the contrary, I agree with it. It is a decision that works considerable hardship, but my duty is clear, that is to say, I am bound by authority to hold that the acting this play in New York was a publication within the meaning of 7 Vict. c. 12, s. 19. By that publication Mr. Boucicault has lost his exclusive right of performance, and I must therefore refuse the motion. With reference to the costs of the motion his Lordship said:—Considering that the case of *Boucicault v. Delafeld* has been before the profession for the last thirteen years, and that this point in dramatic law was perfectly well known to Mr. Boucicault, having been decided in his own case under precisely similar circumstances to those in the case at present under decision, and consider-

ing also that Mr. Boucicault could have treated with Mr. Chatterton for the production of the play in this country, Mr. Boucicault ought to have said, "As I cannot prevent Mr. Chatterton from producing the play I cannot help it; the law has been decided against me, and therefore I had better make terms." Considering all these circumstances I must dismiss the motion with costs.

Solicitors for plaintiff, *Lewis and Lewis*.Solicitor for defendant, *Horace W. Chatterton*.

Wednesday, Dec. 6.

Re THE METROPOLITAN BUILDING ACT 1855; *Ex parte* McBRYDE. (a)

Party-wall—Metropolitan Building Act 1855 s. 85—Appointment of third surveyor—Common Law Procedure Act 1854, s. 12—Pending action.

Where "a difference arises" between a "building owner" and the "adjoining owner" with reference to a party-wall, and the two surveyors appointed by the parties refuse to appoint a third surveyor, the court has power, under the Common Law Procedure Act 1854, s. 12, to appoint a third surveyor to act with the other two in settling the matters in dispute between the parties under the Metropolitan Building Act 1855, s. 85, sub-sect. 7, although an action be then pending to restrain the building owner from interfering with an ancient light of the adjoining owner in the party-wall.

ADJOURNED summons. This was an application by James Montgomerie McBryde and Thomas Workman Orr (the building owners of the premises known as No. 10, Jewin-crescent, in the City of London), that an umpire or third arbitrator might be appointed to act with the surveyors appointed by them and Mr. Warner (the adjoining owner of the premises known as No. 9, Jerwin-crescent) to settle the matters in dispute between such building and adjoining owners respectively under the Metropolitan Building Act 1855.

On the 19th Nov. 1875, Messrs. McBryde and Orr served on Mr. Warner, pursuant to sect. 85 of the Metropolitan Building Act 1855, a notice with reference to the party wall separating the premises known as No. 10 from the premises known as No. 9, Jewin-crescent, stating (amongst other things) that they proposed "to brick up all openings in such wall," and that they had appointed "Messrs. Herbert Ford and R. Lempriere Hesketh, of 21, Aldermanbury, City," as their surveyors to superintend the work, and to settle on their behalf all matters of difference that might arise in relation thereto.

On the 29th March 1876, Mr. Warner wrote to Messrs. McBryde and Orr, informing them that he had appointed Mr. Frederick Todd as his surveyor.

On the 20th April 1876, Mr. Warner commenced an action against Messrs. McBryde and Orr and the Goldsmiths' Company, claiming, amongst other things, an injunction to restrain the defendants from erecting any building on the site of No. 10, Jewin-crescent, and from doing anything to darken or interfere with the windows or lights in the premises No. 9, Jewin-crescent.

On the 25th May 1876, Mr. Warner moved for an injunction, which the Vice-Chancellor refused

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to grant. Mr. Warner then took the matter to the Court of Appeal, who affirmed the decision of the Vice-Chancellor, and refused to grant the injunction.

On the 1st Aug. 1876, Messrs. McBryde and Orr wrote to Mr. Warner (with reference to their party-wall notice of the 19th Nov. 1875) to inform him that the surveyor appointed by them was Mr. Frederick Todd, and that Mr. R. Lempriere Hesketh, mentioned in such notice, was not to act.

On the same day Messrs. McBryde and Orr served upon Mr. Herbert Ford (as their surveyor) and Mr. Frederick Todd (as the surveyor of Mr. Warner) a notice requiring them to appoint an umpire or third arbitrator, pursuant to the 12th section of the Common Law Procedure Act 1854, in consequence of differences having arisen between Messrs. McBryde and Orr (as building owners) and Mr. Warner (as adjoining owner) with regard to the party wall.

Mr. Todd, acting on Mr. Warner's instructions, refused to concur with Mr. Ford in the appointment of an umpire.

The main question in argument was whether, under the above circumstances, the court had power, under the Common Law Procedure Act 1854, sect. 12, to appoint a third surveyor.

The Common Law Procedure Act 1854, sect. 12, is as follows: "If in any case of arbitration the document authorising the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator . . . or if, where the parties, or two arbitrators, are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator . . . then in every such instance any party may serve the remaining parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be; and such arbitrator, umpire, and third arbitrator respectively, shall have the like power to act in the reference, and make an award as if he had been appointed by consent of all parties."

John Pearson, Q.C. and Ferrers, in support of the summons.—On the 19th Nov. 1875, Messrs. McBryde and Orr gave Mr. Warner a proper notice of what they proposed to do to the party wall. The informality (if any) in the notice in naming Messrs. Ford and Hesketh (who are partners) as our surveyors, was set right by the letter of the 1st Aug. 1876, appointing Mr. Ford alone as our surveyor. Mr. Todd was duly appointed by Mr. Warner as his surveyor before the commencement of the action. Our surveyor is willing to concur with Mr. Todd in selecting a third surveyor, pursuant to the Metropolitan Building Act 1855, sect. 85, sub-s. 7; but Mr. Todd, acting on Mr. Warner's instructions, refuses to concur. We have served the two surveyors with a proper notice under the Common Law Procedure Act 1854, sect. 12, to appoint a third sur-

veyor, and, as no such surveyor has been appointed, we are now entitled to ask the court to make the appointment under that section.

Glasse, Q.C. and Nalder for Mr. Warner.—The main object of the action of *Warner v. McBryde*, which is now pending, is to restrain the defendants from interfering with an ancient light of Mr. Warner's house by raising the party wall; and Messrs. McBryde and Orr are now seeking, by an application to raise their party-wall, under the Metropolitan Building Act 1855, to interfere with one of our ancient lights; this they have no power to do under that Act, which has reference only to structural damage:

Titterton v. Conyers, 5 Taunt. 465;

Wells v. Ody, 1 M. & W. 452;

Crofts v. Haldane, 16 L. T. Rep. N. S. 116; L. Rep. 2 Q.B. 194.

The "difference between" the parties not being a matter within the scope of the Building Act, the court has no power, under sect. 12 of the Common Law Procedure Act 1854, to appoint a third surveyor. A subsequent Act of Parliament cannot be "a document authorising the reference" within the meaning of that section. They also referred to

The Metropolitan Building Act 1855, sect. 85, sub-s. 9.

J. Pearson, Q.C., in reply.—The third clause of the Common Law Procedure Act 1854, s. 12, refers to any case of arbitration whatever, where "two arbitrators do not appoint a third arbitrator:"

Re Lyon, 1 K. & J. 90.

MALINS, V.C. said.—I will first take the case as if there had been no pending suit between the parties. The Metropolitan Building Act 1855, sect. 85, sub-sect. 7, provides that "In all cases not hereby specially provided for, where a difference arises between a building owner"—here Messrs. McBryde and Orr are the building owners—"and adjoining owner"—here Mr. Warner is the adjoining owner—"in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor, or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference." Under these circumstances, a difference having arisen, Messrs. McBryde and Orr, on the 19th Nov. 1875, appointed Messrs. Ford and Hesketh as their surveyors. They may have been right, or they may have been wrong, in appointing two instead of one; but that was set right by the notice of the 1st Aug. 1876, which withdrew the name of Mr. Hesketh, and stated that Mr. Ford was alone to act. In the meantime, on the 29th March 1876, Mr. Warner had appointed his surveyor, Mr. Todd. Mr. Ford, on the one side, and Mr. Todd on the other side, being thus appointed, it was their obvious duty to appoint a third surveyor. Mr. Ford is perfectly willing to do so now, but Mr. Todd is not, because he is forbidden to do so by the gentleman who has named him as his surveyor. Under these circumstances what is to be done? This is an arbitration. But

it was gravely argued by the plaintiff that sect. 12 of the Common Law Procedure Act 1854 does not apply because there is here no "document authorising the reference" within the meaning of that section. I was about to decide that the Act of Parliament is a "document" within the meaning of that section; or at all events, that the section applies to every case where there is an arbitration between parties, whether the reference to arbitration be by parol or by a document in the strict sense of the word, or (as in the present case) by an Act of Parliament. The plain object of the Legislature is that, whenever the parties refuse to appoint an arbitrator the court may do so. I am glad to find that the view which I had entertained has already been entertained by Vice-Chancellor Page Wood in *Re Lyon*. That decision meets with my entire concurrence. I am, therefore, of opinion that the case is within sect. 12 of the Common Law Procedure Act 1854. That section provides by the third clause that "if, where the parties or two arbitrators are at liberty to appoint an umpire, or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator . . . then in every such instance any party may serve the remaining parties." This evidently means that one party to the arbitration may serve the other party. I am very sorry that the plaintiff should have thought fit to take the technical objection that the arbitrator and not Mr. Warner was the person to be served. Then the Act goes on—"In every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if, within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the Superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be." Therefore, assuming that no suit is pending, the case is, in my opinion, of the simplest description. The surveyors, appointed by each party, refuse to appoint a third surveyor; and it therefore falls upon the court, under the third clause of the section which I have just read, as a matter of simple justice, to do for the parties that which they refuse to do for themselves. But then it is said that the court must not interfere, because there is a pending suit. It is quite true that, on the 20th April last, Mr. Warner commenced an action against Messrs. McBryde and Orr and the Goldsmiths' Company, to restrain interference with a small window which was in the old party wall. On the 25th May last I decided that the plaintiff had not made out a case for the interference of the court by injunction in regard to that window. The case went from me to the Court of Appeal, who came to the same conclusion, that there was no case for the interference of the court; and so the matter stands at present. I quite agree with the plaintiff that neither my decision, nor the decision of the Court of Appeal is conclusive, because the matter may be decided a different way at the hearing. If I were to accede to the argument that the court must not interfere because there is a pending suit, it would follow that whenever "the adjoining owner," wishing to vex his neighbour and to

impede his building operations, refuses to concur in appointing an umpire, he has only to file a bill and let the court see that there is a pending litigation; and then the mere fact of the pending of such litigation (however ridiculous the litigation might be) would paralyse the arm of the court. I cannot accede to any such argument. And it is unnecessary for me to do so, because the cases cited by Mr. Glasse (and concurred in by Mr. Pearson) decide that the surveyors so appointed cannot decide any question between the parties as to the existence of ancient lights. All that these surveyors are to decide is in what manner and under what circumstances the party wall is to be built; and if they should fail in their duty, and make any order with regard to this ancient light, such order would be entirely disregarded by the court, as being beyond their powers, and entitled to no consideration. If Messrs. McBryde and Orr go on, and erect this wall, with full notice of the claim of the plaintiff in the suit now pending, and stop up a window which ought not to be stopped up, I shall have no hesitation in ordering them (at the hearing) to undo that which they have improperly done. I shall, therefore, accede to this application. The substance of the order will be as follows: It appearing that the surveyors appointed by the parties refuse to appoint an umpire, the court, in pursuance of the Common Law Procedure Act 1854, appoints Mr. Christopher, if he will act, as third surveyor to settle the matters in dispute between the parties under the Metropolitan Building Act 1853, s. 85, sub-sect. 7: and Mr. Warner must pay the costs of the adjournment into court.

Solicitors: *Prideaux and Son; John W. Sykes.*

(Before Vice-Chancellor BACON.)

Nov. 15 and 17.

BOTTLE v. KNOCKER. (a)

Voluntary gift—Bonds passing by delivery—Corroborative evidence—Leasehold house—Imperfect gift—Insufficient declaration of trust.

The defendant, A. B. K., alleged that the testator had given her in his lifetime two Egyptian Bonds, which, together with one admitted to be the defendant's, were found in the testator's safe after his death. Upon one of the bonds in question was written in the defendant's handwriting "given to me with bonds 18th April 1870, A. B. K." The coupons on these bonds were proved to have been carried to the testator's account at the bank. The defendant alleged that these bonds were in the testator's safe for safekeeping only, and that the cash for the coupons carried over to the testator's account, had been regularly paid to her. The only evidence proving the delivery of these bonds, and explaining the fact of their being in the testator's safe, was that of the defendant herself and her sister.

The defendant also claimed a leasehold messuage, which she alleged the testator had built for her. The land on which this house was built was to be held on a long lease from the Dover Harbour Board, to be granted to the testator upon the completion of the house. This lease, however, had not been granted at the time of the testator's death, but there was a

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duplicate copy in an envelope amongst the testator's papers, on which was written "for A. K." Proposals for a lease of a part of this house had been made and accepted, and on the envelope, which contained the letter of acceptance, was written, "The lease of twenty-one years to C. F. T., of London, to be made out in A. B. K.'s name," also, "T.'s rent to be paid to A. B. K., making without harbour rent, 45l." Evidence of the testator's intention was given. The defendant, A. B. K., was appointed executrix.

Held, as to the bonds, that the evidence of the gift by delivery was sufficiently established, and the fact of their being found in the testator's safe satisfactorily explained, and the defendant's claim to them allowed.

Held, as to the leasehold house, that the gift was an imperfect gift, which could not be perfected without the aid of the court, and that aid, according to the principles laid down in *Milroy v. Lord* (7 L. T. Rep. N. S. 178; 4 De G. F. & J. 264), could not be given.

Strong v. Bird (30 L. T. Rep. N. S. 745; L. Rep. 18 E. 314) examined.

This was a suit for the administration of the will of one William Eversfield Bottle, late of Dover, a farmer of tolls, instituted by his three sisters against Ann Blake Keys and two others, the executrix and executors of the will, and other devisees of his estate for the purpose of ascertaining the respective rights of the plaintiffs and the defendant Ann Blake Keys. The two points at issue were, as to the right of the defendant A. B. Keys to two Egyptian Bonds which she alleged the testator had given her, and whether the title to a leasehold messuage, 146, Snargate-street, Dover, which A. B. Keys also claimed, had been sufficiently perfected so as to enable her to hold it as against the plaintiffs, who were his residuary devisees.

The defendant A. B. Keys was engaged by the testator in the month of October 1866, as his housekeeper, and she continued in that capacity down to the time of his decease; it appeared, however, from the evidence that the testator and the defendant lived on terms of equality, and that he had a great esteem and regard for her. The defendant A. B. Keys was largely benefited by the provisions of the testator's will, but among the many specific devises and bequests to her and others, no mention whatever was made of the two Egyptian Bonds, or the house, 146, Snargate-street.

With regard to the Egyptian Bonds the evidence was as follows: In Nov. 1866, the testator purchased through a Mr. Johnson, the manager of the London and County Bank at Dover. In May 1869, the defendant A. B. Keys and her sister purchased, through the same Mr. Johnson, two other Egyptian Bonds, which were handed for safe keeping to the testator, and he, at the time of receiving them, endorsed on the letter in which they were contained, a memorandum referring to the bonds by number, and stating that they were placed in his safe for safety only, and belonged to defendant and her sister. In April 1870, the testator handed to the defendant A. B. Keys the two bonds purchased by him, stating that they were a present to her from him, and on the back of the letter containing them was written by the defendant A. B. Keys at the time, "given to me with bonds 18th April 1870 Ann Blake Keys." The four bonds were then

pinned together, and were for the time being placed for safe keeping in the testator's safe. The dividends were received by the bank, and the dividend on the bonds which the manager knew had been purchased by the testator, were by the directions of the manager, and without any specific instructions, placed to the testator's account, and the testator invariably handed to the defendant A. B. Keys in cash the exact amount of the dividends on these bonds. The dividends on the bonds which the manager knew had been purchased for the defendant A. B. Keys and her sister, were in like manner placed by his directions to their joint account. The sisters' interest in these bonds ultimately became the property of the defendant A. B. Keys, and from that time and for some time afterwards, with but few exceptions, all four bonds were in the defendant's own keeping. On one occasion when the testator's banking account was rather low, the defendant A. B. Keys suggested that he should deposit one of these bonds as a security for any overdrafts, but as the manager did not require any security, the bond was handed back by the testator to the defendant; and, on another occasion, when the testator was pressed for money to meet his payments for toll rents, he asked the defendant if she would mind writing to the manager of the bank, requesting him to allow her an advance on deposit of one of the bonds. The defendant did so, and subsequently deposited one of her bonds with the manager to meet certain cheques, which were, at the testator's request, signed by her to pay for some housekeeping and other expenses. As the lock to the drawers in the defendant's own room was then out of order, the remaining three bonds were rolled up together and given to the testator for safe custody; they were placed by him in his safe, and there they were found after his decease.

As to the house in Snargate-street, the facts and evidence were as follows: On the 10th Nov. 1873, the testator entered into an agreement with the Dover Harbour Board for a lease, for the term of ninety-nine years, at the yearly rent of 4l. 10s., of the piece of land upon which the messuage, 146, Snargate-street, was ultimately erected, in consideration of his pulling down the messuages and buildings then standing thereon, and erecting a new messuage to the satisfaction of the surveyor, for the time being, of the said board; but the lease thereof was not to be granted until the messuage was erected and finished to the satisfaction of the board surveyor. The defendant Ann Blake Keys alleged that shortly after the testator had entered into this agreement, it was arranged between her and him that he should, at his own expense, pull down the said old messuage and complete the new one, and that, when completed, the same should belong absolutely to her. A duplicate of the agreement with the Dover Harbour Board was signed by the board surveyor, and forwarded to the testator in an envelope, and upon receipt of that document the testator wrote upon the envelope the words, "for A. Keys." There was evidence to show that, during the building of the house, the testator had, in almost all matters, consulted the wishes of the defendant A. B. Keys as to alterations and improvements in the plans, that he had handed the key of the house to the defendant in the presence of a third party, saying, "I give you the key of the house;

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you know it's your property." It appeared, too, that the lower part of the house was to be let to a Mr. Taylor, a hatter, and that his son, C. F. Taylor, wrote to the testator on the subject, and in reply a letter was sent by the testator containing the proposals for an agreement. This letter was returned to the testator with the words "approved, C. F. Taylor," written across it, and on the receipt thereof, the testator directed the defendant's sister, Mary Keys, to write on the same page, and she did write, at his dictation, the following words: "The lease of twenty-one years to Charles Fredrick Taylor, of London, to be made out in Ann Blake Keys' name." The testator then replaced that letter in its own envelope, with a memorandum in pencil, in his own handwriting, in the following words: "Taylor's rent to be paid to A. B. Keys, making, without harbour rent, 45l.," and enclosed them in the same envelope with the aforesaid duplicate agreement, on which the words "for A. Keys" had been written, and they were so found after the testator's death.

Sir H. Jackson, Q.C. and William Freeman, for the plaintiffs.—These bonds, no doubt, pass by delivery, and if there is delivery proved, then the legal estate therein must pass, but we submit that there is no evidence to prove the delivery, for the only evidence as to this is the evidence of the defendant A. B. Keys herself, and on the unsupported testimony of a single, and that an interested, witness, a claim against the testator's estate cannot be allowed. The evidence shows that the coupons belonging to the bonds purchased by the testator, and those belonging to the bonds purchased by the defendant and her sister, were treated in two distinct ways, and further, on the bond purchased by the defendant, and found with the others in the safe, is a memorandum in the testator's own handwriting, to the effect that it was not his, and was there for safe custody only: on the bonds in question there is also an endorsement, but then that is admittedly put there by the defendant herself. The case as to the bonds cannot be established. As to the leasehold house in Snargate-street, the only documents (if they may so be called) upon which the defendant can rely are "for A. Keys," "the lease of twenty-one years to C. F. Taylor, of London, to be made out in A. B. Keys' name," and "Taylor's rent to be paid to A. B. Keys, making, without harbour rent, 45l." Now neither of these can operate in any way as a transfer. It is an imperfect gift, and comes within the principle of *Milroy v. Lord* (7 L. T. Rep. N. S. 178; 4 De G. F. & J. 264), that you cannot give any effect to an imperfect gift other than that which the settlor has given. The settlor in these cases must do all that, according to the nature of the property, it is necessary to do, to transfer the property, and render the settlement binding upon him. Neither are these words a sufficient declaration of trust: (*Warriner v. Rogers*, 28 L. T. Rep. N. S. 863; L. Rep. 16 Eq. 340.) They also referred to,

Richards v. Delbridge, L. Rep. 18 Eq. 11;

Moore v. Moore, 30 L. T. Rep. N. S. 752; L. Rep. 18 Eq. 474.

Hearlley v. Nicholson, 31 L. T. Rep. N. S. 822; L. Rep. 19 Eq. 233.

Kay, Q.C. and Ford North, for the defendant A. B. Keys.—The evidence of the interested party may be used in corroboration of other evidence. The evidence of the defendant's sister is corro-

borative evidence which props up and supports the defendant's allegations: (*Parish v. Parish*, 32 Beav. 207.) The delivery of the bonds was complete, and is completely established by our evidence. In *Moore v. Moore* the deposit note (which passed by delivery) was held a complete gift; that decision is in our favour. The defendant is clearly entitled to these bonds. As to the house in Snargate-street; the testator did all that he possibly could to perfect that gift, and to render it binding upon him in accordance with the rule laid down; he had not the lease from the Dover Board to give, or no doubt he would have properly transferred it, for the evidence of his intention is plain. In *Strong v. Bird* (30 L. T. Rep. N. S. 745; L. Rep. 18 Eq. 315), the Master of the Rolls says, "Whether Mrs. Bird did or did not give in law, she intended to do so; the question is, did the law allow her to make this a complete gift without doing more than she actually did." There was nothing more in this case to be done. The testator did all he could. The "documents" referred to are sufficient to create a declaration of trust according to the authority of *Warriner v. Rogers*, for the testator has as far as circumstances would permit, parted with his interest in the property. We, therefore, submit that defendant A. B. Keys has established her right, and ought to have the house in Snargate-street properly made over to her.

Hinde Palmer, Q.C. and T. E. Foakes, for the executors.

Everitt, for other defendants.

E. Ford, for a specific devisee who had been added as a defendant.

Sir H. Jackson, in reply.

BACON, V.C.—This is one of those cases which becomes very nice in its circumstances; but when the evidence is considered, it does establish the right of the claimant to the two bonds, the only thing in question on the first point in this case. No doubt the rule which Sir H. Jackson referred to is an universal one, that you cannot bring a claim against a testator's estate on the evidence of a single, and that an interested, witness. But here there is, as I think, a good deal more than that. The circumstances under which these persons lived in the same house, and the terms on which they lived, establish that there was up to the last the most perfect confidence and regard existing between them. Now, in respect to the claimant's own two bonds, the case is clear, and there is nothing to be said about it; the testator's memorandum would be conclusive on this point, and the evidence would be conclusive even without that memorandum. Sir H. Jackson has argued with respect to the other two bonds (the only ones that are in question here), that because the testator wrote a memorandum on one and did not himself write on the other, that is a circumstance to be taken into consideration against the claim of the defendant; but I do not think the neglect to write the memorandum on the two last bonds can be considered by me as any indication of right in the testator. When I find that, for reasons which are explained, and not contradicted, for a length of time these three bonds remained in the possession of the claimant, that they were placed afterwards in the custody of the testator, for safer custody only, and that he kept them in that way—kept them together—unless I was to

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infer that he never could have read the memorandum, I cannot doubt but that the memorandum is entitled, as a circumstance in the case, to be taken into consideration. Then the evidence of the sister is surely fairly and justly to be taken in corroboration of the statements of the claimant, and when that is admitted as evidence, the right of the claimant to the bonds in question is in my opinion established. What has been said against this right, is, the manner in which these bonds were dealt with, viz., that when she (the defendant) wanted to borrow money she deposited only her own bond, that she was willing that the testator should deposit the other two bonds if the bank required, as they did not, security for the advance then to be made, and that, on presenting the coupons to the bank in order that they might be collected, she made a distinction between the two sets of coupons—the two coupons which belonged to herself and her sister and those which belonged to the testator—and gave directions that they should be carried to separate accounts. Now when the circumstances under which these persons lived in the same house are considered, it would be in all fairness and justice to be presumed, that she was ready to give him the bonds, if they were hers, that he might procure an advance, and also would be desirous of maintaining his credit with the bank. Further she says, and I can see nothing to contradict her, that when the coupons on the second set of bonds were received, although they were carried to the account of the testator, they were handed over by him in cash to her; all this is perfectly consistent, and not desiring to give any more weight to the single testimony of the claimant than the law allows me to do, I am bound to observe that in no part of the case is any doubt thrown on her general veracity, nor is it said that she for this inducement, or for any other, is stating on her oath what was not true. The evidence must be taken together with her statements, and I think that, considering the executors have proved the fact that at the death of the testator these bonds were found wrapped up together, one of them containing the endorsement which is the subject of the present claim, it would be unjust and wrong to hold that these bonds (which by their nature pass by delivery, which had been given to her, and had been in her custody for years) had ceased to be her property any longer simply because they were found after the death of the testator, in the circumstances I have mentioned. As to the bonds, therefore, I think the defendant's claim is established. As to the house in Snargate-street, I think the case is clearly within the principle of *Milroy v. Lord* and the other cases referred to, because the sister says, that the testator who apparently at that time had an equitable interest in the lease to be granted by the Dover Corporation, complained of the dilatoriness of the Dover Harbour authorities, and said, "When I get it, it is my intention to execute a deed of gift;" and this, and every other statement which is made on that subject in the evidence, leads irresistibly to the same conclusion, viz., that the testator knew that there was something to be done by him, something which he intended to do in order to perfect the gift which he intended to make to the claimant. The claimant's own expression is, that when some repairs were being done to the house, the roof being defective, or something the matter, I do not

know what, she said, "If you are going to give me this house, at least let me have a sound house;" and indeed all the witnesses who have been examined, the workmen, masons, carpenters, and everybody else, give evidence in the same way, and all prove, beyond question, that it was the settled and fixed determination of the testator to give this house to the claimant; but that is not enough. The law on the subject is well established, that when the intention is to do something in the future, if there is no perfected gift, executed and performed by the donor, his mere intention does not avail. Now I was greatly struck by Mr. Kay's reference to the case of *Strong v. Bird*, but, when it is looked at, it will be found to have nothing whatever to do with the principle for which he was contending. First of all, the cases are as different from each other in their facts and natures as anything can possibly be; but the Master of the Rolls, who had had this particular point of law, to which I have adverted, before him on a recent occasion, cannot, under any circumstances, be supposed to have forgotten the law. That he did not forget it is perfectly clear, because he says, speaking of the executor being released in that case, "he proves to the satisfaction of the court a continuing intention to give; and it appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership, or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a court of equity to carry it out, or to make it complete, because it is complete already," which is just the distinction between the case here decided in *Strong v. Bird* and the case referred to before me. The Master of the Rolls, therefore, I think, guarded himself most carefully against the possibility of its being thought that he had forgotten *Milroy v. Lord*, or that he intended to establish any principle at variance with the law so clearly established in that and other authorities. Here I find that the case comes clearly within the principles decided in *Milroy v. Lord*, and the other cases mentioned; the gift was an imperfect gift, and it could not be perfected without the aid of a court of equity, and the courts of equity refuse to lend their aid for any such purpose. The fact that the claimant has been appointed one of the three executors does not make the slightest difference. I must, therefore, reject the claim of the defendant A. B. Keys to the house in Snargate-street, though allowing it as to the bonds. The costs will be costs in the cause.

Solicitors, *G. A. Hall, Bower and Cotton*, agents for *James Stilwell*, Dover; *White, Borrett and Co.*, agents for *E. and E. W. N. Knocker*, Dover.

Tuesday, Nov. 21.

DIXON v. ROWE.(a)

Annuity—Forfeiture clause—Writ of sequestration—Special case—Practice—Stay of proceedings—Costs of special case—Rules of Court 1875, Order XXXIV., rr. 1 and 2.

Testator gave an annuity to the plaintiff for life, or until he should assign or encumber his interest under the will, or any part thereof, or until he should do or suffer some act or thing, or some-

(a) Reported by W. C. DAVIES, Esq., Barrister-at-Law.

thing should occur, whereby his interest under the will, or any part thereof, should, or might be, or but for that stipulation would, become vested in some other person, or whereby he would cease to be beneficially in receipt of the annuity; the testator also gave two other specific gifts to the plaintiff, to which the same clause of forfeiture was by reference appended, and a share of the ultimate residue of his estate to which the forfeiture clause did not apply. In Dec. 1874, a writ of sequestration was issued against the plaintiff. Upon this the trustees of the will were advised that the forfeiture took effect, and they ceased to pay the proceeds of the annuity and the other gifts to the plaintiff. In March 1875 the plaintiff commenced this suit against them. In May 1875, the plaintiff's interest in the residue of the testator's estate was sold under an order of the court that issued the writ of sequestration. A special case was stated for the opinion of the court as to whether the plaintiff's interest under the will had not ceased under the forfeiture clauses.

Held, that plaintiff was no longer entitled to receive the annuity, or the proceeds of the other gifts, which ceased to be payable from the date of the sale of the residue; that all further proceedings in the suit must be stayed, and that plaintiff must pay the costs of the suit and the special case.

Held also, that plaintiff had no ground of action against the trustees, and that they were perfectly right in refusing to pay the annuity and proceeds of the other gifts after the issue of the writ of sequestration, and that plaintiff must pay the costs of a motion made to restrain their paying them to anyone but himself.

SPECIAL CASE.

This suit was instituted on the 17th March 1875, for the administration of the estate of one Robert Stainton Dixon, deceased, and the present special case was stated for the opinion of the court under Order XXXIV., rule 2, of the Rules of the Supreme Court 1875.

The material facts were as follows: The testator, Robert Stainton Dixon, by his will dated the 12th July 1872, appointed the defendants, William Kingdon Rowe, and Henry Decimus Wood, and Dawson Burns, his executors and trustees, and after making certain pecuniary and specific bequests, and bequeathing certain annuities, bequeathed to his son the plaintiff, Alfred Dixon, an annuity of 90*l.* for life, or until he should assign or incur his interest, under his (the testator's) will, or any part thereof, or until he should do or suffer some act or thing, or something should occur whereby his (the plaintiff's) interest under his (the said testator's) will, or any part thereof, should, or might be, or but for that stipulation would, become vested in some other person, or whereby he (the plaintiff) would cease to be beneficially in receipt of the annuity so given to him as aforesaid, whichever event should first happen, and from and after the termination of the trust last aforesaid, upon trust during the lifetime of the plaintiff, to apply the same annuity to and for the benefit of the children of the plaintiff in such shares and proportions and in such manner as his (the said testator's) said trustees in their absolute discretion should think best, and after the death of the plaintiff upon trust for such of the children of the plaintiff as therein mentioned, and after bequeathing other annuities, the testator declared that all the aforesaid annuities should be payable

during the existence of his then present lease of Providence Wharf thereafter referred to and no longer. And the testator bequeathed to his said executors and trustees his leasehold wharf, known as Providence Wharf, held on lease from Jesus College, Oxford, for a term of which about thirty-one years were then unexpired, at an annual ground rent of 165*l.*, upon trust to receive the rents thereof, and after satisfying the ground rent and all other proper outgoings in respect of the said wharf, to apply the net rents in payment of several specified annuities, among others the said annuity of 90*l.* to the plaintiff, or such of them as for the time being should be payable, and subject thereto to stand possessed of such net rents from time to time upon the trusts therein mentioned, that is to say, as to three equal shares thereof upon certain trusts therein declared, and as to one other equal share thereof in trust for the same person or persons, who for the time being should be entitled to the annuity of 90*l.* thereinbefore primarily given to the plaintiff. And after making a specific bequest of leasehold houses, the testator bequeathed to his said executors and trustees his leasehold hereditaments, No. 27, Tennyson-street, York-road, Lambeth, for all his term and interest therein, upon trust to stand possessed thereof, upon the same trusts as thereinbefore declared with regard to the annuity of 90*l.* thereinbefore primarily given to the plaintiff, but for the term for which the testator held the same last mentioned hereditaments. And the testator gave the ultimate residue of his estate in equal shares to his daughter, E. C. Savill, his son, E. Dixon, his son, R. Dixon, his son, the plaintiff, and his daughter, S. Dixon, or to such of them as should be living at his decease.

The testator died on the 4th March 1873, and his said will was duly proved by the defendants, W. K. Rowe and H. D. Wood.

The plaintiff had four children who were all under the age of twenty-one years.

On the 9th Nov. 1874, the plaintiff was ordered by the Court of Divorce, in a suit instituted therein against him by his wife Kezia Eleanor Dixon, to pay a sum of 78*l.* 14*s.* 10*d.* for, taxed costs, and being in contempt for non-payment thereof a writ of sequestration was on the 16th Dec. 1874, issued out of the said court directed to the four sequestrators therein named, authorising and commanding them to enter upon all the surplus lands and tenements of the plaintiff, and to collect, receive, and sequester into their hands, not only all the rents and profits thereof, but also all the goods, chattels, and personal estate whatsoever of the plaintiff, until he should pay 78*l.* 14*s.* 10*d.*, and clear his contempt, and the court should make other orders to the contrary. The defendants W. K. Rowe, and H. D. Wood, were served with notice of this writ of sequestration on the 17th Dec. 1874. Upon this the trustees, being advised that the plaintiff's interest under the will was thereby forfeited, declined any longer to pay the proceeds of the annuity and of the other gifts to the plaintiff, and thereupon he commenced this suit, and shortly afterwards moved for an injunction to prevent the trustees from paying the rents as they proposed to do, and for a receiver.

By an order made by the said Court of Divorce on the 4th May, 1875, it was ordered that the sequestrators named in the said writ of sequestration should be at liberty to sell for such price or prices as they could obtain for the same, the share

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and interest of the plaintiff in the residue of the estate and effects of the said testator.

By an indenture dated 6th May, 1875, and made between the said sequestrators of the one part, and George Wingfield, of the other part, the sequestrators in exercise of the power conferred upon them by the said writ of sequestration, and the said order of the 4th May, 1875, granted and assigned for the considerations therein mentioned unto the said G. Wingfield, his executors, administrators, and assigns, all that the undivided one-fourth part or share of the said plaintiff, and all other his part, share, and interest of, and in the residuary estate of the testator given and bequeathed in and by his said will, and all and every sum and sums of money to become due and payable in respect of the same part, share, and interest, to hold the same unto the said George Wingfield, his executors, administrators, and assigns, for his own use and benefit absolutely.

The questions submitted for the opinion of the court were, whether under these circumstances, first, the plaintiff was still entitled to receive the annuity of 90*l.* by the will of the testator primarily bequeathed him; secondly, whether he was still entitled to receive that part of the rents of Providence Wharf which was bequeathed in trust for the same person or persons as for the time being should be entitled to the said annuity of 90*l.*; thirdly, whether he was still entitled to receive the rents and profits of the hereditaments No. 29, Tennyson-street, by the will of the said testator bequeathed upon the same trusts as were declared with regard to the annuity of 90*l.*

Caldecott for the plaintiff.—Though the special case asks for the opinion of the court on three points, yet virtually there is only one to be considered, and that is what is the effect of the writ of sequestration upon the gift of the annuity to the plaintiff "for life, or until he shall assign or incur his interest under this my will, or until he shall do, or suffer some act or thing, or something shall occur, whereby his interest under my will, or any part thereof shall, or may be, or but for this stipulation will, become vested in some other person, or whereby he will cease to be beneficially in receipt of the annuity so given to him, whichever event shall first happen." The writ of sequestration simply says that the sequestrators "shall be at liberty to sell." The writ of sequestration alone is nothing more than a direction to the persons therein named to go and put their hands on the goods of another person, it gives them no power to deal with them, it acts only as a stay of the right of disposal of the beneficial owner, it is not alone of itself sufficient to vest the property in the sequestrators. An order for sale has to be made before any sale can be effected, and the order that was made related only to the "share and interest of the plaintiff in the residue of the estate and effects of the testator." The plaintiff's interest cannot be said to have ceased, for the sequestration may be taken off at any time as soon as the contempt is cleared. In *Neale v. Bealing*, cited in the note to *Franchlyn v. Colhoun* (3 Swans. 305), it is stated that "sequestrators have but precarious or temporary power to levy a debt, and the sequestration may be taken off to-morrow, or as soon as the demand is discharged." "Cease" must mean finally cease, and in these cases the circumstances must exactly hit the words of the forfeiture

clause in order to work a forfeiture. The residue of the estate was the only property affected by the order of the Divorce Court, and that has been sold and disposed of, therefore I submit that the other gifts to the plaintiff are, notwithstanding the writ of sequestration, the property of the plaintiff. True, the plaintiff's interest in the residue is sold, but the clause of forfeiture is not appended by the testator to this gift.

Kay, Q.C. and *C. Browne*, for the defendants, the infant children of the plaintiff.—This clause is not a forfeiture, but a limitation over. The plaintiff's "interest under the will" includes his interest in the ultimate residue, this residue has been sold, and consequently has become vested in some other person. The words are "the interest under my will," not the interest under the gift of the annuity; in the interest, therefore, of the infant children, we ask you to decide that the plaintiff's interest in the annuity and in the other gifts under the will has passed over.

Ingle Joyce for the trustees of the will.

Caldecott in reply.

BACON, V.C.—The question is one purely on the construction of the will. The testator's intention to provide for his son is plain. He says in effect, I am going to give some benefit to my son, but all is to be overridden by the condition, that if he does anything to encumber, or part with his interest, then that interest is to cease, and go over to his children. It is true this overriding clause is not appended to the gift of the ultimate residue, still, the plaintiff's interest under the will must include his interest in the ultimate residue. The sequestrators have taken and sold the entire interest in the residue, which is clearly a part of the benefit the son took under the will; I therefore must hold that the plaintiff is not entitled to receive the annuity of 90*l.*, that he is not entitled to receive any longer that part of the rents of Providence Wharf, nor the rents and profits of 27, Tennyson-street, given upon the same trusts as were declared concerning the annuity of 90*l.*, all which ceased to be payable from the 6th May, the date of the sale to Wingfield, at which time the "vesting" contemplated by the testator operated.

Kay, Q.C., then applied under Order XXXIV., r. 2, that all further proceedings in the suit, now rendered unnecessary by the present decision, might be stayed, and that as the plaintiff's suit had failed, he might be ordered to pay the costs of that as well as of the special case.

Ingle Joyce.—The defendants put in an answer stating that they had been advised that the plaintiff's interest under the will had ceased, and that therefore they should pay the annuity and rents to him no longer, but notwithstanding this the plaintiff has put them to the expense of resisting a motion for injunction and receiver. I ask for the costs of that motion, as well as for the costs of the special case, and the costs of the suit.

Caldecott submitted, that inasmuch as the forfeiture did not take place until the sale on the 6th May, he had at the time in question a good cause of action, notwithstanding the writ of sequestration, and that as to the costs of the special case, there should be no order, as both sides had concurred in stating that. The trustees put their own construction on the will, and paid the rents and the annuity to the children; the plaintiff was

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therefore obliged to have this question as to the right to receive the rents and annuity decided somehow.

The VICE-CHANCELLOR held that the plaintiff had no right to file his bill after the sequestration was issued, and that the trustees were quite right. The order would, therefore, be to stay all further proceedings in the suit, the plaintiff to pay the costs of the suit, and the costs of the motion, and special case.

Solicitors: *Hicklin and Washington; Denton, Hall, and Barker.*

Tuesday, Nov. 21.

DAY v. FREUND. (a)

Married woman trading separately from her husband—Married Women's Property Act (33 & 34 Vict. c. 93) s. 1—Bankruptcy of married woman.

A writ was issued for goods sold and delivered against a married woman trading separately from her husband; part of the defence raised was, that proceedings in bankruptcy were then pending.

Held, that as long as these proceedings remained undisturbed, application to recover the debt must be made in Bankruptcy, and leave was given to go in and prove for the debt and the costs of the action.

THE plaintiff issued a writ against Louisa Freund, a married woman, and her husband, specially endorsed under Rules of Court 1875, Order III., r. 6, whereby he claimed to have the separate estate of the married woman vested in her or her husband in her right declared chargeable with the amount of his alleged debt for goods sold and delivered, the said Louisa Freund being a married woman carrying on trade separately from her husband within the meaning of the Married Women's Property Act 1870, sect. 1. To this writ the defendant, Louisa Freund, put in a defence, in which she stated that she was not indebted; that at the commencement of the action she was, and still was, a married woman, and claimed the same benefit as if she had pleaded coverture; that she had no separate property beyond what she had acquired by her own exertions as a contributor to books and otherwise; and also, that since the commencement of the action, she had presented a petition for liquidation, upon which a valid resolution for liquidation by arrangement had been duly passed and registered, and a trustee and committee of inspection appointed.

Shackleton Hallett for the plaintiff, now asked that judgment might be entered for the plaintiff.

Mrs. Freund did not appear.

The VICE-CHANCELLOR.—I have read the statement of defence, and I see that there is a subsisting bankruptcy. You must get this bankruptcy annulled before you can apply here for relief, or you can apply in Bankruptcy, whichever you like.

S. Hallett submitted that having regard to the decision in *Ex parte Holland; Re Heneage* (30 L. T. Rep. N. S. 106; L. Rep. 9 Ch. 307), where Lord Cairns decided that a married woman could not be brought under the law of bankruptcy, the resolutions were bad, and therefore the present application was necessary.

The VICE-CHANCELLOR.—I find on the pleadings a subsisting bankruptcy, to disturb which, no attempts whatever have been made, either on the authority of *Ex parte Holland; Re Heneage*, or otherwise, and I must abide by the existing proceedings. The creditors have a right to have the estate administered, and as long as the bankruptcy is subsisting the plaintiff has a right to go in under the resolutions and prove for the amount of his debt. The only order, therefore, under these circumstances that I can make is, that the plaintiff may be at liberty to go in under the existing bankruptcy and prove, amongst other creditors, for the amount of his debt and interest, including the costs of the action.

Solicitors, *Saunders and Baker.*

QUEEN'S BENCH DIVISION.

Wednesday, Nov. 8.

REG. (ON THE PROSECUTION OF BAXTER AND ANOTHER.)
v. GREAT NORTHERN RAILWAY COMPANY. (a)

Compensation to tenant for longer term than a year whose term has less than a year to run—Whether justices have jurisdiction to determine—8 Vict. c. 18, s. 121.

Justices under the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18, s. 121) may award compensation in respect of any interest being less than that of a tenant from year to year, although such interest arises out of a lease originally created for a longer term.

In August 1871, A. demised to the prosecutors for one year a piece of land by an agreement, giving option of renewal for a further two years afterwards. In August 1873, the defendants served the prosecutors with a notice to treat, and in the same month of that year the prosecutors served the defendants with a notice of claim, requiring them to proceed to arbitration. An arbitrator was appointed by the defendants under protest, and an award was made, which the defendants refused to take up.

Held, upon a special case stated in an action by the prosecutors for a writ of mandamus, that the claim was one for the determination of justices under the 121st section of the Lands Clauses Consolidation Act.

THE pleadings in this cause raised certain issues on a claim by the prosecutors for a writ of mandamus to the defendants. The issues in fact came on to be tried before Cleasby, B., at the Guildford Summer Assizes, when, by consent, a verdict was found for the Crown, subject to the opinion of the court upon a case which set out the facts at great length, and raised other questions between the parties not material to this report. The facts are sufficiently stated in the head note. The 121st section of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18) is as follows:

If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, to compensation of the damage done to him in his tenancy by

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severing the lands held by him or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking or to the person appointed by them to take possession thereof any such lands in their possession required for the purposes of the special Act.

Philbrick, Q.C. for the prosecutors of the writ.

Reginald Brown, for the defendants, was not called upon to argue.

Mellor, J.—This is clearly a case provided for by sect. 121 of the Lands Clauses Consolidation Act 1845. The very object of that section was to send small and insignificant—I do not say unfounded—claims for compensation to justices of the peace or a stipendiary magistrate, a tribunal which is just as likely to be right as an arbitrator or a jury.

Lush, J.—I am of the same opinion. I have the impression that the point has been decided on a former occasion, but, however, that may be, I do not entertain the slightest doubt in relation to it. The intention of the 121st section was to give compensation for every species of interest being less than the interest of a tenant from year to year, and I observe that the justices have full powers to award compensation in respect of the tenant having to give up possession before the expiration of his term.

Solicitor for the prosecutors, *Vant*.

Solicitors for the defendants, *Johnston, Farquhar, and Leech*.

Nov. 8 and 15.

REG. (ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE POPLAR UNION (resps.), v. INGALL AND ANOTHER (apps.).) (a)

Rating in Metropolis—Making valuation list, statutory time for—Whether statute imperative or directory—Valuation of Property Metropolis Act 1869, 32 & 33 Vict. c. 67, s. 42.

By sect. 42 of the Valuation of Property Metropolis Act 1869, the overseers "shall make and deposit the valuation list" before the 1st June, and the assessment committee "shall hold a meeting for hearing objections to the list" before the 1st Oct., and "shall finally approve the list" before the 1st Nov.

Held, that the section was directory and not imperative, and that a valuation list deposited on 27th Sept., and finally approved on 21st Jan., was good.

This was a case stated by the Justices of the Court of General Assessment Sessions, holden under the Valuation (Metropolis) Act 1869, at the Guildhall, Westminster.

1. The appellants are the occupiers of premises used as oil and turpentine stores, and situate in the West Ferry-road in the parish of All Saints', Poplar.

2. Previous to the valuation made as hereinafter stated, the appellants were rated at 445*l.* gross, and 371*l.* rateable value.

3. Upon the 27th Sept. 1875, the overseers of the said parish of All Saints', Poplar, made and deposited a valuation list for the said parish in which the appellants' premises were assessed at 666*l.* gross and 555*l.* rateable value.

4. Upon the 18th Oct. 1875, the said list was transmitted to the Assessment Committee of the Poplar Union.

5. Upon the 7th Dec. 1875, at a meeting of the Assessment Committee to hear objections to the said list, the appellants appeared by counsel, who said that on behalf of the appellants he reserved their right to dispute the validity of such list, and of the proceedings then being and about to be taken thereon, and objected to the valuation of their premises contained in such list, but notwithstanding such reservation, urged objections and adduced evidence in support thereof, and after duly weighing and considering the same, the Assessment Committee altered the valuation of the said premises, and fixed 550*l.* gross and 460*l.* rateable as the value thereof.

6. The said Assessment Committee approved the valuation list as altered by them upon the 4th Jan. 1876, and sent the said list to be re-deposited upon the 7th Jan. 1876.

7. By the 3rd of the General Orders made at the General Assessment Sessions holden on the 23rd June 1870, it is required that all appeals to the Assessment Sessions shall be entered by petition to be lodged with the clerk to the Assessment Sessions on or before the 14th Jan. next following the final approval of the valuation list by the Assessment Committee.

8. The appellants duly gave the required notice of appeal to the Assessment Sessions before the 14th Jan. 1876.

9. Upon 21st Jan. 1876, the Assessment Committee held a meeting to hear objections on behalf of persons or parties other than the appellants to the alterations made by the Assessment Committee in the said valuation, but no objections were made to the alteration of the valuation of the appellants' premises.

10. Upon the hearing of the appeal the said valuation list was produced, and it appeared that the same had been finally approved upon the 21st Jan. 1876.

11. Between the hearing of the Assessment Committee of objections to the said valuation list and the holding of the court of general assessment sessions, no special sessions had been held to which the appellants could appeal against the decision of such assessment committee in accordance with the directions and provisions of the Valuation of Property (Metropolis) Act 1869; neither appellants or respondents took any steps to obtain the holding of any special sessions for hearing an appeal.

The question for the opinion of the court is whether the said valuation list is null, void, bad in law, and of no effect, by reason of such valuation list not having been made and deposited by the overseers of the parish of All Saints', Poplar, nor transmitted by them to the assessment committee, nor by the said assessment committee finally approved and signed within the time limited by the Valuation (Metropolis) Act 1869.

If the court should be of opinion in the affirmative, judgment is to pass for the appellants, and the said valuation list shall be dealt with as to the court shall seem fit.

If the court should be of opinion in the negative, judgment is to pass for the respondents.

E. Clarke, for the appellants, argued that the result of the delay had been to extinguish the appellants' right of appeal, and that therefore sect.

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

42 of the Valuation of Property Act 1869, ought to be construed as imperative.

Tindal Atkinson and W. English Harrison, for the respondents, argued that the present case fell within the rule that where public convenience required it, a statute as to time would be construed as directory on this point; they cited

Lefevre v. Miller, 26 L. J. 175, M. C.;

Reg. v. Fordham, 11 Ad. & E., 73;

Reg. v. Mayor of Rochester, 7 E. & B. 910.

E. Clarke, in reply, cited

Bowman v. Blyth, 7 E. & B. 26; 27 L. J. 23, M.C.;

Hunt v. Hibbs, 5 H. & N. 123; 29 L. J. 222, Ex.

The following sections of the Valuation of Property Metropolis Act 1869 (32 & 33 Vict. c. 67), were referred to in the course of the arguments and judgments:

Sect. 13. If the overseers of any parish fail to transmit such a valuation list as is required by this Act, the assessment committee shall appoint some person to make a valuation list, and may allow such person such remuneration in addition to his expenses as they think fit; and all expenses incurred by the assessment committee in pursuance of this section shall be paid by the guardians, and charged to such parish. The person so appointed shall have for the purposes of this section the same powers and duties as overseers, and the valuation list so made shall be dealt with in like manner as if it had been duly made and transmitted by the overseers.

Sect. 32. Any ratepayer and any surveyor of taxes, and any overseer, with the consent of the vestry of his parish, who may feel aggrieved by any decision of the assessment committee on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions. Any assessment committee in the metropolis, or in the county in which the parish to which the appeal relates is situate, any overseers in the metropolis, or such county, with the consent of the vestry of their parish, any ratepayer in the metropolis or such county, and any body of persons authorised by law to levy rates, or require contributions payable out of rates in the metropolis or such county, may appeal to the assessment sessions, if they or he feel aggrieved by reason,

- (1) Of the total of the gross value of any parish being too high or too low.
- (2) Of the total of the rateable value of any parish being too high or too low.
- (3) Of there being no approved valuation list for some parish.

Sect. 35. If it appears to the justices in assessment sessions, on any appeal that there is no approved valuation list for some parish, they may appoint some proper person (with such remuneration as they may appoint) to make a valuation list. Such person shall have for that purpose the same powers and duties as overseers. The valuation list so made shall be deposited and otherwise made known to the persons interested in such manner as the court may direct, but in manner as near as may be as is provided in this Act, with respect to the list originally made. The costs of making such valuation list shall be paid by the assessment committee, who failed to approve the list, and shall be deemed part of their expenses under the principal Act.

Sect. 42. With respect to the times within which proceedings under this Act, and the Acts incorporated herewith, are to be done, the following provisions shall have effect, that is to say:

- (1) The overseers shall make and deposit the valuation before the 1st June, in the first year after passing of this Act.
- (2) The overseers shall transmit the valuation list to the assessment committee, not sooner than fourteen and not later than seventeen days after notice is given of deposit of such list.
- (3) Notice of any objection by any person other than the surveyor of taxes and the overseers, shall be given before the expiration of twenty-five days after the list is deposited.
- (4) The assessment committee shall revise the valuation list before the 1st Oct., in the same year, and,

before the same day, but not less than sixteen days after the transmission of the list to them by the overseers, shall hold a meeting for hearing objections to such list.

- (5) The assessment committee shall give notice of a meeting for hearing objections to a list not less than sixteen days before such meeting.
- (6) Notice of objection with respect to any list by the surveyor of taxes and by the overseers, shall be given not less than seven days before the meeting at which objections to such list will be heard by the assessment committee.
- (7) The assessment committee shall send the valuation list to be redepotised within three days after it is approved by them, and shall appoint a day not less than fourteen nor more than twenty-eight days after such redeposit for hearing objections to the alterations of which objections seven days notice shall be given by the objector.
- (8) The assessment committee shall finally approve and send the valuation list to the overseers and the clerk of the managers of the Metropolitan Asylum district before the 1st Nov. in the same year.
- (9) Notices of appeal to special sessions shall be given on or before the 21st Nov. in the same year.
- (10) The justices may hold the special sessions at any time after the 30th Nov. in the same year, which will enable them to determine all appeals before the ensuing 1st Jan.
- (11) The clerk of the said managers shall send out the printed totals before the 1st Dec. in the same year, and shall return the valuation list to the assessment committee not sooner than fourteen, nor later than twenty-one, days after the totals are sent out.
- (12) Notices of appeals to assessment sessions shall be given on or before the 14th Jan. in the same year.
- (13) The justices may hold the assessment sessions at any time after the 1st Feb. in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st March.
- (14) Notices of the times at which the assessment sessions will be held at each place shall be given by the clerk ten days at least before the first court is held.

MELLOR, J.—My mind has fluctuated much during the progress of the argument, but on the whole I am of opinion that section 42 is directory, and that this valuation list was in time. It was intended by the Legislature that the valuation list should be made up in time for the assessment sessions, in order that it might be discussed there whether it was good or bad. It has, indeed, been very plausibly argued before us that the valuation list was too late, on the ground that certain things were not done. But on the whole I think that these arguments ought not to prevail. Mr. Clarke's clients have full power of appealing to sessions on the merits of their case, but it would seem as if they appealed against the list because they had no case upon the merits. The sessions having confirmed the list, the only question for us is whether it is bad on the ground of its being out of time, and I am of opinion that it is not. It is, I think, absurd to suppose that the Legislature could have intended these sections to be other than directory. Perhaps, however, the Legislature may have intended that if a party should suffer any damage by the delay of the overseers in making up the list, he should have a remedy against the overseers by action.

LUSH, J.—I am of the same opinion. In order to interpret sections of an Act of Parliament which require certain things to be done within a certain time, we must look to the object of the Act in which those sections occur. Now the object of this Valuation Act is clearly to secure a valuation of property every five years, in order

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that the valuation list may be quite uniform. It is, therefore, of the utmost importance that the whole list be completed every five years, and a machinery is provided by the statute for bringing objections and hearing appeals. The 42nd section is framed to effect this purpose. [The learned judge read the section and proceeded.] It appears from this section that a time is limited for every stage of the process until the appeal is arrived at, and it also appears that the Legislature contemplated that all the stages should be gone through before the 5th April. Next in order we come to the provision for certain failures. "If the overseers," says the 13th section, "fail to transmit the required valuation list," the committee shall appoint some person to make a valuation list. The assessment committee, therefore, have power to intervene and to fine a defaulting parish. The appeal is not against the valuation list as a whole, but against a particular decision of the assessment committee. [The learned judge then read the 35th section, and proceeded.] Mr. Clarke says that before the words "for some parish," we must read in the words "or no list signed within the time hereinbefore mentioned." Now can we insert these words? I think not. If the Legislature had intended the insertion of such a provision it would have been inserted expressly—especially in a statute of this kind, which is by no means an elliptical one, but is rather too full in its terms than otherwise. Consider too, the consequences of reading in the provision suggested. All the delay and expense of making a fresh list would have to be incurred. I cannot think that the Legislature ever intended such a consequence. But then it is asked—what is to be done if the overseers delay so long as to deprive a party of his power to appeal. This would be a defect in the statute, for which it would be for the Legislature to provide a remedy, but the existence of such a defect cannot make the statute other than directory. If, however, a party be deprived of his appeal by the neglect of the overseers, it may well be that those who undertake public duties, and fail in them, would be liable to an action at the suit of the party aggrieved.

Judgment for the respondents.

Solicitors for the appellants, *Pontifex and Co.*

Solicitors for the respondents, *Baker and Nairne.*

COURT OF BANKRUPTCY.

(Before the CHIEF JUDGE.)

Monday, Nov. 6 and 13.

Ex parte THE HALIFAX JOINT STOCK BANKING COMPANY; *Re* ARMITAGE AND COMPANY. (a)

Guarantee—Ostensible partner—Release of—Proof—Delay.

In consideration that the Halifax Bank would open a banking account with A. and B., and make advances to them, B. guaranteed the payment of the balance, which upon the closing of such account should be due to the bank from A. and B. individually or in partnership to the extent of 1000l. No partnership at any time existed between A. and B., but when the guarantee was given, B. represented to the bank that he was a partner

with B., but did not wish his name to be disclosed. A. traded under the name of A. and Co. for about two years, and then became bankrupt. The bank proved against A.'s estate for the whole amount due upon the balance of account. Subsequently B. paid the bank 1000l. under his guarantee and received a receipt "in discharge of all claims against him in reference to the guarantee, or in connection with A. and Co." The trustee of A.'s estate having rejected the proof by the bank upon the ground that the release to B. operated also to release A.:

Held, that as no partnership had existed between A. and B., and no right of contribution which A. could enforce against B., the release of B. by the bank did not operate as a release to A.

THIS was an appeal from the decision of the County Court Judge of Yorkshire holden at Dewsbury.

In Aug. 1870, John Armitage, who was then carrying on business as a woollen manufacturer, applied to the Halifax Joint Stock Banking Company to open a banking account with them, and to have an open credit thereon to the extent of 1000l., to which the bank consented upon his giving security. Accordingly on the 23rd, John Smithies, who stated to the bank manager that he was a partner with John Armitage in his business, but particularly wished that his name should not be disclosed, executed in favour of the bank the following document:

In consideration that you will open a banking account with John Armitage and John Smithies, of Bradford-road, Dewsbury, and make advances to them and give credit to them by discounting bills or otherwise, I hereby guarantee the payment of the balance which may on the closing of such account be or become due to you from the said John Armitage and John Smithies, individually or in partnership with any other person or persons, to the extent of 1000l.; and I agree that in default of payment of the balance due on the said banking account by the said John Armitage and John Smithies, you shall be at liberty if you shall think fit, to receive and place to the credit of such account all such moneys, whether in the shape of payments, compositions, dividends, or otherwise, as may be recovered from the said John Armitage and John Smithies, or from their estate or from any collateral securities; and after giving credit for the same the balance that may then remain shall be recoverable under this guarantee, and any liabilities you shall be under by reason of your having put your names to any bills or in any way guaranteed the same for the said John Armitage and John Smithies, may be reckoned as part of such balance, notwithstanding such liabilities may be outstanding at the closing of the account. . . . And this guarantee is to extend to the house or firm of John Armitage and John Smithies, as John Armitage and Co., of whomever it may consist."

On the 8th Oct. 1870, a similar guarantee was executed by Joseph Smithies to secure the repayment to the bank of any balance due to them from John Armitage and Co. to the extent of 2000l.

On the 11th Nov. 1872, John Armitage alone filed a liquidation petition describing himself as trading under the style or firm of "John Armitage and Co." The first meeting of the creditors was held on the 4th Dec., when resolutions for liquidation by arrangement were duly passed, and Joseph Good was appointed trustee, with a committee of inspection, and John Armitage received his discharge. The bank tendered a proof for 4229l. 7s., to which no objection was raised.

On the 2nd May 1873, the bank issued a writ against John Smithies alone to recover the sum of 5659l. 16s. 3d., he having disputed that his liability under the guarantee extended beyond 1000l., the

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amount of the balance due upon the banking account of John Armitage and Co.

On the 27th June, John Smithies filed a bill in Chancery against the bank for an injunction to restrain the further prosecution of the action, and prayed that the guarantee might be delivered up to be cancelled or otherwise rectified according to the true intention of the parties. The bill denied the partnership and charged fraud. The court granted an injunction upon terms that the plaintiff paid the sum claimed into court, which he did. On the 16th Sept. a compromise of the action was entered into between John Smithies and the bank, by which the bank consented to take from John Smithies the sum of 2818*l.* 9*s.*, part of the moneys in court, in satisfaction of their claim against John and Joseph Smithies, although the latter was not a defendant in the action. The following receipt signed by the bank manager was, *mutatis mutandis*, endorsed upon each guarantee: "Received this 16th Sept. 1873, from the within named John Smithies the sum of 1000*l.*, being the amount of the within guarantee, and in discharge of all claims against him in reference thereto, or in connection with John Armitage and Co."

On the 1st Sept. the bank tendered to Joseph Wood a further proof against John Armitage's estate for 1430*l.* 9*s.* 3*d.*

Pending these proceedings the other creditors respecting, although there was no actual proof, that a partnership really existed between John Armitage and some other persons, the committee of inspection by a resolution dated the 18th Dec., instructed their solicitor to investigate the matter.

On the 28th Aug. 1874 an action of *Jubb v. Smithies* was commenced by the committee of inspection against John and Joseph Smithies to recover the sum of 89*l.* 3*s.* 2*d.* with the object of proving the partnership. The action came on for trial on the 3rd Aug. 1875, but was compromised by Messrs. Smithies paying 2000*l.* to the trustee under the liquidation, and 600*l.* to the plaintiffs or costs, the said sum of 2000*l.* to be distributed amongst the creditors of John Armitage on their signing a release to the Messrs. Smithies, which they all did except the bank, who were not asked to do so.

It appeared from the evidence adduced at the trial that the trustee and committee of inspection learned for the first time the precise terms upon which the action by the bank against John Smithies was settled. In Dec. following the trustee gave notice to the bank that the proofs sent in in 1872 and 1874 were rejected upon the ground that the receipts endorsed on the guarantees showed that they were intended to be in full discharge of the bank's claims against John and Joseph Smithies and the estate of the debtor, and that the settlement of the 16th Sept. 1873 with Messrs. Smithies as co-partners with the debtor, operated as a release of any claim they had against the debtor, inasmuch as the release of one of two partners was a release of all as well as a release of all the estate. On the other hand it was contended that the delay of the trustee in not rejecting the proofs earlier than Dec. 1875, amounted to an admission of the debt under the 72nd Bankruptcy Rules 370, and that the point was covered by *Ex parte Kemp; re Pastnedge* (L. Rep. 9 Ch. App. 383; 30 N. Rep. N.S. 109).

On the 13th July 1876, the bank applied to the County Court for an order directing the trustee

to admit the proofs, and this application was dismissed with costs.

The bank thereupon appealed.

De Gaz, Q.C. and *West* appeared for the appellants.—They contended that the trustee was precluded from objecting to the proofs by his own laches, and cited *Ex parte Kemp* (L. Rep. 9 Ch. App. 382; 30 L. T. Rep. N. S. 109) in support of that contention. The release endorsed upon the guarantee was simply equivalent to an undertaking not to sue Smithies for the debts of the firm. The rule that a release of one partner for a partnership debt operates as a release to all the partners did not apply to cases where a partnership never actually existed. In the present case there was no partnership at any time either in fact or by deed, no holding out to any of the creditors that Smithies was a partner, but only an ostensible partnership *quoad* the bank, and the bank in releasing Smithies in no way had waived their rights against Armitage. They referred to

North v. Wakefield, 13 Q. B. Rep. 536;

Watters v. Smith, 2 B. & Ad. 889;

Price v. Barker, 4 Ell. & Bl. 780.

Winslow, Q.C. and *E. Cooper Willis* appeared for the trustee.—The evidence of the bank manager clearly proved a partnership, which, after the litigation that had taken place, could not now be disputed, and the bank could not now say that there was only an ostensible partnership. Further, the receipt contained no reservation of any right to sue Armitage, as in *North v. Wakefield* (*sup.*), and where no such reservation was made, a release of one of two joint debtors was a release to both. Here the release was most express and full in its terms, and discharged Smithies from all debts on account of the firm of Armitage and Company, and therefore it operated as a discharge to both.

Nicholson v. Revell, 4 A. & E. 675;

Ex parte Slater, 6 Ves. 146.

De Gaz, Q.C., in reply.

The CHIEF JUDGE.—The appeal in this case is brought by the Halifax Banking Company against an order made by the learned judge of the County Court of Yorkshire, upon a motion made by the company, in which they complained of the rejection by the trustee in the liquidation of proofs which they had made, and by which motion they asked for an order upon the trustee for payment of the dividends upon their proofs. By the order complained of their motion was dismissed with costs. The hearing of the motion seems to have occupied some considerable time, which was occasioned by the discussion of a variety of topics, and a lengthened statement of facts, perhaps indispensable, considering the period which had elapsed since the commencement of the liquidation and the transactions which have since ensued. The question to be decided seems, however, in itself, reasonably simple, and is whether or not the banking company has forfeited or released a debt, which as to its nature and amount is wholly undisputed, by reason of their having released a person who was indebted to them jointly with the liquidating debtor. The very clear and full narrative of the facts, which is contained in the copy of his honour's judgment, with which I have been furnished, enables me, by referring to it, to state all that is material for the determination of the question before me. [His Lordship then fully stated the facts and continued.] The contention

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of the trustee under those circumstances was that a partnership had existed between John Armitage and John Smithies, and that the terms of the receipt given by the banking company to John Smithies amounted to a release of the joint debt, and that the right to prove against the estate of John Armitage, one of the joint debtors, had become thereby forfeited. The learned judge appears to have adopted this view of the case, and to have held that Armitage and Smithies were partners, and, overruling the objection of the appellants founded upon the length of time which had elapsed since the proofs had been admitted without dispute, he dismissed the appellant's motion with costs, upon the ground that the appellants, by releasing one of the partners, had lost their right of recourse against the estate of the other. Now, after considering the facts as they appear in evidence and are admitted, I must say that I am unable to concur in the judgment which has been pronounced. John Armitage and John Smithies have each of them deposed that *de facto* there was no partnership at any time between them, and their statements are in no respect contradicted. The conduct of the trustee and committee of inspection corroborate the fact so stated. If there had been such a partnership, it would have been the duty of the trustee to keep distinct accounts of the joint estate of the partnership which came to his hands, and of Armitage's separate estate, and to have administered those estates according to the rights of the several creditors. It does not appear that he did anything of the kind. It seems that he and the committee of inspection had a notion from the beginning that Smithies was jointly liable with Armitage in respect of some, if not all, of the debts which were admitted to proof. That Smithies was so liable to the banking company, although he was no partner, does not admit of doubt; but until three years after the liquidation petition was filed, the trustee took no steps to enforce any right against Smithies, and when he did at length, by means of the action in the name of *Jubb v. Smithies*, that action was compromised in the manner before stated, thereby obtaining from Smithies a sum which was carried to the estate of Armitage. If, then, the case wholly depended upon the point arising out of the delay of the trustee, I should be of opinion that the case was governed by the observation and the decisions of the Court of Appeal in *Ex parte Kemp, re Russell, ubi sup.*, and I think it would be not only at variance with that explicit decision, but would be a most dangerous relaxation of the rules, and the course of procedure in bankruptcy, to permit trustees to delay the performance of that which they must know to be their plain duty, upon the ground alleged by them that they had no sufficient information upon which they could proceed. They might, by examination of Armitage and Smithies, and of the manager of the bank, and by other means, have satisfied themselves of the truth of the case. I am unwilling, however, to dispose of the appeal before me upon that ground.

Nor have I thought it necessary to entertain the appellants' objection, although I think it is well founded, that the trustee ought, if he thought he had any ground for disputing the proofs, to have applied for an order to expunge. I therefore suggested to the appellants that it would be better to proceed upon the materials which were before the judge of

the County Court, inasmuch as their success upon the objection, which is technical merely, would only lead to further delay and expence, without determining the real question between the parties, and on both sides this suggestion has been adopted.

The real question then is whether or not the appellants have lost their right to maintain the proofs by reason of the receipt which was given to John Smithies upon the banking company receiving the sums which were paid by him in Sept. 1873. In considering that question I cannot adopt the conclusion that any partnership existed. A partnership can only be formed by contract between the parties, the *consensus* is indispensable. I find it in this case proved that there was no such *consensus*. That Armitage and Smithies had contemplated a partnership may be taken as established by the evidence of Mr. Fisher, but that they ever carried that intention into effect, or what were its terms, in what shares, or for what duration, there is not only no evidence, but there is no statement or explanation applicable to the subject. That they contracted joint liabilities is clear beyond doubt, but the difference between a partnership proper and such representation or dealing as would make a man jointly liable with another is palpable. In the one case, no matter what was the extent or nature of his interest, he is liable without limit or qualification to all the creditors of the partnership. In the other, he is liable to all the persons who may have given credit to his representations, or may have acted in the belief occasioned by his conduct that he was a partner. In the one case he is a principal debtor; in the other he is only liable as between himself and the person with whom he has permitted his name to be used, or his credit to be engaged in the character of surety merely, and no action for contribution could possibly arise. In the judgment appealed against this distinction has not been observed, and yet, as it appears to me, it is of essential importance in considering the effect of what has been called a release of a joint debt. Now, in point of law, it is not to be disputed that a release to one of several joint debtors releases them all. The case of *Nicholson v. Revill* referred to in the argument before me is one of the many instances in which this rule of law has been applied, and the reason upon which the rule is founded is as clear and as plain as the rule itself. It is to prevent circuity of action, inasmuch as, if the debtor released were still liable to an action of contribution by his co-debtor, who had been sued and had paid, he would not be released (*North v. Wakefield* 13 Q. B. 541). But this principle has no application to the present case, for Armitage being released by the resolution of the creditors from all his debts could neither sue himself, nor could his trustee sue on his behalf even if the supposed partnership had existed, although the right of the joint creditors against the other joint debtor would be unaffected by the bankruptcy: (sect 50 Bankruptcy Act 1869.) But although the general rule as to releases given to joint debtors, whether partners or not, is as I have stated, each particular release is to be construed according to the plain intention of the parties (*Watters v. Smith*, 2 B. & Ad. 887). Now what was the manifest intention of the parties here? The banking company had proved against Armitage's estate for the whole amount of

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Ex parte WILKES; Re LEWER.

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the debt, and this proof had been admitted, and Armitage was by resolution of the creditors discharged. The bank was content to accept from Smithies, and Smithies was willing to pay, 1000*l.*, the amount mentioned in the agreement. The validity and effect of that agreement was the subject of litigation between the bank and Smithies. Without adverting to the grounds alleged by Smithies in his bill of complaint, and upon which he founded his title to relief, it cannot be disputed that the construction of the instrument itself was open to question, although, even if it were to be read only as a security limited to 1000*l.*, the representations made by Smithies to the bank manager might establish as against Smithies a liability jointly with Armitage for the whole balance due upon the banking account. These questions between them being open, the bank having proved against Armitage, and, having released him, are content to take from Smithies the whole amount mentioned in the agreement in full discharge of all that they could claim against him. It would, in my opinion, to use the words of the Lord Chief Justice in *Watters v. Smith*, be contrary to the intention of the parties, and, wholly unjust to hold that in the existing circumstances it was the intention of the banking company to do more than to limit their claim against Smithies to the 1000*l.* mentioned in the agreement, and upon receiving that sum, to forego any further claim as against him in respect of any liability he might be under, or that the intention of Smithies was to do any more than to give up his contention as to the agreement, to set aside which he had filed his bill, upon condition that the bank would undertake not to sue him in respect of any claim arising out of their dealings with John Armitage and Co. I am, therefore, of opinion that the order of the County Court judge ought to be discharged, and that an order ought now to be made upon the trustee for payment of the dividends upon the two proofs which have been admitted, and that the costs of the appellant, as well as in the County Court as of this appeal, should be paid by the trustee.

Solicitors for the appellants, *Layton and Jaques*.
Solicitor for the respondent, *C. Walker*.

Monday, Nov. 13.

(Before the CHIEF JUDGE.)

Ex parte WILKES; Re LEWER, (a)

Trustee—Charge on trust fund in favour of—Subsequent incumbrancer—Notice—Priority.
A trustee who himself has a valid charge upon the trust funds is not as a general rule bound, on receiving notice from a subsequent incumbrancer, to disclose the existence of his charge.

This was an appeal from the decision of the judge of the County Court of Devon holden at East Stonehouse.

On the 15th July 1875, Edwin Wilkes and Ward Arliss were appointed joint receivers by an order of the Court of Chancery in a suit of *Reed v. Lewer*, being a suit instituted for the dissolution of the partnership then existing between George Palmer Reed and George Lewer; and it was ordered that, after paying the debts of the firm and the costs of suit, they should pay the residue of the moneys received by them to George Lewer

and George Palmer Reed, according to their respective interests in the partnership.

On the 6th Sept., George Lewer, who was then carrying on business as a brewer and wine merc. ant in Plymouth, gave to Edwin Wilkes the following order to secure to him the repayment of 69*l.* 1*s.* 11*d.*, and interest in respect of moneys which had been advanced by him to George Lewer:

To Messrs. W. W. Arliss and Wilkes.

Read v. Lewer, in Chancery.

I hereby authorise you to pay to Mr. Wilkes, of 22, Courtenay-street, the amount due to me for goods supplied in the above estate for which his receipt will be a sufficient discharge.

On the 18th Sept., George Lewer, being pressed by a firm of Garrard and Bartram, creditors of his to a considerable amount, gave them the following order:

To Mr. Edwin Wilkes.

Read v. Lewer.

I hereby authorise and request you to pay the balance of money due to me for goods supplied in the above estate, which I estimate at between 500*l.* and 600*l.* to Messrs. Garrard and Bartram of Bristol, wine merchants, whose receipt shall be a sufficient discharge to you for the same.

Edwin Wilkes accepted the notice of the above order in the following terms:

I accept the above order, and undertake to pay the balance collected by me in the above estate, and due to you for goods supplied, to Messrs. Garrard and Bartram, of Bristol, wine merchants. I estimate the balance at about 500*l.*

Upon the occasion of their giving Edwin Wilkes notice of their charge, Messrs. Garrard and Bartram made no inquiries of him whether there were any other incumbrances upon the fund, nor did he inform them of his own charge.

In Dec. 1875, Edwin Wilkes, with the assent of W. Arliss, applied 400*l.*, part of the moneys in his hands as receiver, in partial satisfaction of his own charge.

On the 4th Feb. 1876 George Lewer filed a liquidation petition, but the proceedings fell through. In March following he was adjudicated bankrupt, and a trustee was appointed. On the 18th Aug. the County Court Judge, upon the application of Messrs. Garrard and Bartram, ordered Edwin Lewer to pay over to them the 400*l.* which he had retained, upon the ground that he ought to have disclosed to them his charge at the time he accepted the notice of their charge, and that by not doing so he had lost his priority.

Against this order E. Wilkes appealed.

De Gex, Q.C. and *Finlay Knight* for the appellant, contended that it was a simple question of priorities, and that the appellant had done nothing to forfeit his right to pay himself out of the moneys in his hands before paying over anything to Garrard and Bartram. He undertook only to pay over the "balance," that is, the balance remaining after all deductions had been made. No inquiries were made of him, and it was not incumbent upon him to tell them of his charge: They referred to *Stephens v. Venables* No. 1 (30 Beav. 625).

Robertson, Q.C. and *Henderson* appeared for the respondent.—The conduct of the appellant had been most negligent, if not fraudulent. He prepared the several documents himself, which they contended they were entitled to read strictly against him. The word "balance" mentioned there was misleading. It in fact meant the balance of account coming to his hands as the

(a) Reported by A. A. DORR, Esq., Barrister-at-Law.

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receiver in the Chancery suit before deducting any charges. At any rate, as soon as he knew that their clients were to have a charge upon the fund, it was his duty to inform them of his own charge; and not having done so, his charge ought to be postponed in favour of the respondents.

Beresford, for the trustee who had been served with the notice of appeal, asked for his costs.

The CHIEF JUDGE.—The case is not without difficulty. It is not disputed that on the 6th Sept. the appellant had a good security. Then upon the 10th Sept. is presented to him the order in favour of the respondents, which he accepts, and undertakes "to pay the balance collected by me in the above estate." The only question therefore is, whether it was incumbent upon the appellant to explain to the respondents that he himself held a prior charge, because "balance" in my opinion must be taken to mean the balance that is left after deducting everything that is to come out of the moneys to be received by him. I know of no authority for the proposition that a mortgagee is bound when a second mortgagee gives him notice of his charge to disclose a prior charge. Unless some such duty was incumbent upon Wilkes, how can I postpone him? There was no persuasion on his part. The sole question therefore is, whether it was the duty of the appellant to communicate to the respondents the existence of his charge when they gave him notice of theirs. That is the whole case. I do not find that it was his duty to disclose his own charge to the second incumbrancers. I am of opinion, therefore, that the order appealed against cannot be sustained. It must be discharged, but the appellant has sailed so close to the wind, that I will give him no costs of this appeal. The trustees will have his costs out of the estate.

Solicitor for appellant, *Visard, Crowder, and Co.*
Solicitor for respondents, *J. Pettingill.*

Monday, Nov. 13.

(Before the CHIEF JUDGE.)

Ex parte THE GOVERNORS OF ODIHAM SCHOOL;
Re NEWMAN AND SON. (a)

Building contract—Liquidated damages—Penalty—Proof—The Bankruptcy Act 1869, ss. 23, 31.

*N. and Son, in April 1875, contracted with the governors of a school to build and complete a schoolhouse by the 31st Dec. following. The contract contained a variety of stipulations, with remedies for the breach of them, and concluded with a clause, that if in case the contract was not in all things duly performed by N., he should pay to the governors 1000*l.* as liquidated damages.*

N. failed before the 31st Dec., and his trustees in bankruptcy repudiated the contract:

*Held, that the sum of 1000*l.* was liquidated damages and not a penalty, and that the governors were entitled to prove for the amount without showing any damage.*

This was an appeal from the decision of the judge of the County Court of Hampshire, holden at Winchester.

On the 20th April 1875, Henry Newman and Samuel Newman, carrying on business in copartnership at Winchester, as masons and builders,

under the style of Newman and Son, entered into a written contract with the Governors of the Odiham Endowed School for the erection of new school buildings and a master's residence for the said school for the sum of 3290*l.*, in accordance with certain plans and a specification. The contract was to be completed and the buildings were to be delivered up, cleared of all scaffolding, rubbish, and other impediments, on or before the 25th Dec. 1875, and in default thereof, "the contractors were to forfeit and pay to the governors the sum of 10*l.* for every week after that date during which the works should remain unfinished and not delivered up." The purchase-money was to be paid by instalments. The contract contained various building clauses, giving the governors remedies in the event of any breach of the same, and concluded with the following clause: "that in case this contract be not in all things duly performed by the said contractors, they shall pay to the said governors the sum of 1000*l.*, as and for liquidated damages."

The performance of the contract was secured by the contractors and two sureties in the penal sum of 2000*l.*

The works were commenced and carried on by the contractors until the 5th Nov. 1875, when they filed a liquidation petition. Previously to this date they had received from the governors 1500*l.* on account of the works done under the contract.

The works were carried on by the trustees under the liquidation until the 31st Dec. 1875, when they became entitled, under the architect's certificate, to a further sum of 500*l.* on account of the contract, which was accordingly paid.

On the 6th Jan. 1876, the trustees gave notice of their intention to abandon the contract to the governors, who thereupon entered into an arrangement with the sureties for the completion of the buildings, which was duly carried into effect.

On the 1st Feb. the governors tendered a proof against the debtors' estate for the 1000*l.* as liquidated damages for the breach of the contract, but the proof was rejected by the trustees, upon the ground that it was not shown that any damage had been sustained by the non-performance of the contract.

On the 16th Aug. an application to the County Court by the governors for an order that their proof should be admitted, was dismissed with costs, upon the ground that the 1000*l.*, although stated to be "as and for liquidated damages," was in effect in the nature of a "penalty."

Against this order the governors appealed.

De Gex, Q.C. and *G. W. Lawrence*, for the appellants contended that the rule was that where there are one or more stipulations, the breach of which cannot be measured, there the sum agreed upon must be taken as liquidated damages and not as a penalty, as laid down by *Parke, B.*, in *Kemble v. Farren* (6 Bing. 183.) Here the damage caused by the school not being ready at the time specified could not be measured. The clause in question, therefore, must be read strictly, and the 1000*l.* as being the sum which the parties themselves had agreed upon received as the true estimate of the damage. They cited

Atkins v. Kinnear, 4 Exch. Rep. 776;

Galdesworthy v. Strutt, 1 Exch. Rep. 639.

Rosburgh, Q.C. and *F. O. Crump*, appeared for the respondents.—The 1000*l.* was in their nature a

(a) Reported by A. A. DONALD, Esq., Barrister-at-Law.

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penalty, and only intended as the measure of possible damage, and the appellants in order to be entitled to prove must specify and prove special damage to that amount. The point was really covered by the *dictum* of Coleridge, C.J. in *Magee v. Lavell* (L. Rep. 9 C. P. 111; 30 L. T. Rep. N. S. 169), "that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." They also referred to

Kemble v. Farren (sup.);

Reilly v. Jones, 1 Bing. 802;

Mayne on Damages, pp. 101-108.

De Gen, Q.C. in reply.

THE CHIEF JUDGE.—The provisions that were made are so plain in the case of this contract that, whatever they may have been in the other cases that have been mentioned, it would be very difficult to give any other meaning to them than that which they bear upon their face. Of course it is necessary carefully to construe penal clauses in instruments of various kinds; but I do not see what similarity there is between this case and the case of *Kemble v. Farren* (6 Bing. 183), because in that case the real contract was that where a payment of money should be made periodically, a default in paying that money should not be considered in the light of the forfeiture of a penal sum. But what resemblance has that case to the present? The present case is this. The school trustees for the benefit of the school agree to employ the bankrupt on certain terms, and I must say that their plain object is that the buildings should be completed by the 31st Dec. That is the contract between the parties, that they should have the schools fit to use by that time. The contract contains a variety of stipulations, not at all unusual in such an instrument, and at the end of it there is that one upon which this discussion has arisen, that in default being made in the performance of all these things there should be a penalty of 1000*l*. How am I to know that the trustees of the school would ever have entered into the contract but for that clause? It was agreed that the contractors should build the schools in the way prescribed in the specification, and the very essence of the contract was this: "you shall give us the schools by the 31st Dec., and if you do not you shall pay us the sum of 1000*l*." and the contractors say "very well." The contention on the part of the respondents is that there was no contract for the payment of any particular sum of money, and that clause is commented upon which provides that if the schools shall not be completed by the 31st Dec. the contractor shall pay a penalty of 10*l*. per week from the time of such non-completion of the contract on the 31st Dec. until the schools shall be completed. It is impossible to ascertain that sum at all. The schools never can be completed within the time specified in the contract. They were not completed then, and now they never can be. The trustees have repudiated the contract under these circumstances. The bankruptcy happened early in Nov. There may have been time enough between then and the 31st Dec.—I do not know, and would not say whether there was or not, but the trustees of the bankrupts seemed to think that there was time enough—to complete it, and at first they go on with the contract for the purpose of completing

it, and actually received a sum of money as payment towards the completion of it; but when it seemed to them likely to be unprofitable, they make up their minds that they will have nothing further to do with it, and they throw up the contract. What resemblance does this case bear to *Kemble v. Farren*, or to any other of the cases that have been referred to? The last case that was mentioned was that of *Magee v. Lavell* (L. Rep. 9 C. P. 111), where the object was to get possession of a document and pay a certain sum, or in default of paying a certain sum there should be a penalty of 100*l*., and in construing such a clause in a contract the judge came to the conclusion in distinct and express terms that the penalty was to be incurred if any one of these things were not done. Here it is the substance, the very essence of the contract. In Nov. the trustees had the option to say whether they would or would not complete the contract. They did not say that they would not, but they go on to do whatever it seemed right to them to do up to a certain time, when they repudiated the carrying out of the contract. Now the meaning of the clause, if it mean anything at all, is that the penalty of 1000*l*. has been incurred. I cannot alter the contract, and I cannot find any circumstances that will induce me to say, or justify me in considering this contract in saying that in the event of such things happening as have happened, a less sum than 1000*l*. should be paid. If I said that I should be obliged to ask myself the question how much less than 1000*l*. ought to be paid? What means have I of ascertaining that? There has been no suggestion of the existence of any particulars of the amount of damage that has been incurred, and I do not know that anyone is in a position to furnish that; but I say that if the contention of the trustee were right, and I decided according to that contention, I should be puzzled greatly in either finding or directing any other tribunal to find the amount of the specific damage that has been sustained. The order is wrong, and the appeal must succeed. The appellants will have the costs of this appeal and in the court below.

Solicitors for the appellants, *Lambert, Petch, and Shakespear*.

Solicitors for the respondents, *Pickett and Mytton*.

House of Lords.

July 10 and 11.

(Before The LORD CHANCELLOR (Cairns), Lords HATHERLEY, PENZANCE, O'HAGAN and SELBORNE.)

DIXON v. THE LONDON SMALL ARMS COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Letters patent—Infringement—Manufacture under contract with Crown—Agency.

The appellant was the sole assignee of a patent for improvements in the breech action of fire arms. The respondents entered into a contract with the Crown to provide and deliver, according to specifications, a certain number of rifles, at a fixed price per rifle. By the terms of the contract the Government were to supply a part of the raw

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material, and had the power to inspect and reject any part of the arms in the course of manufacture, or the whole when completed. In an action brought by the appellant against the respondents for infringing his patent,

Held (reversing the judgment of the court below), that the contract did not make the respondents servants or agents of the Crown, within the decision in *Feather v. The Queen* (6 B. & S. 257; 35 L. J., Q. B. 200; 12 L. T. Rep. N. S. 114), and that the plaintiff was entitled to recover. *Feather v. The Queen* commented on, and explained.

THE appellant in this case was the sole assignee of the patent for the locks used in the Martini-Henry breechloading rifles. The respondents were a limited company for the manufacture of small arms, carrying on business at Old Ford. In April, 1872, they entered into a contract with the Secretary of State for War for the supply of 13,875 Martini-Henry rifles, for the public service. They did not pay the patentee any royalty for the use of the patented invention in making the rifles under this contract, and he accordingly commenced this action against them. The defendants contended that as the rifles were manufactured for the Crown, for the public service, the royalty payable in private transactions could not be demanded, according to the decision of the Court of Queen's Bench in the case of *Feather v. The Queen* (6 B. & S. 257; 35 L. J. 200, Q. B.; 12 L. T. Rep. N. S. 114). A special case was stated by an arbitrator for the opinion of the court, and the Court of Queen's Bench (Cockburn, C.J., Mellor, Lush, and Archibald, JJ.) gave judgment for the plaintiff, as reported in L. Rep. 10 Q. B. 130, and 31 L. T. Rep. N. S. 830.

On appeal the Court of Appeal (Kelly, C.B., James, and Mellish, L.J.J., and Grove, J.) reversed this decision, as reported in L. Rep. 1 Q. B. Div., 384, and 35 L. T. Rep. N. S. 138.

This appeal was then brought to the House of Lords.

Sir W. Vernon Harcourt, Q.C., Aston, Q.C. and Macrory, appeared for the appellant.

The Solicitor-General (Sir H. Giffard, Q.C.), and Bowen (The Attorney-General (Sir J. Holker, Q.C.) with them) for the respondents.

The special case is fully set out in the reports in the courts below, and the arguments appear sufficiently from the judgments of their Lordships, the main contention of the appellant being that the decision in *Feather v. The Queen*, was erroneous, or at all events that the present case did not fall within it.

At the conclusion of the arguments their Lordships gave judgment as follows:

LORD CHANCELLOR (Cairns).—My Lords, the question in this case is one of great importance to the parties concerned, and of considerable general interest. It has been very elaborately argued at your Lordships' bar, but I think your Lordships do not entertain any doubt as to the conclusion at which you should arrive. I will remind your Lordships that the respondents undertook to manufacture for the Crown, through one of its departments, the department of the War Office, a certain number of rifles—13,875. The appellant at your Lordships' bar is the owner of one or more patents connected with the manufacture of small arms. He complains that the respondents in executing the order to which I have referred have

infringed his patent rights. For the purpose of the argument it is admitted between the parties that the patents belonging to the appellant are to be taken as valid; and furthermore, that it is to be taken for the purpose of the present argument, that if those rifles which have been made had been supplied to any subject in this country, the manufacture of them was of such a kind that it would have been an infringement of the patent rights of the appellant. That question is still further narrowed, for it has been insisted on the part of the appellant, and was not, so far as I could understand, controverted by the respondents, that the part of the rifles manufactured which is an infringement (at all events for the purpose of the argument) of the rights of the appellant, is that which is called the breech action, or the lock of the manufactured rifle. Bearing those matters in mind, I may add that the respondents contend that they are not answerable to the demand of the appellant, for these reasons: In the first place, they say that it must be taken as established by the case of *Feather v. The Queen* (12 L. T. Rep. N. S. 114; 6 B. & S. 257), decided in the year 1865, that the Crown is not bound by the monopoly created through the grant of letters patent; and they contend that in manufacturing these rifles under the order to which I have referred, and to the particular wording of which I shall afterwards have to advert, they were manufacturing the rifles for the Crown, and that whatever exemption from the stringency of letters patent existed in the Crown they are entitled to, and that consequently they are not answerable to the claim of the appellant. To that the appellant replies by three propositions. In the first place he asserts that the case of *Feather v. The Queen* was not properly decided; and he contends, as he is entitled to do at your Lordships' bar, that it is an erroneous decision. In the second place he contends that even supposing the case of *Feather v. The Queen* to have been rightly decided, yet that in the present instance the Small Arms Company, the respondents, were not in the position of servants or of agents of the Crown, and entitled to the privilege of the Crown. And in the third place he contends that even if that was their position, in point of law and in point of fact, still, in this particular case, having regard to the wording of the contract between them and the Crown, the privilege of manufacturing free from the rights of the patentee was not passed by the Crown to them or intended by the Crown to be exercised by them. When those propositions on the part of the appellant were stated to your Lordships you determined that in the first instance, at all events, you would hear the argument upon the second and the third of those propositions, and not upon the first. The argument has proceeded upon that footing, and, I think, your Lordships will be able to dispose of the case with reference to the argument upon those second and third propositions. I advert to that for the purpose of making it clear that your Lordships will assume, without finding it necessary to decide it, that the case of *Feather v. The Queen* was properly decided. I have spoken of the second and the third propositions in the argument of the appellant; but in point of fact, I think your Lordships will find that those two propositions really centre themselves in the second. I think when your Lordships have adverted to the position of the respondents in

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this case with reference to the Crown, a position which must be tested and judged of by the wording of the contract, you will be able to arrive at a conclusion one way or the other, whether the respondents were in fact and in law the servants and the agents of the Crown. If they were the servants and the agents of the Crown acting on behalf of and for the use of the Crown, then it may be that they would have the privileges with reference to the patent which the case of *Feather v. The Queen* decided to remain in the Crown, even although there is nothing whatever in the contract expressly taking notice of those privileges, or authorising the respondents to exercise them. I have used the words "the servants or agents of the Crown" for this reason. The case of *Feather v. The Queen* decided that although every grant of letters patent communicates in general terms to the patentee the right, and the sole right, to use and to exercise the invention, and prohibits other persons from using or exercising that invention, yet that a grant of that kind, being a Crown grant, must be construed with reference to those principles which regulate Crown grants, and that that which appears from its wording to be a general privilege, and a general prohibition must be read with an exception in favour of the Crown itself; and inasmuch as an exception in favour of the Crown itself cannot be a personal exception, for the Crown itself could not exercise patent rights, the exception must be not only in favour of the Crown, but in favour also of those who act on behalf of, and as the agents of the Crown. I, therefore, in the course of the argument took the liberty of proposing to the Solicitor-General the insertion of words in the letters patent which would indicate the decision of the court in the case of *Feather v. The Queen*; and with the exception of one word which the Solicitor-General proposed to add, I did not find that he took any exception or made any objection to the words which I proposed to insert. I propose to read, and I submit to your Lordships that it is the proper course that we should read, the grant of the letters patent as a grant by the Crown to the patentee of a "licence, full power sole privilege and authority, that he," the patentee, "his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he," the patentee, "his executors, administrators, or assigns, shall at any time agree with and no others;" I propose there to insert these words, "excepting officers, agents, and servants of the Crown, acting on behalf of and for the use of the Crown," "from time to time and at all times hereafter for the term of years herein expressed, shall and lawfully may make, use, exercise, and vend the said invention within our United Kingdom, &c." I say I did not understand the Solicitor-General to object to the words which I proposed to insert, except that he added to the words which I have proposed the word "agents;" I have simply added the words "officers and servants of the Crown." The question then is, if that be the effect of the grant of the letters patent, if the grant is such that the sole privilege is communicated to the patentee, and to those whom he may license, but that there is still engrafted upon that an exception which would authorise the Crown to use the invention, and would authorise an agent, an officer, or a servant of the Crown,

acting on behalf of and for the use of the Crown to use the invention, is it the case that the respondents in the appeal before your Lordships fill the position of officers, agents, or servants of the Crown, acting on behalf of and for the use of the Crown? Now, in order to answer that question your Lordships must turn to the contract itself. The Crown were desirous of being supplied with 13,875 rifles, and a tender was issued which appears to have been circulated among the different companies and firms of manufacturers who might be likely to supply these arms, and among the rest one of these tenders was sent to the London Small Arms Company Limited—the respondents. The tender contains in the first place the terms and conditions of the contract. Then there follow the details of the articles to be supplied which are stated to be "13,875 rifles, Martini-Henry, without swords, bayonets, or scabbards at 3*l.* 10*s.* (say seventy shillings) each, less 7*s.* 6*d.* each for steel tube, and 2*s.* 2*d.* each for stock. Patterns and specifications to be seen at the Royal Small Arms Factory, Enfield. Materials for barrels and stocks will be issued from the Government Stores. The viewing as required by specification during the process of manufacture will take place at Old Ford, Bow, E." To that must be added what is not printed in the case, but was produced by the parties before your Lordships as being referred to in the tender, namely, the specification of these rifles. In substance the result of the whole is this: what I may call the raw material for the barrel, the steel tube, is supplied by the Government at a certain price, the butt or stock of the rifle is supplied by the Government at a certain price, all the other component parts of the arm have to be provided or made (for the contract is consistent with either view) by the contractors. The whole have to be inspected from time to time by the officers of the Government. They have the right from time to time to reject any part of the arm while in the course of manufacture which is not consistent with the contract and the specification; and when the whole is, to use the technical term, "assembled,"—when all the pieces of the arm are put together—then if it complies with the specification, and in that case only, it is to be taken over by the Government, and accepted by the Government, and the property in it is to pass to the Government, and on the other hand, the price is to be paid for the article to the contractors. The question then has to be asked,—during this process, what is the position of the person who is called the contractor? He is clearly not a servant of the Crown. That was not contended. There is no contract of service whatever between him and the Crown. He is not an officer of the Crown engaged in the service of the Crown. Is he, then, an agent of the Crown? I cannot find any ground whatever for contending that the contractor is an agent of the Crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a very large and extensive character; he is a tradesman manufacturing certain goods for the purpose of supplying them according to a certain standard, which is laid before him as a condition on which the goods will be accepted. During the time of the manufacture the property, at all events in that which concerns the present case, namely, the property in the lock or the breech-action of the rifle, is not the property of the Crown. The materials are not the

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materials of the Crown. If the respondents make the lock themselves the materials are provided by the respondents, and the respondents work upon those materials, not as the agents of the Crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm. I can find here no delegation of authority, no mandate from a principal to an agent. I find here simply the ordinary case of a person who has undertaken to supply manufactured goods, who has not got the goods ready manufactured to be supplied, who has to make and produce the goods in order to execute the order which he has received. I find him engaged in that work on his own account up to the time when the article is completed and handed over to and accepted by the person who has given the order. I, therefore, arrive at the conclusion that there is not here on the part of the respondents that which amounts in any way to the character or the status of an agent, a servant, or any officer of the Crown. If so, the respondents are not within the exception which the case of *Feather v. The Queen* decided to exist in letters patent; and if they are not within that exception, it appears to me that the other question becomes quite unimportant, for if not within the exception, it would be impossible that the Crown could communicate to them a privilege which was only a privilege attaching upon the Crown itself, and upon those who might be the agents, servants, or officers of the Crown. That is the whole of this case. It appears to me, with great respect for the Court of Appeal, that the decision of the Court of Queen's Bench, a unanimous decision, and a decision pronounced by judges of whom two at least took part in the decision of the case of *Feather v. The Queen*, was an entirely correct decision. Speaking with great respect of the very learned persons who composed the Court of Appeal, and who also were unanimous, I am bound to advise your Lordships that the decision of the Court of Queen's Bench ought to be restored, and that of the Court of Appeal reversed. I apprehend that your Lordships will think it right, if you reverse the decision, to reverse it in a way which will carry to the successful party the costs in the Court of Queen's Bench and the Court of Appeal.

LORD HATHERLEY.—My Lords, I have arrived at the same conclusion upon a consideration of the few facts which are important, as it appears to me, for your Lordships' deliberation in this case. In the first place, I will direct my attention to that which I conceive to be settled in the case of *Feather v. The Queen*, as far as that case went. I take it to be there settled that notwithstanding letters patent having been granted to a subject giving him the sole and exclusive right of manufacturing and vending any patented article, and notwithstanding those letters patent being still current, it is competent to the Crown to manufacture those articles through the medium of its officers, its servants, or its special agents, if you will, appointed for that purpose. The decision in that case went no further than that. Then turning one's attention to the few facts, as I have said, which exist in this case, it appears to me that we have a contract entered into on the part of the respondents with the Crown, which contract I will very briefly consider presently; and we have to ask ourselves whether anything can be found within that contract to induce your Lordships to

say that the respondents on this occasion, by virtue of that contract, fill the position of being either servants or agents to the Crown in the manufacture of the article which they undertook to supply. Now, there are two very well known modes of arriving at the possession of a manufactured article of which you desire to have the use—two modes recognised both in private life and in public engagements, and which are in themselves clear, distinct, and separate in every way, although when you come to reason upon cases put hypothetically before you for consideration you may find in some cases that the boundary line between that which is manufactured by what I may term home manufacture and that which is bought under a contract such as we have here, may be fine. I do not think in the present case such a difficulty exists; but, taking an illustration from the very same character of case as that before us, I can explain very readily what I meant to convey by the observations I have just made. The Crown possesses dockyards in which vessels are built; it possesses divers manufactories in its public arsenals which are put in use by the Crown by means of its servants and agents. There is, I think, at Plymouth a large biscuit manufactory, through the medium of which all the biscuit for the navy is, or used to be (I do not know whether it is now or not), manufactured distinctly by the Crown; and in those numerous cases which occurred some years ago upon Bovill's patent with regard to the grinding of corn, reference was made to the use of his apparatus in the Royal biscuit manufactory. I take it that the Crown through its servants and its agents would be at perfect liberty, under *Feather v. The Queen*, acting in its own factory to carry on that manufacture without paying any royalty, except as a matter of bounty on the part of the Crown to the patentee of the machinery which was employed in such a work. So again, whilst building their ships in their naval arsenals, the Crown and its officers would be entitled to make use of the very largely multiplied patent inventions which exist with reference to the construction of a ship, without paying, except as I have said by way of bounty, any premium to the patentee for the use of any invention or any article which had been patented. But then one has to ask whether in the documents which we find before us there is anything at all approaching to this. Now, I apprehend that when you speak of a home manufacture and a manufacture through the medium of servants and agents of your own, you ordinarily mean, although in some cases some elements may be wanting, and in others others, that there is a plant, that you have an establishment; that you either have in your own possession, or have acquired by purchase, the article upon which you are to operate in bringing your manufacture to perfection, and having done all that, you proceed to manufacture as you think fit, at your own time and in your own manner, stopping the manufacture when you think fit so to do, and retaining the control over it in your own hands. I do not think that that would be interfered with, because you might give out one or two portions of it to be manufactured by piece work, if you so think fit. But how different is that from the contract which you enter into when you go out into the open market and purchase an article. For instance, if for some reason or other the Crown should cease to manufacture its own biscuits, and apply to the

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contractors who contract for the supply of articles of this description, provision contractors and the like, and offer to them contracts to be tendered for and say, "We give up our plant; we give up the persons who have been engaged in our service, the persons who have been employed in carrying on this work; we think it beneficial to the public that we should become purchasers instead of manufacturers of this article." It appears to me that that is the simple thing that has occurred here. I am stopped from considering all the nice distinctions which might be made in the case of a contract in such a form or in such another form, and the like; and I ask myself, what is the contract we have here? Now, the first observation I make upon it is this: there is a printed document which is issued, and which is obviously, from its printed form and from what you there find, intended to be a form for inviting tenders for every description of supply that the Government may think fit to invite tenders for. The first document, that document which is dated "War Office, 5, New-street, Spring-gardens," is to invite tenders for rifles, and it has the word "rifles" introduced into it. It might have been for biscuits; it might have been for anchors, patented in a certain manner, or otherwise; but it happens to be for rifles. This being a printed document, it has no reference at all to patents, or to dealings with patents, in regard to the articles which were to be supplied by the contract. If there was any intention of handing over an authority on the part of the Crown; if the Crown conceived that it had such a right, which I for one am not satisfied that they would be able in any way to establish; if there was any intention of handing over with the contract by others to supply what the Crown did not think it convenient to manufacture for themselves, the power and authority to the contractors of providing themselves with patented articles for that purpose without obtaining a license from the patentee, or without purchasing them from the patentee, I apprehend that if that idea had crossed anybody's mind in framing this invitation to tender, we should have found some reference to patents in it, whereas we find none; we find only a contract to deliver a certain article patented or unpatented. After that comes the tender, exactly in the same form; and then after that the specification. I do not intend to occupy your lordships' time at any length upon this subject, but I can find nothing in the specification, in any portion of it, which leads me at any rate to the conclusion that the Crown intended that this supply should be different from any other supply which a person or a company may desire when he is going to do any work upon a large scale, anything which can make this, in fact, different from many cases that were suggested in the course of the argument. Here on the one hand the Government say, we do not intend to home manufacture—we have home manufactories, but we do not intend to use them for this purpose—we have home manufactories for cannons, provision, biscuit, and the like, but we do not intend to carry on these home manufactories at all, we intend to purchase these articles, and to obtain a tender of the prices at which those articles are to be supplied. We have furnished a pattern which is to be followed, and that pattern as it happens involves a patent breech to the gun which is to be furnished. The contractor

says, I undertake to furnish you with all this; and he, being a contractor who is furnishing for a given price, for a profit to himself—not as it appears to me in any sense in which the word can be used as an agent for the Crown, but simply as engaging to sell to the Crown, to supply to the Crown, this article in this form—he is undertaking to do all that. Of course if a patented portion comes in his way in the pattern gun which has been furnished to him, that patented article he must provide in a lawful manner. I cannot understand in the least that he is placed in any position of difficulty whatever. Several possible positions of difficulty were suggested; but if he did make the complaint and made it with any justice that he could not obtain the articles of a patented character, I apprehend the answer of the Crown would be, We told you that you might look at the pattern of the article you were to furnish; we told you that you might look at the specification of the article you were to furnish before you made your tender. You made your tender, we presume you considered all these things beforehand. If you have not done so it is your fault, it is no fault at all of those who entered into the contract with you. Under those circumstances I cannot understand how this contract can be said to be anything else than a contract of those who had tendered and who are acting as contractors for the sale of an article they have manufactured just like any other articles they are in the habit of manufacturing, and that the privilege which would have attached to the Crown for its own manufacture cannot be considered to attach to a person who on his own behalf, enters into this contract and undertakes to supply the Crown with these articles. For these simple reasons, it appears to me that this case becomes when it is thoroughly sifted, sufficiently plain in its results, although undoubtedly one ought to speak with some hesitation upon the subject when one sees the unanimity which prevailed in the court from which the appeal is brought. But on the other hand one must set off against that the unanimity which existed in the court whose original judgment was reversed on that occasion.

Lord PENZANCE.—My Lords, I am very glad that this case should have received so full and so very elaborate an argument, not only on account of the importance of the case and the principles involved in it, but because I think the result of that argument has been to show that the real point upon which the case turns is narrowed to a very small one. I conceive that the real question in this case is simply this, whether under the circumstances the contract which was made between the respondents and the Government was a contract of agency or a contract of sale: and I conceive that the argument on the part of the respondents, that it was a contract of agency, rests upon the general proposition that, in all cases where an individual bargaining, contracts to sell a completed article which is to be manufactured according to the special directions of the purchaser, he is, while in the course of manufacturing that completed article, the agent of the purchaser. It seems to me that it is impossible for the respondent's argument as presented at the bar of your Lordships' house, to be correct unless it go that length. It must go the length of asserting that when an article required specially to be made is ordered of a tradesman subject to a condition and bargain on the part of the orderer that he will

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accept the article when made if satisfactory, and if in accordance with his order, the tradesman, while in the course of making the article, is throughout acting as the agent of the purchaser. Now, I say it is necessary to go that length, because in the present case the basis of the whole argument is the case of *Feather v. The Queen*, in which it was decided that although a patent created a monopoly as against all the Queen's subjects in the patentee, yet it reserved to the Crown the use of the invention without regard to the patentee's rights. That is the basis of the argument, and in order to carry the argument forward it is necessary to make out that in this case the Crown has used the invention. We all know that the Crown is an abstraction, and that the Queen individually could not use the invention. Therefore, if there has been a use of the invention by the Crown, it could only be by the Crown's agents; and so it is that the argument comes round to the point, whether upon a contract, which no one will deny to be upon the face of it, a contract of sale, there is a contract of agency during the carrying out of the work—a contract of agency which, when completed, must end in a sale of the property in the completed thing, and a passing over of it to the purchaser. Now, I will not trouble your Lordships by reading again the contract, but it is obvious from the terms of it that it is a contract for the supply of certain articles to be delivered in certain quantities at certain times. It is obvious furthermore that the articles are not to be received unless they come up, in the opinion of the Crown officers who were to inspect them, to the sample and the specification according to which they were to be made. The contract itself contains of course a reference to the specification, and it has been argued that that specification in some respects alters the character of the contract. Now, in this specification I can find nothing but this: certainly the language used in the specification seems to contemplate that the arm as a completed article is to be manufactured at the premises of the respondents, because in the tender the respondents made, I find that under the heading of the place where the viewing is to take place during the process of manufacture, they put the address of "Old Ford, Bow." Again, I find that the arms are to be taken over by the Royal Small-Arms Factory superintendent at the company's manufactory at Old Ford. Then, again, in the specification I find the manufacture by the respondents in so many terms spoken of. Therefore, I think it is a fair result of this specification, coupled with the words of the tender which was put out by the Government, that the respondents were to manufacture the article as a complete article. But it is impossible, I think, to say, upon the face either of the contract or the specification, that they were bound to make every individual part of it. It is impossible to say that they would not have fulfilled their contract, if in the course of manufacture of the entire arm they had introduced parts which had been made by other people or came from other sources. That being the state of the contract, the question which occurs is whether there is anything in that contract to turn it into a contract of agency. Now, my Lords, in asking that question several tests have occurred to my mind which might throw some light upon the subject. First, could the respondents, if a foreign Government had wanted a thousand of these breech actions, have sold a thousand of these

breech actions, which were in the course of being made at their factory? And if they had sold them, and if, nevertheless, they had supplied the British Government with the requisite and agreed quantity of arms at the agreed times, would Her Majesty's Government have had any cause of action against them? If they were making them as the agents of the Government, as fast as every piece of work was put upon the material, it would become the property of the Government. The Government would have an interest in it, and the respondents would not, as it appears to me, be able to sell or part with it to anybody else. But if they were only under a bargain to deliver a certain number of articles at a certain time, then, although in the first instance, they may have intended certain portions of the work to be applied to the fulfilment of that contract, there would be nothing, if they were not agents, to prevent their parting with them to other people. Then again, could the Crown, who is looked upon according to the argument as the employer, the person whose agent the respondents were—could the Crown, while the work was going on, order the dismissal of a particular workman, or order any step to be taken which they thought desirable? Could they give any special directions for doing the work in a special way, or was that entirely in the power of the respondents? If the respondents were their agents doing the work under a contract of agency, it would seem to follow that the principal might withdraw any previous orders he had given, and order that the thing should be done in a different way. Of course, when the question of remuneration came to be considered, that might impose upon the employer some further pecuniary liability; but, so to speak, he would be master of the work, and would be entitled to give such orders as he pleased while the work was going on. Another test occurs to me. Suppose a fire had taken place at the factory while this work was being done, and some of these articles had been either injured or utterly destroyed, at whose risk would that have been? There can be but one answer. I speak only of the breech-action; I pass by those portions of the work which were provided by the Crown. With regard to the breech-action, those things upon which the respondents had been doing work with a view to complete this contract ultimately by presenting a complete arm, there can be no doubt that any loss which happened by fire to those portions of the work would fall upon the respondents themselves. Then, again, as to the rate at which the work should proceed; provided they complied with the contract by delivering the requisite quantity of arms at the given time, the Government would not have had the ordinary power which an employer has, of either accelerating or retarding the rate at which the work was to proceed. All these are trifling matters, but they are all incidents which appear to me to belong to a contract of agency as distinguished from a contract of sale. I think the true distinction in this case is between an authority or mandate to do a thing for a money reward, in the doing of which, whether the individual is a servant or only a contractor, he is all along acting as an agent; and a contract for the supply and acceptance, if approved when completed, of an article to be made by the contractor, in the making of which the contractor, though working under inspection, is all along acting on his own behalf and at his

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own risk. I conceive that this latter description is a description which properly applies to the contract in this case, and, consequently, that the respondents never were the agents of the Crown, and, consequently, are unable to set up the immunity which the Crown enjoys. I wish to say one word upon another branch of the subject. Supposing it is said that the Crown has power to authorise an agent to do work for it which would otherwise be an infringement of this patent, must there or must there not be some authority beyond a mere authority to make a patented article? Must there or must there not be some authority to make it without a license from the patentee? Now, I confess I incline to the opinion that Sir William Harcourt's argument upon that subject is well-founded. The patent reserves, as patents generally do—always, I believe, now—a power in the Crown to demand of the patentee the making of any quantity of the patented article they might require, at reasonable prices. No doubt that means a price which will remunerate him as a patentee. On the other hand the case of *Feather v. The Queen*, which we assume for this purpose to be good law, declares that the Crown may do it without giving any reward whatever. But I cannot help thinking that, whether the Crown should or should not in any particular case desire to take advantage of that immunity, must be a question upon which the Crown is entitled to exercise its discretion, and, therefore, that any bare contract (supposing that this were one of that character, which I have already pointed out, I do not think it is) with an agent to do the work, if the Crown says nothing to the effect that he is to do it without reference to a patentee's rights, will not be sufficient to show that the Crown was exercising such an election, and, consequently, the agent without such express authority would have no right to infringe the patent. I say that with some hesitation, because my noble and learned friend on the woolsack appeared to think otherwise. It is not perhaps material in this case, because all your Lordships are, I believe, of opinion that on the main point the judgment of the Court below must be reversed, and the judgment of the Court of Queen's Bench restored.

Lord O'HAGAN.—My Lords, this case has been narrowed so much and discussed so thoroughly that, but for the general importance and the singular conflict of judicial opinion upon it, I should have declined to add anything to the observations of my noble and learned friends. I shall state in the briefest terms the grounds of my agreement with them. I am strongly of opinion with the learned judges whose decision in *Feather v. The Queen* is the subject of our present consideration, that it is not desirable to extend the principle established by that case. I do not think that it should be extended for any of the reasons which have been suggested to your Lordships, and it seems to me that the ruling of the Court of Appeal if adopted by this House, would involve such an extension with very serious consequences. In *Feather v. The Queen* the contention was between the Crown and the patentee. Here it is between two subjects, one of whom complains of the other as having infringed on his undoubted right, and unless in the doing of the thing complained of, the Crown was really the actor, and the respondent its mere servant or agent, obeying its express command for its sole use and benefit,

the invasion of the patent was unwarranted, and the appellant must prevail. But for the weight of authority the other way, I should hold it clear that the respondent was not the servant or the agent of the Crown, so as to obtain for his admitted infringement the immunity which the law, as it stands, must be taken to afford to the Crown. He was not a servant or agent for that purpose, acting under a master's control, dealing with a master's property, and attending merely to a master's interests. He was a contractor, making a specific bargain for his own profit, and securing that profit by operating on property of his own. He entered freely into a contract "to provide and deliver" the articles specified in it. During the preparation of those articles the property with which he dealt continued to be his own, save perhaps so far as the materials to be manufactured were supplied to him. Until the contract was complete he used that property as he pleased, on his own responsibility, and at his own risk, and it was in the power of the Crown to reject his work at any time before the completion and delivery of it. I think it impossible to say that in such circumstances, the incidents of the relation of master and servant, or superior and agent, attached as between the contractor and the Crown. It has been urged that the contract was to "make" or "manufacture" the rifles. I find nothing in its terms, or in the specification, or the schedules, to necessitate any such construction of it. As I have said, the contractor's undertaking is "to provide and deliver," and the specification begins by the consistent use of the word "supply." I conceive that the exigency of that undertaking would have been answered if, manufacturing the materials supplied by the Crown, he had supplemented them and finished the arms by other materials, including the patented articles, however and from whomsoever they might have been procured. His contract was not of service but of sale, for his own benefit, of certain commodities, fulfilling certain conditions and to be paid for on certain terms; and if those conditions were fulfilled, whether by his own workmanship, or articles provided at his instance, I apprehend the Crown could not have rejected the commodities, as, on the other hand, its right of rejection on non-fulfilment until the moment of delivery remained intact, a state of things difficult to be reconciled with the theory of agency or service. The exact position of the parties, in this regard, seems to me to have been somewhat misconceived by the learned judges of the Court of Appeal when they describe the Crown as "supplying the materials, and simply ordering the manufacture of an unmanufactured article." If this had been so; if all the materials had been supplied by the Crown to its own hired servants, acting in its own premises, exercising no discretion and having no property, but merely carrying its orders into effect, the cases cited as to the liabilities of principals might have application, and the Crown might have been regarded as itself the manufacturer and protected by the implied exception of the patent. But the facts appear to me to be otherwise, as I have indicated already, and I agree with Mr. Justice Archibald that "the contract might have been performed by supplying articles manufactured long before the date of the contract. The rifles were to be furnished by sub-contractors, and it was not a case in which the Crown was manufacturing itself." Then it was

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competent for the contractor to have fulfilled his agreement to the letter by paying for the licence of the patentee; and the contract does not on any construction of it, expressly or impliedly declare that the Crown designed or directed the dispensing with the licence. The order "to provide and deliver" involved neither requirement nor approval of illegality, and cannot be assumed to have been issued with the desire that the contractor should act without the permission of the patentee, and therefore, so far as he was concerned, in fraud of individual right and contravention of the law. Surely the contrary assumption, if any, should be made. If the work could be done, in one of two ways, legally or otherwise, ought we to suppose that the legal mode was not contemplated, in the absence of clear words forbidding it? But there are no such words. There is not in this case any protective or fortifying order of the Crown, if any order could have been so, by which one subject can shield himself from the consequences of his invasion of another's right; and, on this ground Sir W. Harcourt's argument appears to me unanswered and sufficient. As to the reasoning based on considerations of policy, I shall only say that it cuts both ways. The Crown appears to me to have guarded the public interests, by the frame of the patent, with abundant care. It secures the service of the patentee on terms dictated by itself, and with penal consequences of a grave character if that service be not fitly rendered: and it has power, if necessary, to increase the stringency of the conditions of its grants. But on the other hand, policy and justice seem equally to demand that we should not be persuaded lightly to adopt a view derogating largely from the rights which a patentee has purchased by his genius, his labour, and it may be, his fortune, and which are vested in him for the interests of society more than for his own. At the very least, a royal order relied upon as authorising injurious interference with profits which are solemnly secured to him by royal grant, should be clear and unequivocal if it is to be effective: and no such order, as I have said, has been proved in this case. The argument from policy does not, therefore, help the respondent. With very sincere deference for the Court of Appeal, and such distrust of my own judgment as that deference suggests, I am obliged to concur in the reversal proposed to your Lordships.

LORD SELBORNE.—My Lords, I agree with the opinions which have already been expressed. I consider the case of *Feather v. The Queen* to have determined that letters patent for inventions operate to grant an exclusive privilege to the patentee against all the subjects of the Crown; and that the Crown is not bound by them, not (strictly speaking), because it is impliedly excepted but because the privilege granted is a privilege against the subjects only and not a privilege against the Crown. But, for the purpose of testing, in this or in any other case, the consequences of that decision, I see no reason to object to the manner in which it was put by my noble and learned friend on the woolsack, viz., as if the sovereign, and the officers, agents, and servants of the sovereign, had been expressly excepted from the operation of the grant. I agree with the Court of Queen's Bench that this decision is not to be extended by any reasoning from the convenience of the Crown, or of the public service, or from any idea that it practically comes to the

same thing whether the Crown manufactures itself or gives orders to other manufacturers. It cannot, on any such grounds, be extended so as to make the grant less operative than, according to its proper construction, it purports to be, against the subjects of the Crown. It would be inconsistent with the grant to hold that the exemption of the Crown from this privilege can be imparted to the subject; whether it might or might not be convenient to the public service, in any particular case that this should be done. The case, therefore, in my opinion, depends upon the question whether the relation of master and servant, or of principal and agent, existed between the Crown and these defendants during the process of the manufacture of the breech-action in question, and for the purposes of that manufacture, and this question must, in my opinion, be decided by a strict and accurate application of legal principles to this particular contract, exactly in the same manner as if any private person, and not a public department, had contracted with the defendants, in terms of the documents before us, for the supply of these arms. I cannot doubt as to the answer to be given to the question when that test is applied. There was clearly no contract of hiring and service; and I am equally clear that any private persons who entered into such a contract would not have been liable for the acts of the defendants during the process of manufacture as a principal is liable for the acts of his agent. It is not like the case of a railway contractor who executes works which the company itself is bound by law to execute, and which only can be executed by them, or by some person acting by their authority, and entitled on their behalf to exercise the powers vested in them by the Legislature. Nor is it like the case of a direct order to a contractor to do an unlawful act, to the injury of another person. Here there is no order to infringe any patent; and it cannot be inferred that this would have been intended or authorised by a private person entering into this contract; the use of patented articles or patented processes being, in the ordinary course of business, a thing which may be lawfully obtained in the proper market, just as any necessary materials might be which the manufacturer taking the contract might not himself have in stock.

Judgment of Court of Appeal reversed, and judgment of the Court of Queen's Bench restored.

Solicitors for the appellant, *Stibbard and Crossley*.

Solicitor for the respondents, *The Solicitor to the War Department*.

June 27 and 29, July 3 and 27.

(Before Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE.)

ANDERSON v. MORICE; MORICE v. ANDERSON. (a)
ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER
IN ENGLAND.

Marine insurance—Insurable interest—Commencement of risk—Perils of the seas—Evidence.
The appellant contracted for the purchase of rice in the following terms: "Bought for account of A., of B. and Co., the cargo of new crop Rangoon rice per Sunbeam." The day after making this contract

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the appellant insured the rice at and from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, and after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, and the rice already shipped was wholly lost. In an action on the policy, Held, by Lords Chelmsford and Hatherley (affirming the judgment of the court below), that the appellant had no insurable interest in the rice, it not being at his risk till the cargo was completed. By Lords O'Hagan and Selborne contra.

The evidence tended to show that the ship was seaworthy and in good repair on the voyage to the port where she was lost, and no direct evidence was, or could be, given why she sank.

Held (affirming the judgment of the court below), that there was evidence of a loss by the perils insured against.

This was an action on a policy of insurance on a cargo of goods and merchandise, at and from Rangoon to the United Kingdom.

The plaintiff, Anderson, was a merchant in London, and on 2nd Feb. 1871. he entered into a contract for the purchase of a cargo of Rangoon rice in these terms:

"Bought for account of Anderson and Co. of Borradaile and Co., the cargo of new crop Rangoon rice per *Sunbeam*, 707 tons register, No. 1254, in *Veritas*, at 9s. 1½d. per cwt. cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April 1871. Payment by seller's draft on purchaser at six months' sight, with documents attached."

The following day he effected an insurance with the defendant Morice in these words: "At and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the first of April, on rice, as interest may appear. Amount of invoice to be deemed the value; average payable on every 500 bags. The said merchandises are and shall be valued at 5500*l.*, part of 6000*l.*"

The *Sunbeam* arrived at Rangoon in ballast on 2nd March 1871, and anchored at the usual place by two anchors. She began to load the rice on 9th March, and continued loading till the 30th, on which day about five-sixths of the cargo was on board, and the remainder was in lighters alongside, she then suddenly began to leak very fast, and sunk at her moorings on the following day.

Evidence was given that she had been thoroughly overhauled and reclassified in 1869, and had been quite seaworthy in several long voyages, including the voyage to Rangoon, and had been examined by the captain while lying there.

After the loss the captain signed bills of lading for the cargo actually shipped, which were indorsed to the plaintiff. The sellers drew bills of exchange for the price which the plaintiff duly accepted and met.

The action was tried before Brett, J., at the sittings in London after Hilary Term 1873, when the jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict on the ground that there was no evidence of a loss by the perils insured against, and that there was no insurable interest in the plaintiff.

A rule was according obtained, but it was discharged by the Court of Common Pleas (Lord Coleridge, C.J., Brett, and Denman, JJ.) as re-

ported in L. Rep. 10 C. P. 58; 31 L. T. Rep. N.S. 605.

On appeal to the Exchequer Chamber (Bramwell, Pollock, and Amphlett, BB., Blackburn, Lush, and Quain, JJ.) the decision of the Court of Common Pleas was affirmed on the question of a loss by the perils insured against, but reversed on the question of the plaintiff having an insurable interest in the rice before the loading was completed, Quain, J., dissenting from the majority of the court on this point (L. Rep. 10 C. P. 609; 33 L. T. Rep. N. S. 355).

Cross appeals were then brought to the House of Lords.

Sir H. James, Q.C. Watkin Williams, Q.C., and J. C. Mathew, appeared for Mr. Anderson, the plaintiff, below.

Butt, Q.C. and Cohen, Q.C., for Mr. Morice, the defendant below.

The same arguments were urged, and the same authorities relied on, as in the courts below.

July 27.—Their Lordships gave judgment as follows:

LORD CHELMSFORD.—My Lords,—The question to be determined upon this appeal is one of some difficulty, and it has given rise to a great diversity of judicial opinion. It may be thus shortly stated: Whether the appellant, under a contract for the purchase of a cargo of rice to be shipped on board a vessel called the *Sunbeam*, had any property in the rice, or had incurred any risk in respect of it so as to give him an insurable interest at the time of the total loss of the vessel and cargo. Having read the terms of the contract for the purchase of the rice, the noble and learned lord said that if the intention of the parties was to be collected from the written contract alone, payment was to be made only on the completion of the cargo. According to the case of *Appleby v. Myers* (L. Rep. 2 C. P. 651; 14 L. T. Rep. N. S. 669), no interest in it passed to the purchaser until the cargo was completed. But although the purchaser of a cargo might have no interest in it until a certain event happened, as, for instance, until the delivery, he might, if he pleased, expressly take upon himself all the risks and dangers of the voyage, as in *Castle v. Playford* (L. Rep. 7 Ex. 98; 26 L. T. Rep. N. S. 315), although, without a stipulation to that effect, he would not be affected by anything which might happen to the cargo in its transit to him. In the present case it was contended that either under the contract itself the appellant's risk began as soon as any rice was shipped on board the *Sunbeam*, or that the act of effecting an insurance on the rice by the appellant was an agreement on his part to undertake the risk." Assuming that the intention of the parties might be implied from their acts, and so become a term in the contract, the acts ought to be such as to manifest that intention without ambiguity. The acts relied upon in this case were a notice from the vendors to the purchaser to effect an insurance on the rice in the *Sunbeam*, and a policy of insurance effected by the purchaser accordingly, describing the adventure as "beginning upon the goods and merchandises from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon," &c. It seems to me clear that, unless a change was produced in his rights and liabilities under the contract by his undertaking the insurance, Anderson would have had no interest in the rice until a complete cargo had

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been shipped. But, although this was his position in relation to the contract itself, he had a contingent benefit which might accrue to him from the completion of the cargo on board the *Sunbeam*, and its safe delivery. This contingent benefit was one on expected profits, and, although it would not be protected by an insurance on the rice (*Lucena v. Crawford*, 2 B. & P., N. R., 269), yet Anderson, having that contingent interest in the safety of the cargo, might not be indisposed to take upon himself an insurance against its loss, more especially as he would have an interest in the rice itself at Rangoon as soon as the cargo should be completed. The question is, did this insurance throw the risk of the loss of the rice upon him? Did he, by undertaking it, impliedly agree with the vendors that, if the rice was destroyed after any part had been shipped on board the *Sunbeam*, the loss should be his? Did this act change the nature of the contract, the stipulations of which, enabling the vendors to take the bill of lading in their own name and to send it forward with the draught, were *prima facie*, though not conclusive, evidence of the interest and property remaining in them? What was the nature of the risk which Anderson was supposed to have undertaken? In the words of Blackburn, J., in *Castle v. Playford*, it was, "If the property perishes by danger of the seas, I shall take the risk of having lost the property, whether it be mine or not." If this was really his undertaking, every bag of rice shipped on board the *Sunbeam* was at his risk, and the loss of it must have fallen upon him. But the Court of Common Pleas held that, as Anderson would not, if the ship had sailed and arrived with what was on board of her when she sank, have been obliged to accept what was on board, he was not bound to pay for the rice which was on board and lost when the ship sank; from which it would seem to follow that Anderson was not exposed to any risk of loss before a complete cargo had been shipped in the *Sunbeam*. There being, therefore, conflicting evidence of intention as to the interest in the rice passing to the purchaser or remaining in the vendors, the effect of the written contract being that the interest was to continue in the vendors until the completion of the cargo, and the consent of the purchaser to insure not shifting the property during the loading and before the cargo was complete, and it being at the utmost an indication of intention to assume the risk, I think your Lordships ought not to look out of the contract, but to determine the rights and the liabilities of the parties by it alone. It was not disputed that by the terms of the contract Anderson was not bound to take less than a complete cargo of rice, and that he had an option either to accept or reject a part cargo. If he had exercised this option by accepting what was on board before the *Sunbeam* sank as a fulfilment of the contract on the part of the vendors, he would have had an insurable interest in the rice at the time of the loss. The Court of Common Pleas thought the property had not passed out of the vendors at this time, but they were of opinion "that there was such an appropriation of the rice on board to the contract as to prevent the sellers from withdrawing that rice without the consent of the buyer;" thus apparently fixing the buyer with the risk of the rice, from time to time, as it was put on board. Upon this, Blackburn, J., in his judgment in the Exchequer

Chamber, observed, "If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent; but we cannot find anything to this effect." Now, an intention that each bag of rice shipped should be at the risk of the purchaser was necessary to be established as a foundation for the argument maintained by the learned counsel for the appellant, that, if part of the rice had been shipped and had been damaged while on board, the vendors might, without removing it, have gone on loading the rice until a full cargo had been put on board, and have delivered it to the purchaser, who would have had no option, but must have accepted it as a faithful performance of the contract. Sir H. James went further than that, and argued that, even if part of the cargo shipped had been totally destroyed by fire, and the vendors had come with a further quantity of rice to be shipped, the master must have taken it in, and if the *Sunbeam* had afterwards arrived with a quantity of rice which, together with that destroyed, would have amounted to a full cargo, the purchaser could not have refused to accept it. This rather bold proposition requires for its support that it should first be established that each bag of rice as it was shipped on board was appropriated to the purchaser and was at his risk. Assuming that the rice was not the purchaser's property, nor at his risk, as Bramwell, B. thought, I cannot agree that in the circumstances supposed there could be a performance of the contract. The purchaser was entitled to a full cargo of merchantable rice, and was not bound to accept less than a full cargo. The learned counsel for the appellant argued that after the *Sunbeam* sank with a deficient cargo the purchaser had a right to exercise his option, and to accept the rice at the bottom of the river in fulfilment of the contract. As between the purchaser and the vendors there was nothing to prevent the purchaser, if he chose to do so extraordinary a thing, from taking the perished rice and paying the invoiced price for it. But the case was between the purchaser and the underwriters. The purchaser was entitled to a cargo of rice shipped on board the *Sunbeam*; the option which he was entitled to exercise related to a cargo of rice on board that ship, and no other. Both vessel and cargo were utterly lost, and therefore what subject was in existence upon which an option could be exercised? After the loss, the purchaser was not bound to pay for the rice, and the vendors could not insist upon payment. If there had been no insurance it could not be supposed that the purchaser would have taken to and paid for the rice at the bottom of the river. The payment was entirely voluntary, and, instead of being the exercise of a *bona fide* option by the purchaser, was only made by him and accepted by the vendors with the view of relieving themselves and throwing the loss upon the underwriters. In these circumstances I think that the judgment of the Exchequer Chamber was right and ought to be affirmed.

LORD HATHERLEY concurred in the view taken by Lord Chelmsford.

LORD SELBORNE.—My Lords, it is my misfortune to differ from two of your Lordships, as well as from the majority of the court below, my opinion being that the case was placed upon its

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proper ground by the judgment of Quain, J., in the Exchequer Chamber. It was on all hands admitted that, if by the contract between the parties the rice was to be at the risk of the buyer during the time of its shipment at Rangoon, the plaintiff (the appellant here) was entitled to recover. I do not consider it necessary that this should have been expressed in the bought note. It was sufficient if it appeared by evidence proper to be considered by a jury that the parties did in fact so agree. But I cannot read the terms of the bought note without drawing from them the inference which there was certainly nothing in the rest of the evidence to repel, that the intention of the parties was that the goods should be insured by the buyer. The judges of the Exchequer Chamber were of opinion that, as the time when the sellers under the terms of the contract would be entitled to draw upon the buyer for the price of the goods, and when the buyer would be bound to accept the goods in fulfilment of his contract, would not arrive until a full cargo had been put on board, the risk, against which the buyer was intended to insure, would commence at the same time and not earlier. I am unable to agree in that opinion because the evidence satisfies me that this was not the actual understanding or intention of the parties. On the day after the contract, when there could be no object in shifting any burden from the right to the wrong party, the buyer did actually insure in terms which covered every bag of rice put on board from the first commencement of the loading of the vessel. The fact that such an insurance had been made seemed not to have then been communicated to the sellers. But they made no insurance, and on the 6th March 1872, when the vessel was in the Rangoon river, exactly three days before she began to take in her cargo, they advised the buyer by telegram that she was there, and called his attention to "insurance." I can only understand that as meaning that the time was then close at hand at which, by the commencement of the loading of the cargo, the risk intended to be insured against by the buyer would begin. Nor does it appear to me to be reasonable, or according to the probable and ordinary course of mercantile usage, that when a cargo was to be loaded at a given place on board a particular ship for a particular adventure, and when the duty of insurance was undertaken by the buyer, the parties should be supposed to mean to divide the risk, so that the buyer should insure after the cargo was complete, and the seller (though nothing was said about it) until that time. When we have once got so far as the direct evidence leads us in this case, the presumption appears to me to be against such a distinction, and the burden of proof to lie upon those who affirmed it. Baron Bramwell, whose opinion I always hold in the highest respect, considered it a sufficient answer that there might be a risk while the goods were on their way to and not yet on board the ship, against which it would certainly not be for the buyer to insure, and that the line must always be drawn somewhere. I am not satisfied with that argument. The line in this case appears to be clearly drawn by the contract. Whatever was within the scope of the contract is on one side of that line, and whatever was not is on the other. The parties, had, of course, in their contemplation the cargo of the ship, and that only, and goods neither placed on board the ship as part of that cargo nor subject to any maritime risks of

that particular ship as hired for that particular adventure would be altogether outside of this contract, and entirely unaffected by its provisions. But surely it is otherwise with regard to goods put on board as part of the cargo and subject to the maritime risks of the ship as hired for the particular adventure. The subject of the contract was "the cargo," not specific goods nor a defined quantity of goods. Nothing could be less likely than that when the buyer undertook to insure, an insurance was meant which would not cover the whole risk of the adventure from its commencement as to every part of the cargo; or that they should have thought of such a refinement as that goods put on board for the purpose of the adventure were not to be regarded as "cargo" for the purpose of insurance, until the whole lading was completed. So, understanding from the agreement that the purchaser was to insure, I think that is sufficient for the decision of the case. Mr. Justice Blackburn, in the case of *Allison v. The Bristol Insurance Company* (L. Rep. 1 App. Cas. 209; 34 L. T. Rep. N. S. 809), said, "According to my experience merchants attach very great weight to a stipulation as to who is to insure as showing who is to bear the risk of loss." I agree in that remark, which is supported by several authorities. I think, therefore, that it was intended that the buyer was to bear the risk of loss in this case. In my opinion the judgment of the Court of Exchequer Chamber ought to be reversed, and I confess I very much regret the decision which will pass in the name of your Lordships' house as being a failure of what seem to me to be substantial justice.

Lord O'HAGAN concurred in the view taken by Lord Selborne.

The votes being equal the decision appealed against was affirmed.

Judgment of the Exchequer Chamber affirmed and appeal dismissed without costs.

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THIS was the cross appeal from the unanimous judgments of both the courts below as to whether, under the circumstances, there was evidence of a loss by the perils insured against.

The evidence appears fully in the reports in the courts below (*ubi sup.*).

Their LORDSHIPS were unanimously of opinion that the decision appealed from should be affirmed with costs.

Solicitors for Mr. Anderson, *Parker and Clarke.*

Solicitors for Mr. Morice, *Hollams, Son, and Coward.*

July 3, 4, 6, and 27.

(Before the LORD CHANCELLOR (Oairns), Lords CHELMSFORD and SELBORNE.)

LYON v. THE FISHMONGERS' COMPANY.(a)

ON APPEAL FROM THE COURT OF APPEAL IN CHANCERY IN ENGLAND.

Riparian owner—Tidal river—Thames Conservancy Act (20 & 21 Vict., c. cxlvii.), ss. 53, 179—Private right.

A riparian proprietor on the banks of a tidal navigable river has similar rights and natural easements to those which belong to a riparian pro-

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prior above the flow of the tide, subject to the public right of navigation.

The Thames Conservancy Act, by sect. 53, empowers the conservators to grant a licence to the owner of any land adjoining the river, to make an embankment in front of his land, into the body of the river; by sect. 179 all existing rights of owners of lands on the banks of the river are preserved. The appellant and the respondents owned adjoining wharves, the appellant had access from his wharf to the river both on the south and west sides; the respondents obtained a licence, under sect. 53 of the Act, to make an embankment, the effect of which would have been to cut off the appellant's access to the river on the west side.

Held (reversing the judgment of the court below), that this access was a private right within sect. 179, and that the conservators had no power to grant such licence.

This was an appeal from a decision of the Lords Justices, reported in L. Rep. 10 Ch. 679; 33 L. T. Rep. N. S. 146, reversing a decision of Malins, V.C., reported in 32 L. T. Rep. N. S. 479.

The appellant was the owner and occupier of a wharf on the banks of the Thames, called Lyon's wharf. The south side of the wharf fronted the main channel of the river, and on the west side there was an inlet of the river called Winckworth's Hole. The appellant's property, therefore, had the advantage of an access to the river on two sides, which was useful to him in his business. The respondents were the owners of a wharf at the bottom of Winckworth's Hole; and in 1872 they obtained from the Conservators of the Thames a licence to make an embankment in front of their wharf, up to the main line of the river, which would have had the effect of cutting off the appellant's access from the west side of his wharf to Winckworth's Hole, and so to the main river. The licence was obtained under sect. 53 of the Thames Conservancy Act (20 & 21 Vict. cxlvii.), which is as follows: "It shall be lawful for the Conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames, a licence to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this Act directed, and under and subject to such conditions and restrictions as the Conservators shall think fit to impose."

Sect. 179 of the Act is as follows: "None of powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry; but the same shall continue and remain in full force and effect as if this Act had never been made."

The appellant filed his bill against the respondents to restrain them from making the embankment, and Malins, V.C. made a decree for an injunction; but his decision was reversed on appeal, as above mentioned.

This appeal was then brought to the House of Lords.

Cotton, Q.C. and R. E. Webster, for the appel-

lant, argued, that, independently of the Act, the appellant's rights as a riparian owner could not be prejudiced without compensation. It was not the intention of the Legislature to destroy private rights, and this right of access clearly came within the saving clause of sect. 179.

The Solicitor-General (Sir H. Giffard, Q.C.), Glasse, Q.C., Chitty, Q.C. and Dundas Gardiner, for the respondents, contended that the 179th section was inapplicable, for the appellant's right as a riparian proprietor was confined to the south side of his wharf, which fronted the main stream, and that was not interfered with. The injury he suffers, if any, he suffers in common with the public at large, and for that he has no remedy by action.

Cotton, Q.C. replied.

The following authorities were cited, or referred to, in the course of the arguments:

The Duke of Buccleuch v. The Metropolitan Board of Works, 27 L. T. Rep. N. S. 1; L. Rep. 5 H. L. 418;
The Metropolitan Board of Works v. McCarthy, 31 L. T. Rep. N. S. 182; L. Rep. 7 H. L. 243.
Miner v. Gilmour, 12 Moo. P. C. 131;
Lord v. The Commissioners of Sydney, Ib. 473;
The Attorney-General v. The Conservators of the Thames, 8 L. T. Rep. N. S. 9; 1 H. & M. 1;
Ross v. Groves, 5 M. & G. 613;
Eastern Counties Railway Company v. Dorling, 5 C.B., N. S. 821;
Kearn's v. The Cordwainers Company, 6 C. B., N. S., 388;
Marshall v. The Ulster Steam Company, 25 L. T. Rep. N. S. 793; L. Rep. 7 Q. B. 166;
Res v. Bristol Dock Company, 12 East, 428;
Res v. London Dock Company, 5 A. & E. 163;
Ricket v. Metropolitan Railway Company, 16 L. T. Rep. N. S. 542; L. Rep. 2 H. L. 175;
Galloway v. The Mayor of London, 14 L. T. Rep. N. S. 865; L. Rep. 1 H. L. 34;
The Attorney-General v. The Corporation of Cambridge, L. Rep. 6 H. L. 303;
Anonymous case, 1 Mod. 105.

July 27.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—After going through the facts of the case, and the sections of the Act of Parliament, continued: My Lords, it is to be observed that the power granted by sect. 53 to the conservators is not simply a power to be exercised by them with any view to the improvement of the navigation of the Thames. It is, of course, a power, which, like every other power given them by the Act, they are to exercise so as to preserve the navigation from injury; but subject to this it is a power of granting to individuals, upon a money payment, the privilege of doing what they otherwise could not do in a navigable river, of pushing out an embankment or works in front of their land into the body of the river. It is also to be observed that the possession by the appellant of a west frontage to his wharf, and of the power of loading and unloading there as well as on the south, was to him a property of very great value. It was admitted at the bar on the part of the respondents, that the statements made to the effect that the owner of Lyon's Wharf had not the same right of access to, and use of, the river on the west frontage which he had on the south could not be supported; and it was admitted, and indeed could not be disputed, that if, independently of the Act, this west frontage access between his wharf and the river had been cut off, or interfered with, he might have maintained an action for damages; and that in

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any public work executed under the powers of the Lands Clauses Consolidation Act, the destruction or interruption of this access would be an "injuriously affecting" of the appellant's land within the meaning of that Act. The right to compensation in such a case under the terms of the Lands Clauses Consolidation Act was well established in this House in the cases of *The Duke of Buccleuch v. The Metropolitan Board of Works* (*ubi sup.*) and *The Metropolitan Board of Works v. McCarthy* (*ubi sup.*) Now it is further to be observed that no compensation whatever is provided by the Conservancy Act for any injury done to the adjacent owners of lands on the banks of the river by the execution of a licence granted under sect. 53. Admitting, therefore, as may well be done, that a licence under that section would be a perfect justification for an embankment made by a riparian owner in front of his own land, so far as it merely affected the public right of navigation, it would appear to be *à priori* in the very highest degree improbable that an Act of Parliament could intend, through the operation of that section, to authorise the conservators to permit one riparian owner to affect injuriously the land of another riparian owner, in consideration of a payment to be made not to the person injured, but to the conservators themselves. The appellant contends that the Act has no such operation, and that any such operation is clearly prevented by sect. 179, which protects all private rights. The Lords Justices held that it must be taken to be established, and it was not disputed at your Lordships' bar, that the appellant had in respect of the west side of Lyon's Wharf, at the time when the Conservancy Act passed, the ordinary rights of the owner of a wharf on the banks of a navigable river. The question is, what are these rights, and are they preserved intact by sect. 179? Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quâ* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an "injuriously affecting" of the land, that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be no injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented. It appears to me impossible to say that a mode of enjoyment of land on the banks of a navigable

river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than "a right or claim to which the owner of land on the banks of the river is by law entitled," within the meaning of the 179th section of the Act. The title of the appellant, however, appears to me to stand still higher than I have thus put it. Mellish, L.J., takes notice that it was contended on behalf of the wharfinger that the owner of premises abutting on a navigable river where the tide flows and reflows, has rights belonging to him as a riparian proprietor, wholly distinct from the public right of navigation, and he goes on to observe that the Lords Justices had been unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide. With much deference for the Lords Justices, I should have thought that some authority should be produced to show that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river are not possessed by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not; and not between tidal and non-tidal rivers; for as Hale observes (*De. Jur. Mar. Pt. 1 c. 3*) the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and reflow or not; and he remarks that the Wey, the Severn, and the Thames, "and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well when they are become to be the private propriety as in what parts they are of the king's propriety, are publick rivers, *juris publici*." A riparian owner on a navigable river has, of course, superadded to his riparian rights the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas in a non-navigable river all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river, the public right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation. The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land in the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this it may be observed that the soil of a navigable river may, as Hale observes, be private property. But putting this aside, I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream. The late Lord Wensleydale observed in this House, in the case of *Ohasmore v. Richards* (7 H. of L. Cas. 382): "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments, placed upon a clear and satisfactory footing. It has been

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now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturalis*, belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour." I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation, to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by the public right of navigation. It cannot, as it seems to me, be open to doubt that if the appellant at the time of the passing of the "Conservancy Act," had the ordinary rights of a riparian owner in the water of the river, that right was maintained by the saving clause, and being infringed, as it clearly was infringed, by the embankment of the respondents, he ought to be protected by the injunction of the court. The authorities which were referred to during the argument appear to me, with one exception, to be in favour of the appellant. I have already referred to the two cases in your Lordships' House. The case of *Rose v. Groves* (5 M. & G. 613), was a case where a riparian owner, having a public house on the Thames at Bermondsey, complained that his access to the river was obstructed by timbers and spars placed in the river by the defendants, which drifted at high water up to and along the plaintiff's land. Speaking of the declaration in the case, Tindal, C. J., says, "a private right is set up on the part of the plaintiff, and to that he complains an injury has been done. The declaration states that the plaintiff carried on the business of an innkeeper in a house which abutted upon a certain navigable river, and was, and of right ought to have been, accessible, from the river to persons navigating thereon in boats and other craft." And further on he says, "It appears to me that the plaintiff is not complaining of any public injury, but even if he were, I think, after the cases that have been cited, that he discloses a sufficient cause of action." Mellish, L. J., states that the Lords Justices thought they could not decide in favour of the appellant consistently with the case of *The Attorney General v. The Conservators of the Thames* (1 H. & M. 1; 8 L. T. Rep. N. S. 9), and that they were not prepared to overrule that decision. As I understand that decision it is one favourable and not adverse to the appellant's argument. The question there no doubt turned upon an obstruction, and upon the effect of the saving clause in the Conservancy Act. But Wood, V. C., held in that particular case that the obstruction complained of by the wharfinger was not a direct interference with the access to his wharf, but was, if an obstruction, an obstruction to the general navigation of the river. But speaking of a direct interference with the access to a wharf, he expresses himself as follows: "Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from

the public right of passing and repassing along the public highway on the river. The existence of such a private right of access was recognised in *Rose v. Groves* (*ubi sup.*). As I understand the judgment in that case, it went not upon the ground of public nuisance accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with; and it would be the height of absurdity to say that a private right is not interfered with when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. Tindal, C. J. put the case distinctly upon the footing of the infringement of a private right. Independently of the authorities it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." The case which appears at first sight to be unfavourable to the argument of the appellant is that of *Kearns v. The Cordwainers' Company* (6 C. B. N. S. 388). In that case, however, the only question was one between a lessee and his lessor as to the propriety of an award which directed the lessor to apply for a licence to embank under the "Conservancy Act." It was contended by the lessee that the licence, if obtained, would not exclude the rights of adjacent owners, to which it was replied, in defence of the award, that the licence under the Act would be effectual, because the adjacent owners would not be within the saving clause. But there was no adjacent owner before the court, and the court proceeded upon the supposition of what might be said for or against those who were not there to argue their own case. I cannot, therefore, look on the expressions of the learned judges in that case as entitled to the same weight as if they had been made after an actual issue of right had arisen. Mellish, L. J., indeed refers to two other cases: *Marshall v. The Ulleswater Steam Navigation Company* (*ubi sup.*) and *The Eastern Counties Railway Company v. Dorling* (*ubi sup.*), not for the purpose of showing that there is no such private right as alleged by the appellant, but as proving, to use the Lord Justice's own words, "that the wharfinger is amply protected in his right of access to his wharf by his interest as one of the public in the right of public navigation, and that there is no necessity to invent any private right in him as a riparian proprietor." It is sufficient to say that these cases appear to me to be irrelevant, and the question is not as to inventing a private right in the riparian proprietor, but what are the rights of a riparian proprietor actually existent which are referred to in, and saved by the 179th section. On the whole I cannot but arrive at the conclusion that the decree of the Lords Justices ought to be reversed, and that the

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decree of Malins, V.C. ought to be restored, and that it should be declared that the petition of appeal of the Fishmongers' Company to the Court of Appeal in Chancery ought to have been dismissed with costs.

LORD CHELMSFORD.—My Lords, the questions for the determination of your Lordships upon this appeal are: First, What are the powers of the Conservators of the River Thames, under the 53rd section of the Act 20 & 21 Vict. c. cxlvii., for the conservancy of the river, and the restriction of those powers in respect to the private rights of individuals? Secondly, whether there is any individual right or privilege in the owner or occupier of Lyon's Wharf peculiar to his river frontage, distinct and different from the right of all the Queen's subjects in the highway of the river. Upon this second question the Lords Justices said they were "unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide." But, with great respect, I find no authority for the contrary proposition, and I see no sound principle upon which the distinction between the two descriptions of natural streams can be supported. And it appears to me that cases have been decided which are strongly opposed to it. Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorised interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury. The owner of Lyon's Wharf has a double frontage to the Thames, one frontage to the south, the other to the west. The west frontage he has used for the purpose of loading and unloading goods into craft, in "Winckworth's Hole," which is admittedly part of the river Thames. No question of prescription enters into the case. The owner of the wharf has an undoubted right to use the river flowing up to his premises in the manner he has done whenever that user commenced. The authority conferred by the licence of the Conservators on the Fishmongers Company, if exercised, would entirely fill up "Winckworth's Hole" and cut off all access of barges to the west front of Lyon's Wharf. The Lords Justices held that the conservators have power to grant this licence under sect. 53 of the Act, and that this power is not restricted by sect. 179, in respect of the owner of Lyon's Wharf, for the reason that they had already given, that a riparian proprietor has no rights over the river or the shore of the river, beyond the rights of the rest of the public. They say that the only authority which was cited for the proposition that a riparian proprietor had such rights was the case of *Rose v. Groves*, and what was said by Wood, V.C. in the *Attorney-General v. The Conservators of the River Thames*, which, however, was entirely founded on the case of *Rose v. Groves*, which they thought, "was not a sufficient authority for the proposition it was cited to support." "That the declaration was ambiguously framed, so that it was difficult to tell whether the

pleader intended to rely on the violation of a public right or a private right." Now the case was determined on a motion in arrest of judgment, in which the only question was whether the declaration disclosed a good cause of action. The court unanimously held that the declaration did not complain of any public injury. Maule, J. said, "Supposing that the declaration did allege a nuisance to a public highway, still there is a clear statement of a private injury to the individual complaining, but I think no public injury is alleged." The Vice-Chancellor was, therefore, justified in the passing remark he made in the *Attorney-General v. The Conservators of the River Thames*, which the Lords Justices disputed, that if the Fishmongers' Company had their wharf with the right of access to the river, and this were taken away, they would be within the provisions of sect. 179, and would be entitled to an injunction. The Lords Justices state as the result of their judgment that the right of a wharfinger to bring an action or file a bill for an obstruction in the river that renders the access to his wharf less convenient, and one which deprives him of all means of access, depends upon the same legal principle, viz., that he suffers a particular damage from a public nuisance, and in neither case is there a violation of private right of his distinct from the public right of navigation which is in all the Queen's subjects. And they held that they could not affirm the decision of the Vice-Chancellor consistently with the cases of *Kearns v. The Cordwainers' Company*, and *The Attorney-General v. The Conservators of the Thames*. These cases appear to me not to have been decided upon the ground that a private right in a public river could not exist. In *Kearns v. The Cordwainers' Company* the Court of Common Pleas was of opinion that the only right which was interfered with was a right of enjoyment in the free navigation of the river, which the plaintiff had in common with the rest of the public. And in *The Attorney-General v. The Conservators of the Thames*, the Vice-Chancellor, after making the observations with regard to the private right of the Fishmongers' Company, to which I have already referred, added, "but in truth the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route, but that is a mere interruption to the navigation of the river, which they enjoy in common with the public, and not as part of their special right of access." The Solicitor-General argued that, under the 53rd section of the Act, the Conservators have an absolute and unrestricted power to authorise the owner and occupier of land fronting and immediately adjoining the river, to form an embankment into the body of the river, and that the 179th section did not apply to the power conferred by the 53rd section. But the 179th section qualifies and restricts whatever powers are vested in the conservators by the Act. It enacts that none of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, &c., to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river are now by law entitled. But then it was said that if the 179th section did apply, the right protected by it is a right of property, and not a right of action, for which the opinion of Crowder, J., in *Kearns v.*

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The Cordwainers' Company was quoted. A right of action in the present case, which it cannot be disputed Lyon might have maintained against an individual obstructing the access to the west front of his wharf, would be an action for any injury to the enjoyment of his right of property. And so the obstruction authorised by the Conservators, if carried out, will take away, or at all events alter or abridge, his right to the free and lawful application of his property to the purposes of his business. To show that the owner of Lyon's Wharf has a private right which is protected by sect. 179, the counsel in the court below cited the cases of *The Duke of Buccleuch v. The Metropolitan Board of Works*, and *The Metropolitan Board of Works v. McCarthy*, decided in this House (*ubi sup.*) of which the Lords Justices took no notice in their judgment, although they appear to me to be conclusive authorities in the appellant's favour. In these cases it was determined that a riparian proprietor on the river Thames, and the owner of lands near a public dock upon the river, were entitled to compensation in respect of their lands being injuriously affected by being deprived of access to the river and to the dock. Lord Campbell, C.J., in *Re Penny* (7 E. & B. 660), which was the case of a claim for compensation under the Lands Clauses and Railways Clauses Acts, stated this to be the test of the right, that "unless the particular injury would have been actionable before the company had acquired statutory powers, it is not an injury for which compensation can be claimed." The Lords Justices held that Lyon, a riparian proprietor, had no such right of action, nor any right in respect of his property upon the banks of the river distinct from the public right of navigation in all the Queen's subjects. But when this House decided in the above cases that the owners of lands on the river were injuriously affected by having their access to the river cut off; as the test of such injury was the right to maintain an action, if no statutory powers had been granted, the decisions are directly opposed to the judgment of the Lords Justices, and if they had considered them, must, I venture to think, have led them to a different conclusion. I agree that the order of the Lords Justices reversing the decree of the Vice-Chancellor ought to be reversed.

Lord SELBORNE.—My Lords, the judgment under appeal seems to be founded upon these two propositions: First, that a riparian proprietor on the banks of a tidal navigable river has no rights or natural easements similar to those which belong to a riparian proprietor on the banks of a natural stream above the flow of the tide. Secondly, that a riparian proprietor whose frontage and means of access to such a tidal river is cut off by an encroachment from adjoining land into the stream, suffers no loss or abridgment of any private right belonging to him as such riparian proprietor, but is only damaged in common with the rest of the public by the diminution of the water space in the navigable stream, and by such obstruction of the navigation as may be consequent thereon. The Lords Justices were of opinion that there was no authority at variance with these propositions. To me the propositions appear to be at variance with the opinions delivered in this House, both by the judges who attended your Lordships, and by the noble lords who took part in the decision, in the case of *The Duke of Buc-*

cleuch v. The Metropolitan Board of Works, by which opinions the decision of this House in that case was governed. I also think them at variance with the views of the law applicable to such a case as the present, which were expressed by the learned judges who decided *Rose v. Groves* and *The Attorney-General v. The Conservators of the Thames*. The Lords Justices thought that the latter of those two decisions would have been virtually overruled, if the judgment of the Vice-Chancellor in the present case had been affirmed; but they only arrived at that conclusion by themselves first overruling a distinction which the Vice-Chancellor who decided that case held without doubt to be well founded in law. Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may and do exist in a tidal navigable river. The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the common law, public rights in respect of navigation and otherwise, which do not generally, in this country, exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs generally to the riparian proprietors, while in the estuary it belongs generally to the Crown. But the rights of a riparian proprietor so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream, and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognise and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and if there is any sound principle on which it ought to be made, the burden of proof seems to me to lie on those who so affirm. As for the public right of navigation, it may well coexist with private riparian rights, which must, of course, be enjoyed subject to it, just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors. With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not the bed of the stream; and the connection, when it exists, of property in the bank with property in the bed of the stream depends not upon nature but on grant or presumption of law. In some tidal navigable rivers, as the Severn, parts of the bed of the tidal stream belong to riparian owners, and it appears from Angell on Watercourses that in Pennsylvania and Alabama states, whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navigable rivers is in the State. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by everyone having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should

be in contact with the flow of the stream, but lateral contact is as good *jure naturæ* as vertical; and not only the word "riparian," but the best authorities, such as *Miner v. Gilmour* (12 Moo. P.C. 131), and the passage which one of your Lordships has read from, Lord Wensleydale's judgment in *Chasemore v. Richards* (7 H. L. C. 382) state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right. Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, for the purpose of using, when upon the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation. In the words of Mellish, L. J., "The right of embarking and disembarking, and so using his property as a wharf for the unloading of goods, is a most valuable right," and I am at a loss to see why it should not be recognised as entitled to protection under sect. 179 of the Conservancy Act, although, as the Lord Justice went on to say, "it arises simply from the fact that he owns land immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation." It was admitted that if the case had been for compensation under the Lands Clauses Acts the land if the riparian proprietor would, by the deprivation of this water frontage, be "injuriously affected." But unless this was an interference with some right or privilege, recognised by law as belonging or incident to the land, it would be no actionable wrong as an injury to the land, although not authorised by Parliament, and in that case the land would not be "injuriously affected." If on the other hand it is an interference with a right or privilege recognised by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation. The cases as to the alterations of the levels of public highways, by which houses immediately adjoining have been deprived of their access to and from the highway, seem to be authorities *à fortiori* on this point, because they had not in them the element of a right *jure naturæ*. If I correctly understand the Irish case *Moore v. The Great Southern and Western Railway Company* (10 Ir. C. L. Rep. N. S. 46), which was approved and followed by the English Court of Queen's Bench in *Chamberlain v. The Crystal Palace Railway Company* (2 B. & S. 15; 8 L. T. Rep. N. S. 149), those authorities recognise such a right of immediate access from private property to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself, as one of the public. That a public body, such as the Thames Conservancy Board, should be empowered by

Parliament to sell for money to private persons the right to execute for their own benefit works injuriously affecting the land of an adjoining proprietor, without compensating him for that injury, which is the contention of the respondents, is inconsistent with the ordinary principles and with the general course of public legislation on such subjects. When, therefore, we find in the Act which is alleged to confer such powers a saving clause in the large and untechnical terms of sect. 179, by which, without any forced or unreasonable extension of their natural meaning, this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection. I am for these reasons of opinion that the present appeal should be allowed.

Decree appealed from reversed; decree of Malins, V. C., restored; cause remitted to the Court of Chancery.

Solicitors for the appellant, Brettell, Smythe, and Brettell.

Solicitor for the respondents, C. O. Humphreys.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S-INN.

July 7 and 14.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

POCOCK v. THE ATTORNEY-GENERAL (a)

Trust—Discretion—Charitable legacy—Fund to be distributed by executors at their discretion.

A testator by a codicil to his will gave certain charitable legacies out of a fund over which he had a general power of appointment, and directed the residue of the fund to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift then to be distributed by his executors at their discretion.

The testator made no subsequent codicil:

Held (affirming the decision of Hall, V.C.), that this was a good gift of the residue to charitable institutions.

THIS was an appeal from a decision of Hall, V.C.

By his will made in Nov. 1861, J. J. Pocock gave various legacies, and directed that the insurance and other moneys, stocks, funds, or securities over which he had a general power of appointment under his marriage settlement, should unless otherwise specifically disposed of by a codicil to his will, sink into and become part of his residuary estate thereafter disposed of, and he appointed, gave, and bequeathed the same accordingly. Then he gave all his real and personal estate to the plaintiff and two other persons upon trust to sell, and after payment of debts and legacies, to invest the proceeds and pay the income to his wife for life, and after her decease to hold the capital of his residuary estate upon and for such trusts as he should, by any codicil to his will direct or appoint.

By a codicil made in Dec. 1861 the testator gave

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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out of the insurance and other moneys, funds, &c., subject to the trusts of his marriage settlement, and over which he had any power of disposition at the death of his wife, to the respective treasurers or trustees for the time being, of the following societies and institutions respectively, and in aid of the funds of the same, out of such part of the said insurance and other moneys or securities as might be lawfully devoted to charitable purposes, the following sums or legacies, clear of legacy duty: to the treasurer or trustees for the time being of King's College Hospital, 400*l.*; the Society for Promoting Christian Knowledge, 400*l.*; the Society for the Propagation of the Gospel in Foreign Parts, 400*l.*; and the Society for the Education of the Poor in the Principles of the Church of England, 400*l.*; also to the Society for Convalescent Poor at Seaford, in the County of Sussex, the sum of 100*l.*; and as to the residue of the said insurance and other moneys, &c., he directed the same to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift then to be distributed by his executors at their discretion. And as to his general residuary estate, after giving various legacies thereout, he gave the residue to the plaintiff.

The testator made no further codicil.

On the death of the testator's wife, who survived him, questions arose as to whether the residue of the fund over which the testator had a general power of appointment was effectually given to charity, and if not who was entitled to it.

Hall, V.C., before whom the case came in March last in the shape of a special case, held that the residue was effectually given to charity.

In delivering his judgment his Lordship, after reading the material parts of the will, said: Under that will the insurance moneys were included in the residuary gift to the three persons named, who were also executors, and they would take the insurance moneys in their character of executors in the first instance, and in the next instance in their character of residuary legatees in trust, subject only to such specific dispositions as might be made of them by the testator by any codicil which he might make to his will. The legal title to those insurance moneys would, therefore, unquestionably be in those persons, the executors and trustees. The testator then made a codicil, and in that codicil he takes up the imperfect disposition of the insurance moneys, and out of those insurance moneys he gives to the respective treasurers or trustees for the time being of certain specific societies and institutions certain sums of money. Then he says: "And as to the residue of the said insurance and other moneys, stocks, funds, and securities, I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift, then to be distributed by my executors at their discretion." The disposition made by the testator's will of his general estate being only incomplete, his general estate being only disposed of to the extent of providing for debts, legacies, and annuities, and giving his wife a life interest in the residue, and subject to that he contemplated its being disposed of by a codicil. In this codicil he gives out of the general residue, after the death of his wife, certain legacies, and gives the residue, after payment of those legacies, to his nephew, who is also one of the

residuary legatees in the will. We must, therefore, first of all, as regards the residuary general estate, read the will and codicil together, by reading the will as containing the disposition of the residue in the place of that portion of the will which directs the trustees to stand possessed of the corpus after the death of the wife upon such trusts as he should by any codicil direct. I insert, therefore, into the will, after the gift of the life interest to the wife, this disposition, which is contained in the codicil, of the general residue, and that makes a perfect disposition of the general estate. Having so completed the disposition of the general estate by means of the codicil, I must read the will with reference to the insurance moneys, having regard to its disposition of the general residue, as completed by means of the codicil. Then the disposition of the insurance moneys amounts to this, that by force of the will and codicil taken together, they are given to the nephew, except so far as they are specifically bequeathed, because the general estate is given to him, and the insurance moneys are directed to go along with the residue, except in so far as they are specifically bequeathed. The effect of that is to displace the contention which has been put forward on behalf of the next of kin. I find by force of the two documents taken together a complete disposition, except in so far as the property is specifically bequeathed by any codicil to the testator's will. But that being so, the great and grave question in this case is, whether there is or is not a gift by the codicil of the insurance moneys in favour of charity. Now the argument in favour of charity I conceive to be twofold. One argument is that the property is given to charity because the codicil directs it to be given by the executors to such charitable institutions as the testator should by a future codicil give the same, "and in default of any such gift, then to be distributed by my executors at their discretion," which disposition, it is said, upon a fair construction of the whole sentence, is a disposition in favour of charity altogether. Then it is said that, independently of the mere construction of those particular parts of the codicil, the latter part of that clause is in fact a power in the nature of a trust, which trust was a trust created in favour of charity. It appears to me that the first contention is enough to dispose of this case, that upon a just and fair construction, there is in this clause a direction that the property should go to charity, whether it goes through the medium of a codicil giving it to charity, or whether it goes through the medium of a distribution of the fund made by the executors. I consider that upon a fair construction the disposition amounts to this: "I direct my executors to pay this over to such charitable institutions," so far the direction goes, "as I shall by any future codicil give the same, and in default of any such gift," the word "gift" there having reference to the word "give" immediately preceding it, "then to be distributed by my executors at their discretion in pursuance of my direction," which is a direction that "the same shall be given by my executors to such charitable institutions as I shall either specify by a codicil, or, in default thereof, as my executors in their discretion shall distribute it among." I think, upon a fair construction of the words of the codicil, the distribution of the fund is to be in favour of charitable institutions. If that is the

fair, proper, and sound construction of that part of the will, it disposes of the case quite irrespective of any of the authorities which have been referred to, and I think it is. The sentence begins with a direction, which direction covers the whole of the sentence, not merely that part of it which supposes he may make a codicil, but also the latter part of the sentence as to the distribution by the executors at their discretion. He says, in effect, "It is to be done at your discretion if I do not do it myself. I may do it myself by a codicil; but my direction is that the fund shall be given by my executors to such charitable institutions as they shall in their discretion choose to distribute it amongst, unless I myself point out the charitable institutions which are to take the fund." Then, upon the other ground, it seems to me that upon a fair construction this is a direction amounting to a trust, and a trust to be exercised in favour of charity. The testator had contemplated himself selecting the charities by a further codicil. If he had stopped there, there is no doubt there would have been a trust in favour of charity. That is clear upon the authorities, one of which has been referred to by Mr. Rigby, namely, *Mills v. Farmer* (1 Mar. 55). But it is said that that is not so here, because there is a gift over to somebody else, or something which prevents the application of that rule. It does not appear to me that this case is analogous to the case of a power of distribution, or a power of appointment in favour of a class with a gift in default of appointment, not to the class, but to another person. That is a case where you cannot imply a gift from the power itself. You cannot do that because it is provided that if the power is not exercised the property shall go somewhere else. In that case, therefore, nothing can be implied; but here, there being a direction in favour of charity with a power of distribution in default of particular charities being specified, not saying that they may distribute it among such persons as they may choose to select—but it is to be a distribution, and, as I conceive, a distribution with reference to the obvious and clearly manifest intent to be derived from the earlier part, namely, a distribution among charitable institutions, which are left undefined and incomplete merely by reason of the testator not having made a codicil. It appears to me that the legal title is in the executors, as well by reason of their being executors as by reason of the gift in the will (subject to any special disposition), they taking the legal title, there is really no difficulty whatever by reason of there being contained in his instrument that which has been described as being an actual disposition of the beneficial interest. In most, if not all, of the cases where power, though not exercised, has been held to confer a beneficial interest on its objects, it is true that the property has been given to certain persons, sometimes to a person who upon a true construction of the will is only to take beneficially for life, and then there follows a provision about distribution in the form of a power. In those cases, although the whole interest has been given to the person who upon construction takes beneficially for life only, there has been in reality a disposition whatever of the beneficial interest until you come to the power itself, and therefore there is no other disposition of the beneficial interest except through the medium of the power;

and I observe with reference to that, in a case which was referred to where these cases were very much examined, namely, the case of *Burrough v. Philcox* (5 My. & Cr. 73), that Lord Cottenham examines the cases and comments on the *Duke of Marlborough v. Lord Godolphin* (2 Ves. Sm. 61), in terms which do not add much to its authority. It does not seem to have commended itself to the judgment of the Lord Chancellor, but he refers to more than one case in which there was really no disposition except in the form of a power. *Witts v. Boddington* (3 Bro. C. C. 95), seems to be a case of that kind. There the gift was only to the wife for life, with power, by her will or otherwise, to give the sum amongst the children. The children were held to take in default of appointment by the wife, although there was nothing except the life interest given to the wife. There are other cases referred to, but in fact *Burrough v. Philcox* itself seems to be a case of that kind. I do not see any substance, therefore, in the ingenious argument which Mr. Dickinson has addressed to me for the purpose of distinguishing this case from *Brown v. Higgs* (5 Ves. 495), and that class of cases; and it does seem to me that it is impossible to read this direction at the end of the codicil—a direction which applies as well to the payment of the fund to such charities as shall be nominated by a codicil as to the distribution by the executors themselves—it is impossible, I think, to read that clause without seeing that it is a plain direction amounting to a trust in the form of a power or a direction. I should rather treat it as a direction than as a power, but it may be either or both. There is a clear direction, it appears to me, that the executors shall distribute this fund; and following, as it does, a clear gift in favour of charity and charitable institutions, it appears to me plain on the face of the codicil that there was a duty upon the executors to distribute this fund among charitable institutions in the event, which happened, of the testator failing to make any distribution or disposition of it by any further codicil. It seems to me, therefore, that upon the whole there must be a scheme settled for the purpose of disposing of this charitable gift.

From this decision the plaintiff appealed.

Dickinson, Q.C., and Bond for the appellant. —This fund is not effectually given to charity, the testator never having made the further codicil to which he refers. This case is very similar to *Buckle v. Bristow* (11 L. T. Rep. N. S. 265; 10 Jur. N. S. 1095), where it was held that a fund bequeathed in this way was coupled with a trust, which, being too uncertain, was void, and that the executors were not beneficially entitled. So, too, in *Aston v. Wood* (L. Rep. 6 Eq. 419), where a testator gave to the trustees of a chapel a sum of money to be appropriated according to statement appended, and no statement was appended, it was held that the court could not presume a charitable object in the gift, and that, if not charitable, the object was so indefinite that the gift must fail. This gift fails for vagueness, and the executors are therefore trustees of it for the general residuary legatee: (*Fowler v. Garlike*, 1 Russ. & My. 232; *Ellis v. Selby*, 1 My. & Cr. 286.) [JAMES, L.J., referred to *Gibbs v. Rumsey* (2 V. & B. 294), where under a bequest "to my trustees and executors, to be disposed of unto such person and persons, and in such manner and form, and in such sum and

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sums of money, as they in their discretion shall think proper and expedient," the executors were held to take an absolute beneficial interest.] That decision was disapproved of in *Ellis v. Selby* (1 My. & Cr. 297-8), in *Buckle v. Bristow* (11 L. T. Rep. N. S. 266-7), and in *Yeap Cheah Neo v. Ong Chang Neo* (L. Rep. 6 P. C. 381-9). They also cited:

James v. Allen, 3 Mar. 17;
Morris v. Bishop of Durham, 9 Ves. 399; 10 Ves. 522;
Harris v. Du Pasquier, 26 L. T. Rep. N. S. 689;
Vesey v. Jamson, 1 S. & S. 69;
Ommanney v. Butcher, T. & R. 260;
Smith v. Death, 5 Mad. 371;
Harrison v. Harrison, 10 Jur. 273.

Rigby, for the Attorney-General.—There is a clear intention to devote this fund to charitable purposes. In *Dolan v. Macdermot* (L. Rep. 3 Ch. 676) a bequest of personalty "for such charities and other public purposes as lawfully might be in the parish of T." was held to be a good charitable gift. In *Mills v. Farmer* (1 Mer. 55) and *Moggridge v. Thackwell* (7 Ves. 36), it was held that a gift to such charitable institutions as the testator should by codicil appoint was a good gift to charity, though no codicil was made. Here in the same way there is a clear gift to charitable institutions, and the direction to the executors to distribute the fund does not take away that gift, but leaves the selection to the executors. [He was stopped by the court.]

Bond, in reply.

JAMES, L.J.—I am of opinion that the decision of the Vice-Chancellor must be affirmed. If the court had to construe this will, unfettered by decision and unfettered by rules of construction, and had to consider, without reference to consequences, what the intention of the testator was in using the words, "I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion," the court would have held the plain reasonable construction of the clause to be that the testator meant the discretion of his executors to be a substitute for his own in choosing the charities. The introduction of the words "charitable institutions" could have no effect on a future codicil, and the testator, therefore, had no object in mentioning them, except that of showing that charity was his object, and showing his meaning to be that if he did not name the charities his executors were to do so. The fair construction is, that the gift is to charitable institutions to be chosen by himself, and in default of such choice, then by his executors. And then, if we look at the cases of *Mills v. Farmer* (1 Mer. 55), and *Moggridge v. Thackwell* (7 Ves. 36), we find that a gift to such charitable institutions as the testator shall by codicil appoint is, without more, a clear gift to charity, though no codicil is made. When a clear gift is thus made, clear words are needed to take it away, and it cannot be taken away by mere words directing distribution by the executors.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A., also concurred.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Chapman, Turner, and Pritchard*.

Solicitors for the respondent, *Raven and Hare*.

July 14, 15, 17, and Aug. 4.

CUNLIFFE v. BRANCKER.(a.)

Contingent remainder—Particular estate of freehold to support—Failure—Will—Construction.

Where a will creates a succession of legal limitations of real estate in strict settlement, the court will not hold the legal estate to be in the trustees merely to prevent a contingent remainder from failing for want of an estate of freehold to support it.

A testator, by his will, devised real estate to two trustees, their heirs, and assigns, to the uses and upon the trusts thereafter declared, that is to say, to the use of the trustees, their executors, administrators, and assigns for the term of 120 after his decease, if his niece should so long live, and subject thereto to the use of the niece's husband for life, with remainder to the use of the trustees and their heirs during the husband's life upon trust to preserve contingent remainders, with remainder to the use of all the children of his niece who should be living at the decease of the survivor of her husband and herself, and the issue of such of them as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common, with divers remainders over. The testator's niece survived her husband:

Held (affirming the decision of *Jessel, M.R.*) that the contingent remainder to the children failed for want of an estate of freehold to support it.

THIS was an appeal from a decision of the Master of the Rolls.

By his will, dated the 6th Dec. 1814, Edmund Leigh devised one undivided moiety of and in all and every his messuages, lands, tenements, rents, hereditaments, and real estate to Richard Prescott and Thomas Addison, their heirs and assigns, to the several uses and upon the several trusts, and to and for the several ends, intents and purposes, and subject to the several provisos thereafter declared and contained of and concerning the same, that is to say, to the use of the said Richard Prescott and Thomas Addison, their executors, administrators, and assigns, for the term of 120 years next after his decease, if his niece, Sarah, the wife of John Cunliffe, should so long live, but, nevertheless, upon the several trusts thereafter mentioned of and concerning the same; and from and after the expiration or other sooner determination of the said term, and in the meantime subject thereto, and to the trusts thereof, to the use of the said John Cunliffe during his life without impeachment of waste, with remainder to the use of the said Richard Prescott and Thomas Addison, and their heirs, during the life of the said John Cunliffe, upon trust, to preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and from and immediately after the decease of the said John Cunliffe to the use of all and every or such one or more of the child or children of the said Sarah Cunliffe, lawfully to be begotten, who should be living at her decease, as they the said John Cunliffe, and Sarah, his wife, during their joint lives by deed should appoint, and in default of such joint appointment, as the survivor should by deed or will appoint, and in default of any such appointment, to the use of all and every the child and children of the said Sarah Cunliffe law-

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

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fully to be begotten who should be living at the decease of the survivor of them, the said John Cunliffe and Sarah his wife, and the issue of such of them as should be then dead, leaving lawful issue then living, such issue respectively to have and take, and if more than one equally amongst them, the part or share only which his, her, or their parent or parents respectively would have taken and been entitled to if living at the decease of the survivor of them, the said John Cunliffe and Sarah his wife, and the several and respective heirs and assigns of such child, children, and issue for ever as tenants in common, with divers remainder over. And the testator authorised the trustees, and the survivor of them, and the heirs and assigns of such survivor to convey, in exchange for other hereditaments, all or any part of the devised property, and the inheritance thereof in fee simple, and also in like manner to convey in fee simple upon partition any of his undivided shares in the property, and for those purposes to revoke the uses and limitations thereinbefore limited of and concerning the hereditaments so to be exchanged or conveyed on partition, provided always that all such exchanges and partitions should be made with the consent in writing of the persons for the time being entitled to the rents and profits of the hereditaments to be conveyed in exchange or on partition. And the trustees were empowered to demise or lease any part of the property for any term not exceeding seven years, at such rents as they should think proper, such rents to go along with and be incident to the immediate reversion of the premises so to be demised or leased, and also to grant mining and building leases; and to cut and sell timber. The other moiety of the testator's real estate was devised in the same way in favour of another niece and her husband and children, but no question arose regarding it, as the other niece predeceased her husband.

The testator died in June 1817.

John Cunliffe died in 1871, leaving his wife, Sarah Cunliffe, him surviving.

Sarah Cunliffe died on the 9th Sept. 1873, leaving several children, who brought the present action to settle the question whether the contingent remainder to them could stand, there being no particular estate of freehold to support it.

On the 23rd March last the case came on for hearing before the Master of the Rolls, who held that the contingent remainder failed for want of a particular estate of freehold to support it.

JESSEL, M.R., in delivering judgment, said: This is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if until the time of the determination or cesser of the prior estates of freehold the remainder has not vested, it fails in spite of the intention of the settlor or testator. This rule has nothing to do with the intention; it always disappoints the intention, because every settlor or testator intends the contingent remainder to take effect. It is an arbitrary feudal rule, one of the legacies of the middle ages which has come down to our time, and with which

I cannot interfere, as the Legislature has not interfered with it. All I have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be. I am sorry to say—for it disappoints in this case the intention of the testator—that I cannot bring myself to doubt what the effect of this will is. The only point in contest is whether the legal fee in an undivided moiety of freehold land is or is not vested in certain trustees. Now, apart from the rule of law about the failure of contingent remainders, I think I may venture to say that no human being who understood anything about real property law would entertain a doubt about the effect of this will. How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then to apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity; but I do not see that, because in the opinion of the judge the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered. Here is a gift of an undivided moiety of freehold land to Prescott and Addison, their heirs and assigns, to the several uses and upon the several trusts, &c., thereafter declared, that is to say, &c. That form of gift shows that the testator intended *bona fide* a gift to uses, not that the Statute of Uses applies to wills, as we know; but it is an indication of intention that the legal estate is not to pass under the first gift, but to pass under the uses, for otherwise all these uses would come to nothing, “To the use of the same trustees, Prescott and Addison, their executors, administrators, and assigns, for the term of 120 years after my decease, if my niece Sarah Cunliffe shall so long live.” Can there be a doubt, if it stood alone, that the legal estate in the term of 120 years is vested in the trustees? The contrary construction would lead to this: That the term would be of no use, the trustees would take nothing under the limitation of the term, as they had the fee already. This limitation would be simply absurd. Then it goes on: “But nevertheless, upon the several trusts herein mentioned—the trusts for the separate use of the lady—and from and after the end, expiration, or other sooner determination of the said term of 120 years, and in the meantime subject thereto and to the trusts thereof, to the use of John Cunliffe and his assigns for and during the term of his natural life.” Here, again, the word is “use,” following the devise to them and their heirs; and, of course, it would give him the legal estate. It must be intended to do so. But it does not stop there, for the testator goes on: “and from and after the determination of that estate by any means in his lifetime to the use of the trustees and their heirs for and during the natural life of John Cunliffe, upon trust to preserve contingent uses and estates hereinbefore limited from being defeated or destroyed.” That is the common form, and shows clearly that John Cunliffe takes the legal estate, for you do not want a trust during his life to preserve contingent remainders, except to prevent the consequences of his forfeiture. That is plain; and

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though it is possible you may find a context so clear as to cut down even these words—for it is difficult to say what plain words may not be controlled—you certainly must find a context very plain indeed, and altogether inconsistent, to cut down such a plain limitation. To my mind, having some knowledge of the law of real property, the form of limitation to John Cunliffe, followed by the form of limitation to trustees to preserve contingent remainders during his life, shows clearly that John Cunliffe takes a legal estate for life. Then the will goes on: “And from and immediately after the decease of the said John Cunliffe, to the use and behoof of all and every or such one or more of the child or children of Sarah Cunliffe lawfully to be begotten who shall be living at her decease.” Now, as to that, it is in such proportions, manner, and form, &c., as the survivors or the survivor shall appoint. What does that mean? No children are to take except children of Sarah who shall be living at her decease, and the power only enables the donees to say which of the children then living shall take and in what shares. If it stood there, would there be any doubt in the world that the children who survived Sarah Cunliffe, not being ascertainable till her death, take a contingent remainder? You cannot tell till her death what children will survive. It is quite true that the testator probably never heard of this rule of law, but I think his conveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake—he overlooked the fact that if John Cunliffe died before his wife there would be no freehold to support the contingent remainders. The testator himself may never have heard of the law, and it is quite true that he intended the children of Sarah Cunliffe who survived to take. It is not necessary to take into consideration the effect of the power of appointment being given to the survivor, who may be Sarah Cunliffe, in order to make that intention plain. It was plain enough before; but it is said that, inasmuch as Sarah may survive, and may make a will and appoint, it is impossible the will can take effect if I read it so. It is not impossible through any default or defect of expression of intention, but through the fault of the rule of law, and the argument is really put in this way: Inasmuch as the limitations which the testator intended to take effect cannot take effect unless you give an estate in fee to the trustees so as to get rid of the rule of law, therefore you must infer an estate in fee to the trustee. How far is this to go? Are we to say that in every case where trustees are named for a different purpose, or without any purpose at all, they are to take the fee, if such a construction will preserve contingent remainders? Then, unluckily, in default of appointment the estate is given substantially in the same way to the use of all the children of Sarah Cunliffe who shall be living at the decease of the survivor of the husband and wife, and the children of such of them as shall be then dead, which, of course, is also contingent till the death of the wife. Then it was said that there were some other portions of the will which would enable me to hold that the trustees were intended to take the legal fee in spite of the words limiting their estate in the clear way I have referred to. I confess I should have been very glad if I could have brought my mind to that conclusion, because, construing the will as I feel bound to do, I certainly disappoint

the testator's intention. The first was a power to convey, “And I do hereby fully authorise and empower them or him at any time or times hereinafter to convey in exchange.” The word “convey” by itself does not show much; it is a word of general meaning, denoting any act by which real property is passed from one person to another; a rather more modern term, I believe, than “assure,” but having the same meaning. Then it goes on afterwards, “And for the intents and purposes aforesaid it shall and may be lawful for the trustees or trustee, by any deed or deeds, &c., to revoke, determine, and make void all and every the uses, &c., hereinbefore limited of the hereditaments so to be exchanged or conveyed in partition, or any part thereof. Nothing can be clearer. That is a power to exchange or partition under the Statute of Uses. It is to convey by way of revocation and appointment. On that, therefore, I think nothing available for the plaintiffs can fairly be argued. Then there is a proviso that all the exchanges and partitions under this power of exchange or partition, “be made with the consent in writing of the person or persons for the time being entitled to the rents and profits of the hereditaments to be conveyed in exchange or on partition, notwithstanding the coverture of any of them. And when they shall be under the age of twenty-one years, then with the like consent of his, her, or their guardian or guardians.” Then the next power is: “Provided always, and I declare my will and mind to be that it shall and may be lawful for the trustees, &c., with such consent as aforesaid, to demise or lease all or any of my messuages, lands, tenements, &c., for any term of years not exceeding seven, to commence in possession, or at such other terms as they shall think proper, so that there be reserved and made payable upon every lease during the continuance thereof such yearly rent as they shall think reasonable, such rent and rents to go along with and incident to the immediate reversion of the premises so to be demised or leased.” It is quite plain that this is a common leasing power. There was no necessity in the world to give them anything but a power. The next power is, that it shall be lawful for the trustees, with such consent and approbation as aforesaid, to demise or lease all or any of the mines, quarries, and drifts of coal—a very large leasing power as to mines; and there is afterwards a power of building. Again, the rents are to be incident to and go along with the reversion, and there are provisions for what should be contained in the leases. It appears to me that it is a power, and nothing but a power; it is a power in words, it is a power in substance, and it is a power of intention. Then the next proviso is: “And I do hereby declare my will and mind to be that it shall be lawful for the trustees, &c., as they shall think fit, with such consent and approbation as aforesaid, to fell, cut down, sell, cart and carry away such timber and trees growing and to grow upon my said lands, &c., as they or he shall think fit; and to pay, apply, and dispose of the moneys to arise from the sale or sales of such timber and trees to such person or persons as shall then be entitled to the rents, issues, and profits of the land whereon the timber and trees so from time to time to be felled shall respectively be standing or growing, and in such parts, shares, and proportions as such person or persons

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shall be respectively entitled, to such rents, issues, and profits." It is clear they do not want any estate for this. Then the last power is this: "And that each of them shall, by and out of the the trust moneys or rents which shall come to his and their hands, retain, to reimburse himself and themselves, and pay and allow to his co-trustees, all such costs, charges, and expenses as he or they shall or may pay, bear, sustain, or be put to about the execution of the trusts in this my will contained." That was said to show they had a fee; but I see no reason for it. It is a power to reimburse themselves out of trust moneys that come to their hands. They get trust moneys if they cut timber or if they received the rents under the term of 120 years during the life of the niece. They had, therefore, plenty of ways of getting trust moneys without imputing an intention to the testator to give them a fee. Under these circumstances, though I regret it, the testator's intention appears to me plainly to have been not to invest a fee in the trustees, but to limit legal estates in settlement; and I am compelled by the artificial rule of law, to say that I must disappoint his intention by holding that the contingent remainders fail for want of a sufficient estate to support them.

From this decision the plaintiffs appealed.

Cotton, Q.C. and *Finch* for the appellants.—In order to give effect to all the testator's intentions it is necessary to hold that the trustees took the fee; otherwise the contingent remainders fail for want of a particular estate to support them. In *Doe v. Willen* (2 B. & Ad. 84), the Court of King's Bench was guided by that construction, and *Holroyd, J.* expressed his opinion "that in order to effectuate the intention of the testator the trustees must have an estate in fee, inasmuch as such an estate in them is necessary for enabling them to execute the purposes of their trust." *Houston v. Hughes* (6 B. & C., 403), is also strongly in favour of our contention. In the course of the argument in that case *Bayley, J.* said (p. 419-20): "It may be useful that the whole legal estate should remain in the trustees. Although there may be difficulties as to the execution of certain trusts, those difficulties will not be of the same importance as if there was a difficulty as to the legal estate. An interruption in the case of a trust would not, I apprehend, destroy or prevent a subsequent trust from arising. But the extinction of a particular estate of course destroy every contingent remainder; but if the whole fee is vested in the trustee that will not happen. May not the very existence of the difficulty in this case raise an argument to show that the trustees took the whole legal fee?" Here the devise to the trustees is sufficient to give them the fee; and there being no subsequent express words to take it out of them, the court will not take it out of them when the effect of doing so would be to destroy the contingent remainders expectant on the death of the wife if she survives her husband. Our view of the construction of the will would give effect to all the testator's intentions, while the contrary view would leave an intestacy in the event of the wife surviving her husband. Many of the subsequent powers and provisions of the will are in favour of our contention: the power to "convey" the devised property in exchange, and "the inheritance thereof in fee simple," the power of leasing, and the power of cutting timber are all

in favour of the trustees having the fee: (*Watson v. Pearson* (2 Ex. 581). They also referred to

Rackham v. Siddall, 1 Mac. & G. 607;

Blagrove v. Blagrove, 4 Ex. 550;

Doe v. Hicks, 7 T. B. 433.

Joshua Williams, Q.C. and *North* for the respondents.—The limitations in this will are not like those in any of the cases cited on the other side, but are more like those in *Doe v. Morgan* (3 T. Rep. 763), where there was a devise to B. for life, with remainder to C. for ninety-nine years, if he should so long live, with remainder to the heirs of the body of C.; the remainder to the heirs of the body of C. was held to be a contingent remainder, and to be defeated by C.'s surviving B., there being no preceding estate of freehold to support it. *Festing v. Allen* (12 M. & W. 279) is also a strong authority in our favour. It is quite clear that this will was drawn in such a way as to confer legal estates on the successive beneficiaries, and but for a mistake made by the draftsman no one would ever have thought of contending that the trustees took the fee. As for the argument that the trustees should be held to have the fee in order to prevent the testator's intention from being destroyed, it is disposed of by *Barker v. Greenwood* (4 M. & W. 431), where *Parke, B.* said that no case had been shown "in which the courts have construed persons to be trustees for the purpose of preserving contingent remainders, in the absence of any words by which the testator has expressed that it was with that intention he appointed them." In the recent case of *Brackenbury v. Gibbons* (L. Rep. 2 Ch. Div. 417) *Hall, V.C.* followed the old feudal rule as to contingent remainders in spite of the hardship it produced in that case. As for the powers in this will, they do not support the appellant's contention. The power of sale particularly is framed in such a way as to show clearly that the trustees were not intended to take the fee. They also referred to

Kenrick v. Beauchamp, 3 B. & P. 175;

Hardson v. Williamson, 1 Keen, 33;

Venables v. Morris, 7 T. B. 342;

Curtice v. Price, 12 Ves. 89;

Beaumont v. Marquis of Salisbury, 19 Bea. 198;

Lewis v. Rees, 3 K. & J. 132;

Cooper v. Kynock, 26 L. T. Rep. N. S. 566; L. Rep. 7 Ch. 398;

2 *Williams Saund.* p. 11, b.;

2 *Jarman on Wills*, 3rd edit. p. 293.

Cotton, Q.C. in reply.

Cur. adv. vult.

Aug. 4.—*JAMES, L.J.*, now delivered the judgment of the court. After reading the material limitations and provisions of the will his Lordship continued: It cannot be doubted, and it has not even been argued otherwise, that the limitations, according to their ordinary natural construction, are legal limitations. And it would be impossible for us to make them equitable instead of legal limitations merely because in the events which have happened the contingent remainders are left without a sufficient freehold estate to support them. The rule of law was, and, strange to say, still is, that a contingent remainder fails unless there be a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder is to vest. Contingent remainders have been protected against the destruction of the preceding particular estate, but have been still left to die with the death of

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CUNLIFFE v. BRANCKER.

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such estate through an inherent defect in their original constitution. That is the rule of law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade that rule. We must construe the words just as if there were no such rule of law, and then, having thus ascertained the construction, apply the rules of law to the instrument so construed. I have said that if the devise, the series of limitations I have read, stood alone, no lawyer could doubt that these limitations were limitations of legal estates, or would suppose that it was intended by the instrument that the trustees should have no term of years, should have no estate *pur autre vie* to support the contingent remainders, but should have the entire legal fee in them. But it was contended, and truly, that, notwithstanding these apparently clear indications of intention that the successive beneficial devisees should have the legal estate in them, the rest of the will might still show so clearly a contrary intention that the fee should be in the trustees, that there were purposes to be effected, trusts to be executed, duties to be performed so requiring them to have the fee, that we should reject the formal limitations as the mere blundering of the draftsman, just as if they were, as they often are, found in the wills of testators who had themselves nothing but an equitable estate or a long term of years to deal with. The indications of such intention are, it is said, to be found in the subsequent powers and provisions of the will. The material subsequent powers and provisions are those providing for sale and re-purchase, and for cutting timber. The first, so far from showing any such intention, is, in truth, pregnant with evidence to the contrary. The sale is not to be made by a conveyance out of the legal fee in the trustees, but by revoking the old uses, and limiting new uses to effect the sale in terms the same as the ordinary machinery of a similar settlement by deed. And the new estates to be purchased are to be taken by a conveyance to the existing uses, and a conveyance would naturally, and as a matter of course, limit the estate to releasees to uses, transcribing the very words of the will from the power. The leasing power is the ordinary leasing power which is found generally in settlements and wills, and no more requires that there should be the fee in the donee of the power than the leasing power to a tenant for life enlarges his estate to a fee. The lease would take effect to all intents and purposes legally and equitably under the power, as a mere power, as fully as if it were derived from a fee simple in the persons leasing. The power of cutting and selling timber, again, would not be in the slightest degree embarrassed or prejudiced by the want of an estate in the persons exercising it. Its legal operation would be just the same as that of a power to executors (not being devisees of the realty) to cut and sell timber in aid of the personal estate. The power to sell timber, which is part of the land, certainly no more requires a fee simple estate, or any other estate, than the power to sell the land with the timber on it, which power has already been dealt with. The truth is that these indications of an intention to leave the fee simple in the devisees to uses, are so slight and shadowy that no one would have dreamt of finding such intention in them if they had not been found in the same instrument

with a blundering, inaccurate, and insufficient limitation to preserve the contingent remainders. But I repeat that we must construe these parts of the will as we were obliged to construe the limitations themselves, just as if the limitation to preserve had been ample and sufficient, just as if no such limitation were by the rules of law necessary. Considerable stress was laid in the argument on two cases: *Doe v. Willan* (2 B. & A. 84); and *Houston v. Hughes* (6 B. & C. 420), in which Bayley, J., considered that the want of any estate to preserve the contingent limitations afforded an argument that the fee was intended to remain in the trustees. It is not necessary to inquire whether those *dicta* will bear examination, whether instead of making the legal consequences depend on the construction they are not making the construction depend on the legal consequences. Nobody intends that the contingent remainders devised by his will should fail, and it is by a rule of law, independent of and paramount to his intentions, that they do in the result fail. It is unnecessary to enter upon that inquiry, for it is impossible to apply those *dicta* to this case. In the absence of any contrary or inconsistent intentions expressed in the instrument, it may be convenient to hold that if there are words sufficient to give the fee to the devisees in trust, the same shall be held to remain in them if there be any intention in the will which would be better served by its so remaining. But here the express limitation of the term of years, and of the estate to preserve contingent remainders is absolutely inconsistent with an intention that the fee should remain in them, so that there should be no such term and no such estate ever to come into existence. It is said, indeed, that Lord Cottenham, in *Backham v. Siddall* (1 Mac. & G. 607), held that a limitation of a term to trustees in the particular will before him did not prevent the trustees from having the legal estate in fee. But in that case the legal estate had been in the plainest words limited to them in fee; and he put it expressly on the ground that there were two plainly inconsistent devises, and he chose the first. To apply that case, or the *dicta* of Bayley, J., to the case before us, we should have to hold generally that wherever there is a devise to a man and his heirs to uses, and there is in the will a contingent remainder unprotected, the legal fee remains in him, making every limitation equitable, in order to give protection to such remainder. We could not and would not so hold, if we thought the rules of law as to particular estates and contingent remainders reasonable and beneficial; and so long as the Legislature retains them we are bound to act as if they were most reasonable and beneficial. We could not so hold without expressly overruling the case of *Festing v. Allen* (12 M. & W. 279; 5 Hare 573), in which the point was apparently thought unarguable by most of the counsel engaged, in which it was argued by one counsel and was put aside as not worthy of serious consideration by the judges at common law and in equity; and the case of *Festing v. Allen* has, from the time it was pronounced, been regarded as one of the leading authorities in real property law. We must, therefore, affirm the judgment of the Master of the Rolls.

Appeal accordingly dismissed with costs.

Solicitors: For the appellant, Gregory, Rowcliffe, and Rawle; for the respondent, W. W. Wynne.

CT. OF APP.] *Re* EUROPEAN CENTRAL RAIL CO.; *Ex parte* ORIENTAL FINANC. CORPORATION. [CT. OF APP.]

Nov. 8 and 25.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Re EUROPEAN CENTRAL RAILWAY COMPANY; *Ex parte* ORIENTAL FINANCIAL CORPORATION. (a)

Company—Winding-up—Proof of debt—Debentures—Mortgage—Judgment—Interest—1 & 2 Vict. c. 110.

The Oriental Financial Corporation held debentures of a company bearing interest at 6l. per cent., and charged on the property of the company. The corporation obtained a judgment for the principal, interest, and costs under the Judgment Act (1 & 2 Vict. c. 110); the judgment debt bore interest at 4l. per cent. The liquidator of the corporation was allowed to prove in the winding-up of the company for the amount of the judgment debt, and 4l. per cent. interest. The debenture debt, with interest at 6l. per cent., would have amounted to more, and it was sought to raise the proof to the higher sum.

Held (affirming the decision of Bacon, V.C.), that there was no other debt or obligation between the parties than that which had been converted into a judgment, and that the further claim for additional interest must be disallowed.

This was an appeal from a decision of Bacon, V.C. In Oct. 1864 the European Central Railway Company issued to Mr. H. A. Holden twenty debentures for 1000l. each, in part payment of the contract price of certain works which he was to execute for them. The debentures were in the following form:

The European Central Railway Company (Limited). Debentures for 1000l. Period one year. Know all men by these presents that we, the European Central Railway Company (Limited) in consideration of the sum of 1000l., owing by us to Howard Ashton Holden, of Cannon House, Queen-street, in the city of London, contractor for public works, do hereby bind ourselves, our successors and assigns, to pay to the said Howard Ashton Holden, his executors, administrators, or assigns in London, the said sum of 1000l., together with interest for the same at the rate of 6l. for every 100l. by the year, the principal sum to be paid on the 11th day of Oct. 1865, and the interest to be payable in the meantime half-yearly at the several dates expressed in the interest warrants hereunto annexed, until the repayment thereof; and, for further securing payment of such principal and interest moneys, we, the said company, hereby charge the said railway and undertaking, and the works, land, and hereditaments of the said company, and all the capital, estate, right, title, and interest of the company therein, with the payment to the said Howard Ashton Holden, his executors, administrators, or assigns, of such principal sum of 1000l. and interest.

In Nov. 1864, Holden assigned these debentures to the Oriental Financial Corporation. The debentures were not paid at maturity, and the Oriental Financial Corporation commenced an action against the European Central Railway Company upon them; and on the 25th Nov. 1865, they recovered judgment for 20,636l. 8s. 4d. principal, interest, damages, and costs; and this judgment was entered up on the 18th Dec. 1865. On the 20th Jan. 1868, the European Central Railway Company was ordered to be wound up. The Oriental Financial Corporation also went into liquidation. The liquidators of the Oriental Corporation were admitted to prove in the winding-up of the European Company for the amount of the judgment debt, and for 1767l. 18s. 6d. interest thereon at 4 per cent. per annum down to the 20th

Jan. 1868. They claimed to be entitled also to prove for 861l. 10s. 9d., the amount of additional interest at 2 per cent. per annum on 20,000l. from the 25th Nov. 1865, to the 20th Jan. 1868. The Vice-Chancellor having refused to admit this claim, the liquidators of the Oriental Financial Corporation appealed.

Sect. 17 of the Judgment Act (1 & 2 Vict. c. 116), provides that "every judgment debt shall carry interest at the rate of 4 per cent. per annum from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

Kay, Q.C. and Jason Smith, for the appellants, contended that, as before the Judgment Act, the courts allowed, in a separate action, the subsequent interest on interest-bearing debts to be recovered by way of damages, so now the additional interest might be recovered. On this point they relied upon the unreported case of *Hughes' claim, re Agriculturist Cattle Insurance Company*, which came before the Lords Justices in Jan. 1872, and the facts of which were these: Hughes, in 1859, brought an action against the company to recover the sum of 3000l. and interest at 6 per cent., the payment of which was secured to him by a promissory note of the company. In 1860, however, it was arranged that the loan of 3000l. should be continued for a period of about two years, and that the company should withdraw their pleas in the action, and allow Hughes to recover judgment at once, but that the judgment should not be registered or the 3000l. called in unless default was made in the payment of interest. At the making of this arrangement no mention was made as to the rate of interest, but one of the directors of the company and Hughes' solicitor made affidavits, in which they stated in effect that it was fully understood that the loan was to be continued on the same terms as if the action had not been commenced, excepting that as a collateral security Hughes should be placed in a position to sign judgment. In pursuance of this arrangement Hughes recovered judgment against the company on the 17th April 1861, for the sum of 3537l. 10s. 11d., and in the winding-up of the company he claimed to prove for that sum with interest at the rate of 6 per cent. from that date. The then Master of the Rolls, Lord Romilly, only allowed interest at the rate of 4 per cent.; but on appeal by Hughes, it was held by the Lords Justices that he was entitled to 6 per cent. interest on 3000l. from the date of the judgment until payment of the debt. They also submitted that as mortgagees the Oriental Corporation might pursue all their remedies, and were entitled to a charge on the property for the additional interest. They cited:

Salt v. Donegall, Ll. & G. temp. Sugd. 82;*Morgan v. Evans*, 3 Cl. & F. 159.

Sir H. Jackson, Q.C. and Bardswell for the respondents, contended that *Hughes' claim* was distinguishable from the present, because here the judgment recovered by the appellants was a hostile judgment. They further submitted that when the appellants recovered judgment they elected to abandon the security of the covenant to pay principal and interest for which the security of the judgment had now been substituted.

Jason Smith in reply.

Cur. adv. vult.

(a) Reported by E. STEWART ROCHES, Esq., Barrister-at-Law.

Ct. of App.]

HOWES v. PEAKE.

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Nov. 25.—BRAMWELL, J.A., delivered the judgment of the Court.—We are of opinion that the order of the Vice-Chancellor is right, and should be affirmed. All that the company undertook by each debenture to pay was the principal of 1000*l.* and the sum of 60*l.* for interest in two half-yearly instalments. There was no fresh contract, evidenced by the forbearance of the creditors or in any other way, for the repayment of any further interest. In that state of thing the creditors brought their action; and, on the 25th Nov. 1865, they recovered judgment on their twenty bonds for 20,000*l.* and a half-year's interest, besides a small sum for damages for the detention of the debt, and their costs, in all 20,636*l.* 8*s.* 4*d.* From that time forth that sum, by virtue of the Judgment Act, carried interest at the rate of 4 per cent. per annum. From that time that sum was the sole debt due from the obligors, the company, to the appellants. They were entitled to enforce payment of the sum, with 4 per cent. interest, by execution, and they could enforce nothing more. There was no process by which they could have got more than that sum with interest at four per cent.; that was the sole debt between the parties. It has been contended that the appellants are entitled to something different by virtue of that clause in the debentures which charged the railway and undertaking. It may very well be that if the action had not been brought, the holders of those debentures would have been entitled to prove for interest at 6 per cent., or, at any rate, 5 per cent., by way of damages. A jury would practically have had to give damages in the shape of interest at the rate of at least 5 per cent. But although they have got the judgment, they still claim, by virtue of their charge to be entitled to the additional interest of 2 per cent. It seems to us only necessary to state the facts in order to show that the appellants cannot now have that right, for in terms the charge created by the debenture extends only to the 1000*l.*, and the 60*l.* interest. It cannot be a charge for more than what is due. It is said that there is a hardship because the appellants are worse off by reason of their diligence in bringing their action. But they were not compelled to bring their action; they did so in order to obtain the benefit of execution. There is not, therefore, any hardship inflicted on them by the law. If there were, we might think that the law should be altered, as it ought not to be partial in its operation. There was a case cited in argument in which a Mr. Hughes had 6 per cent. allowed him on a judgment debt; but looking into the facts of that case, it appears to have been understood between the parties that the stipulated interest at 6 per cent. should be continued. Therefore there was in fact a special agreement, which distinguishes it from this case, in which there was none. There is here no other agreement between the parties than that which has been converted into a judgment; there is no other debt or obligation between them. The judgment of the Vice-Chancellor was therefore right, and it must be affirmed with costs.

Solicitors: *Farmer and Robins*, 11, Pancras-lane, City; *S. J. Robinson*, Gresham House, Old Broad-street.

SITTINGS AT WESTMINSTER.

Thursday, June 22.

HOWES v. PEAKE. (a)

23 Vict. c. 27 s. 6—Refreshment house—"Entertainment," what is.

The appellant kept a shop consisting of one room only, open in front, and without any seats. Persons were in the habit of frequenting the shop for the purpose of obtaining lemonade and ginger beer, which they simply drank at the counter and went away.

The shop was kept open until two or three o'clock in the morning. The appellant had no licence to keep a refreshment house.

Held (affirming the decision of the Divisional Court for Appeals from inferior courts, diss. Buggalloy, J.A.), that this was a shop kept open for "public refreshment, resort, and entertainment," and therefore a licence within s. 6 of 23 Vict. c. 27, was required.

APPEAL from a decision of the Divisional Court for Appeals from Inferior Courts.

The appellant was convicted (on a summons taken out by the respondent, an officer of excise) before one of the magistrates of the police courts of the metropolis, for keeping a refreshment house without having a licence for the sale of beer, cider, wine, or spirits, as required by s. 6 of 23 & 24 Vict. c. 27.

The Divisional Court of Appeal (Grove and Field, JJ., Cleasby, B., dissenting) affirmed the conviction, and the appellant appealed from this decision.

The case in the court below is fully reported (33 L. T. Rep. N. S. 818).

The facts sufficiently appear from the head note to this report.

M'Intyre, Q.C., and J. Thompson, for the appellant.—Selling ginger beer over the counter is not keeping a refreshment room within the Act. Entertainment must mean something more than refreshment or resort. It cannot apply where the customers take their refreshment standing and go away. In *Muir v. Keay* (L. Rep. 10 Q. B. 594), the premises were held on appeal from the magistrates to be a refreshment house, but there the defendants' house was found open during the night, and seventeen females and twenty men were there, and were being supplied with cigars, coffee, and ginger beer. [MELLISH, L.J.—The words "public resort" are perhaps meant to exclude clubs, where only certain persons and not the public have the right of admission.] In *Taylor v. Oram* (1 H. & C. 370), the defendants kept a dancing saloon, and the room where the defendants were found selling beer opened into the dancing room. There the magistrates held that it was not a refreshment house within sect. 6 (*ubi sup.*) on the ground that entertainment means something more than mere refreshment, and his decision was upheld.

C. Bowen, for the respondents.—This case does not differ from *Muir v. Keay* (*ubi sup.*). The word "entertainment" has a double meaning. It may mean refreshment only, but the facts here show something more than mere refreshment.

M'Intyre, Q.C., did not reply.

JAMES, L.J.—I think on the whole that the judgment of the majority of the court below must

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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be affirmed. It is very difficult to apply a meaning to the word "entertainment" which would not extend to this case. In this shop the public are received and sheltered and refreshed, and I cannot myself put any meaning upon the word "entertainment" which would not include those facts.

MELLISH, L.J.—I am of the same opinion. The whole question arises upon the effect to be given to the addition of the word "entertainment." The main object of the Act is to deal with refreshment houses, in which refreshments are sold which are to be consumed upon the premises. In sect. 6, requiring licences to be taken out by all houses, rooms, shops, or buildings, no doubt the words "resort and entertainment" are added to the word "refreshment;" but I do not think it necessary to hold that "entertainment" must necessarily be something entirely distinct from "refreshment." I think the word "entertainment," as far as it has any meaning, qualifies the meaning of the word "refreshment," because "entertainment" has a plain and natural meaning, and it includes the receiving of a person and providing him with drink and food of an agreeable nature. If you receive a man into your house and give him drink and food of an agreeable nature you entertain him; and I do not think a man is less entertained because he is not asked to sit down while he takes his refreshment. It appears to me, therefore, the word "entertain" so far qualifies the word "refreshment" that it must be such a kind of "refreshment" as partakes of the character of "entertainment." Mr. McIntyre referred to the case of a chemist's shop—that would be an instance of what probably would not be "entertainment." The refreshment must be such a refreshment as you would call entertainment. I think that persons who are supplied with ginger beer, there being at any rate enough accommodation furnished to the persons drinking the ginger beer to provide them with the means of drinking it comfortably, are entertained. Therefore in my opinion the judgment of the court below ought to be affirmed.

BAGGALLAY, J.A.—I am unable to take the same view of the case as the Lords Justices. It appears to me that refreshments supplied in the way in which they are found to have been supplied in the special case are not within these words of the Act, "houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment." I rely upon the precise words used by the magistrate by whom this case was settled—viz., "That the appellant's shop consisted only of one room, only open in front, without seats of any kind." The persons who frequented the shop simply drank their ginger beer or lemonade at the counter and went away. I think the correct view of the construction of this Act was taken by Mr. Justice Lush in the case of *Muir v. Keay*, to which reference has been made, viz., that there must be something added towards the comfort of the persons resorting to the house, shop, or room, in which the refreshments are supplied. For instance, a room fitted up with little round tables might satisfy that word "entertainment." Of course I do not mean to say it is necessary to have chairs and tables to satisfy the word "entertainment;" but it appears to me that there must be something beyond the mere fact of selling the ginger beer at the counter, and the persons

drinking it and going away. A similar view seems to have been taken by Mr. Justice Blackburn, who seems to take the view that some effect must be given to the word "entertainment." He says, "It is the correlative of resort—the reception and accommodation of the public who resort to the place in question." What meaning he would give to the word "reception" does not clearly appear, except from the facts which existed in that case of *Muir v. Keay*; in that case you have this distinct fact found, not only that cigars, and ginger beer, and lemonade were consumed on the premises, but that at one time seventeen females and twenty males were found together in the room, that is to say, they were resorting there. I entertain some doubt whether the mere going to this shop to take ginger beer at the counter, and then going straight away was a resorting to the place within the meaning of the Act of Parliament. I think what is pointed out by the Act is something more than the purchase of the article, and the consumption of the article at the counter. That is the view I take of this case; and having regard to the particular circumstances of the case, it appears to me that the conviction was wrong.

QUAIN, J.—I am of opinion that the judgment of the court below ought to be affirmed in this case. It strikes me that this shop is a shop kept open for "public refreshment, resort, and entertainment" within the meaning of the Act of Parliament. It is admitted that it is kept open for refreshment, and I do not share the doubts of Sir Richard Baggalay, about whether it is kept open for resort. It is kept open for the public generally who may choose to resort to it as they did in this particular case. "Entertainment" includes refreshments, and may be something more. I cannot have any doubt that the object of this Act of Parliament is to include refreshment rooms; and it seems to me that a man who is refreshed is entertained at the same time that he is refreshed. He may be entertained without refreshment, but I do not think he can be refreshed without being entertained. It appears to me that the case comes within the terms of the Act of Parliament, and a house of this kind kept open till three o'clock in the morning is within the mischief pointed out by the statute; and therefore I think the judgment of the court below is right.

Judgment below affirmed.

Solicitors for appellant, *Hicklin and Washington*.
Solicitor for respondent, *The Solicitor to the Inland Revenue*.

Wednesday, Nov. 8.

(Before MELLISH, L.J., BRETT and AMPHLETT, JJ.A.)
ELLIS v. MUNSON. (a)

Practice—Counter claim arising after action brought—Pleading—Rules of Court, Order XIX., rule 3, Order XX., rules 1 and 3, Order XXIX., rule 13.

A counterclaim founded on facts which have arisen since the action was brought must be pleaded as so arising, so that the plaintiff may be able to confess the plea; and if it is not so pleaded the plaintiff should take out a summons to strike it out, unless it be amended.

Where there is no real question at issue between a

(a) Reported by W. APPLETON, Esq., Barrister at Law.

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plaintiff and defendant, the Court of Appeal will, on an interlocutory application, make such an order as will determine the rights of the parties in the action.

STATEMENT of claim.—That the plaintiff and defendant, being jointly interested in goods consigned abroad, agreed to send out a joint agent to watch their interests, and to endeavour to obtain payment for the goods; that it was further agreed that the defendant should pay to the plaintiff 50*l.* a month towards the expenses of the agent; that the defendant, having paid three monthly instalments, had then made default. The plaintiff claimed to recover a sum of 150*l.* for three months' allowance to the agent which the defendant had not paid.

The defendant, in his statement of defence, delivered on March 11, traversed all the allegations of the statement of claim.

Issue was joined, and the cause was set down for trial on March 17.

The defendant then discovered, by means of interrogatories, that the agent had returned since the delivery of the statement of defence, and had paid to the plaintiff on account of the goods more than 300*l.*, he, therefore, on April 1, having obtained leave to amend his statement of defence, alleged that the plaintiff had received sufficient money from the agent to recoup himself the sum for which he was now suing the defendant, and added a counter claim for the amount of the three instalments which he had previously paid to the plaintiff.

The plaintiff replied that he had not before the delivery of the statement of defence on the 11th March received any sum of money from the agent, as stated in the amended defence.

No rejoinder was delivered, and the plaintiff obtained an order to sign judgment on the defendant's counter claim. This order was, on a summons by the defendant, set aside by a judge at chambers, but Coleridge, C.J. and Pollock, B., sitting as a Divisional Court, reversed his decision and restored the order.

The defendant appealed(a).

(a) The following Rules of Court were referred to on the argument:

Order XIX., rule 3.—A defendant in an action may set off or set up by way of counter claim against the claims of the plaintiff, any right or claim, whether such set off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement or claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the court or a judge may on the application of the plaintiff before trial, if in the opinion of the court or judge such set off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

Order XX., rule 1.—Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if after a statement of defence has been delivered, any ground of defence arises to any set off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may

Winch, for the appellant.—The order of the Divisional Court was wrong, for although the defendant had no answer to the action when he first delivered his statement of defence, yet circumstances occurred between that date and the time of his delivering his amended defence and counter-claim which afforded an answer to the action and good grounds for counter-claim. A counter-claim is really a fresh action, for it amounts to a claim in a cross action (Order XIX, r. 3) and differs therein from a defence founded on facts which may have arisen since the action was brought. [BRETT, J.A.—Surely a counter-claim which really amounts to a plea *puis darrein continuance* should state that it is founded on facts which have arisen since plea delivered.] It need not do so if it is substantially the commencement of a cross action. [MELLISH, L.J.—If it does not, is not the plaintiff deceived and prevented from confessing the defence as provided by Form 2, Appendix B.?]]

H. Payne, for the plaintiff.—When the statement of claim and defence were delivered the defendant was admittedly in default; his counter-claim is framed so as to appear to be founded on facts which occurred before action brought. This being so, it is not supported by evidence, and is bad. The counter-claim forms part of the amended defence, and must, therefore, speak from the date of the original defence; the events on which the defendant relies did not occur till after the cause was set down for trial, and if it had not been thrown over the assizes the plaintiff would have had a verdict before they had occurred. The defence and counter-claim cannot be considered to be founded on the more recent events, and so they are misleading and form no real defence to this claim. But further, the defendant made default in not delivering a rejoinder, so that the plaintiff is entitled, by Order XXIX., r. 13 to apply for judgment. Any plea which does not state whether the defence arose before or after action was, by the Common Law Procedure Act 1852, s. 68, deemed to be a plea of matter arising before action, and this rule still holds good with regard to pleadings under Order XX. The order of the Divisional Court was, therefore, right.

MELLISH, L.J.—It is clear that at the time of the delivery of the original statement of defence, this was an undefended action. Shortly before the trial, however, the plaintiff received a

within eight days after such ground of defence has arisen, and by leave of the court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same.

3. Whenever any defendant in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order.

Order XXIX., rule 13.—In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the court may order judgment to be entered accordingly, or may make such other order as may be necessary to complete justice between the parties.

sum of money to which the defendant had an undoubted right, so that a good defence arose subsequent to the bringing of the action and subsequent to the delivery of the statement of defence. The counter-claim inserted by the defendant in his amended statement of defence is also founded upon matters which arose by way of defence *pais darrein continuance*. The defendant should, therefore, have taken out a summons for leave to plead this as a defence arising *pais darrein continuance*, as the plaintiff could then have confessed the defence, and the action would have been stayed upon the payment of costs. As the defendant's counter-claim was not pleaded as having arisen *pais darrein continuance* the plaintiff should have taken out a summons to strike out the counter-claim, unless it were so amended as to make it appear that the facts which supported it had arisen since the action was brought. But neither party adopted the proper course, and consequently both parties have put themselves in the wrong. The plaintiff delivered his reply, and the defendant took no notice of it, so that a default in pleading was made by him, and the plaintiff was, under rule 13 of Order XXIX., entitled to sign judgment. In form, therefore, the judgment was regularly signed, and the decision of the Divisional Court was right. But when, as in the present case, the court is enabled to see the exact position of both parties, so that it is clear what the legal result of a trial would be; and when, moreover, the court is abundantly satisfied that there is no real question to try, and that the parties are not at issue upon anything save upon a question of costs, I am of opinion that the court is bound to give directions as to what ought to be done, so that it may prevent the parties from proceeding further and from incurring more expense. We cannot allow this plaintiff and defendant to indulge in technicalities of pleading and devices to embarrass each other; but we must make an order which it is clear is the only order that can properly be made, and one which will put an end to this waste of money. The plaintiff must pay over to the defendant the balance that is due to him and must receive from the defendant the costs incurred up to the time, when the receipt of the money by the plaintiff could have been properly pleaded, and the plaintiff must have the costs of the appeal.

BARR, J. A.—I agree with the order which has just been read. The judgment signed by the plaintiff was, as a matter of form, regular; but when it is found that the parties to an action are resorting to technical formalities and devices of pleading instead of prosecuting their cause in a straightforward way, I think it is the duty of the court to put its foot down upon such proceedings, and not to allow a plaintiff and defendant to go on in so unwise a course. The defendant would, if he had pleaded his defence and counter-claim properly as having arisen since the commencement of the action pursuant to the provisions of Order XX., have been entitled to judgment under Order XIX., r. 3. The plaintiff would then have been able under Order XX., r. 3, to confess the defence, and sign judgment for his costs up to the time of such defence being pleaded. Neither party, however, followed out the plain provision of the rules made under the Judicature Act for the simplification of the procedure; both parties indulged in legal finesse, and

what is the result? There has been an order by a master, an appeal to a judge at chambers, then an appeal to a divisional court, and finally an appeal to this court. Now all this might have been avoided, and the parties might long ago have been released from this litigation if only the plaintiff had taken out a summons to stay proceedings, and to make the defendant plead his defence properly. The order which has been read will put an end to these proceedings, and will put the parties to this action in their right position without any further expense.

AMPHLETT, J. A.—I am of the same opinion. There never was any real question between these parties. The action when brought was well founded, but a good defence arose after the defendant had pleaded. This being so, the parties could at once, under Orders XIX. and XX., have brought the case to such a conclusion as would have been just and right. But this was not done, much needless expense has been incurred, and several appeals have been brought when the only question between the plaintiff and the defendant was one of costs.

Judgment, that the plaintiff pay to the defendant the balance due to him on his counter-claim after deducting the amount of the costs due to him.

Solicitors for plaintiff, *Lindo and Co.*

Solicitors for defendant, *Vallance and Vallance.*

Thursday, Nov. 30.

(Before COCKBURN, C.J., and MELLISH, BRAMWELL, and AMPHLETT, L.J.J.)

CHATTERTON AND WEBSTER v. CAVE. (a)

APPEAL FROM THE COMMON PLEAS DIVISION.

Dramatic copyright—Material part of play—3 & 4 Will. 4, c. 15.

To sustain an action for infringement of dramatic copyright under 3 & 4 Will. 4, c. 15 that which is copied from the plaintiff's play must be a material part of the play and of some substantial value.

THE action was brought under the Dramatic Copyright Act (3 & 4 Will. 4, c. 15) for penalties for infringement of the copyright of the plaintiffs as assignees of the author Leopold David Lewis in a dramatic production and piece called "The Wandering Jew," by representing without the plaintiffs' consent the said dramatic production and piece, and divers parts, scenes, stage play, and dramatic business of the same. At the trial before Lord Coleridge, C.J. during the sittings at Westminster after Trinity Term, 1874 it appeared that there was a French novel by Eugene Sue called "The Wandering Jew," and a French drama with the same title, and the plaintiffs' drama was an adaptation from the French drama, and that the defendant had brought out and caused to be represented on the stage a drama called "The Wandering Jew." The plaintiffs complained of the representation of the defendant's drama as an infringement of their copyright. It was arranged by agreement that the jury should be discharged, and that the Lord Chief Justice should read the French novel and play and the two English plays, and direct how the verdict should be entered, both parties having

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

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leave to move. After reading the plays and novel his Lordship published the following finding in writing. "I find in this case that two scenes or points of the drama of the defendant have been taken from the drama of which Mr. Lewis is the author and the plaintiffs the assignees, without recourse to either the French novel or the French drama, originals common to the dramas both of the plaintiffs and defendant. I find this (1) in respect of the final scene of the defendant's drama, and (2) of the appearance of "The Wandering Jew," and the stage business connected with that appearance, which are to be found in the second scene of the second act of the defendant's drama, and the fourth scene of the first act of the plaintiffs' drama. I find that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the plaintiffs. I direct the verdict to be entered for the defendant. I assess the damages at 40s. if upon argument, as provided by the terms agreed to at the trial, the court should be opinion that the verdict ought to be entered for the plaintiffs."

This finding was explained by the Lord Chief Justice in giving judgment in the following terms. "My finding, as I have endeavoured to explain during the argument, amounted to this, that in two situations of the drama containing much more of scenic effect than of dialogue and composition, there had been a copying of part of the plaintiffs' production. But it appeared to me at the same time that the extent of the copying was so slight that it could not be said that a material or substantial part had been copied. Therefore though I was bound to find that two particular parts of the plaintiffs' production had been copied, I wished to find for the defendant, unless bound in law to find for the plaintiffs." (33 L. T. Rep. N. S. at p. 257.) A rule nisi was afterwards obtained to enter the verdict for the plaintiffs for 40s. on the ground that on the finding of the Lord Chief Justice the verdict ought to have been entered for the plaintiffs, as representation by the defendant of part of the plaintiffs' play was found.

The Court of Common Pleas (Lord Coleridge, C.J. Brett, Grove, and Lindley, JJ.) discharged the rule, and the plaintiffs appealed.

The case in the court below is reported 33 L. T. Rep. N. S. 255; L. Rep. 10 C. P. 572; 44 L. J. 386, C. P.

Poulter and A. Ferrell (Day, Q.C. with them) for the plaintiffs.—By the words of the statute (3 & 4 Will. 4, c. 15) if "any part" of the plaintiffs' drama was represented by the defendant, the plaintiffs are entitled to the verdict, and it has been expressly found that two distinct parts of the defendant's play are copied from the play of the plaintiffs; the fact that only a small part of the play was copied cannot affect the plaintiffs' right to recover: (*Planché v. Braham*, 4 Bing. N. C. 17; 5 Scott 242, and see the summing up of Tindal, C.J. in the report of the same case at Nisi Prius, 8 C. & P. 68.) *Pike v. Nicholas* (L. Rep. 5 Ch. 251; 39 L. J. 435, Ch., in which the defendant succeeded, was not a case on this statute, and besides it was a suit for an injunction, and the rule in such a suit would be different from that in an action like the present. The distinction is shown by the rule laid down in *Kerr on Injunctions* p. 443 "If, however, the pirated matter is not considerable in quantity, or of much value in

quality, or if, though considerable in value, it is very small in quantity, and quite out of proportion to the mass of original matter, the court will not, as a general rule, interfere, but will leave the plaintiff to his remedy by damages at law." There is no authority for reading the statute as if the word "substantial" were inserted; if any appreciable part is taken that is enough. [COCKBURN, C.J.—The word "appreciable," if you look to the derivation, means that which is of some value. BRAMWELL, L.J.—Does not the maxim "*De minimis non curat lex*" apply?] The words of the Act are plain, and cannot be added to.

Digby Seymour, Q.C. and Lumley Smith, for the defendant, were not called upon.

COCKBURN, C.J.—We are in a position to decide the point raised by the appeal in this case without calling on the counsel for the respondent. I think that in the first place we are bound on the question of fact by the finding of the Lord Chief Justice of the Common Pleas, to whom the whole case was left by consent without the intervention of a jury, and we must take his decision not from the formal finding alone, but from the finding as explained by the statement which he made when the case came before the court. Taking the whole together in this way it appears that the facts found by the learned Chief Justice are these. It is true that the defendant has, in two instances, taken a given scene or incident from the plaintiffs' play. The Chief Justice says that the scenes or incidents common to both plays are not taken from a common source, but then he goes on to state the fact that these incidents are not of substantial value or material to the play. The question which we have to decide is whether the proposition of law laid down by the Common Pleas, is right or wrong. The proposition is this, the Act for the protection of dramatic copyright (3 & 4 Will. 4, c. 15) can only apply where that which is taken from another person's play is material to the play and of some substantial value. It is true, as was pressed on us in argument by the counsel who appear for the appellants, that by the words of the Act "If any person shall . . . represent or cause to be represented . . . any such production as aforesaid, or any part thereof," he shall be liable to penalties, but this Act like everything else must have a reasonable construction placed upon it, and while we should guard and protect from infringement the property for the protection of which the Act was passed, we should be careful not to withdraw from the common stock anything which is not properly the subject of dramatic property. The true principle is that any part of a play which is not of some value and material to the play cannot form the subject of an action for infringement of copyright under the Act in question. This view is supported by the cases of *Pike v. Nicholas* (*ubi sup.*) and *Bradbury v. Hotten* (L. Rep. 8 Ex. 1; 42 L. J. 28, Ex.; 27 L. T. Rep. N. S. 450). I think that while we ought to be careful to protect that which has some substantial value, we ought not to encourage litigation about that which is in reality of no value at all. I am of opinion that the judgment of the Common Pleas ought to be affirmed.

MELLISH, BRAMWELL, and AMPHLETT, L.JJ. concurred for the same reasons.

Judgment affirmed.
Solicitor for the plaintiffs, Chatterton.
Solicitors for the defendant, Lewis and Lewis.

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THE METROPOLITAN BOARD OF WORKS v. THE NEW RIVER COMPANY.

[CT. OF APP.]

Wednesday Dec. 6.

THE METROPOLITAN BOARD OF WORKS v. THE NEW RIVER COMPANY. (a)

*Practice—Judicature Act 1875, Order XXXIV., rule 2—Question of law raised without pleadings—Judge's discretion—Special case—Affidavit.**It is within the discretion of a judge at chambers, under Order XXXIV., rule 2, to order a special case to be settled by the parties to raise a point of law, where the plaintiffs, without putting in a statement of claim, have made an affidavit, not contradicted by the defendants, that there are no facts in dispute, and that the question between the parties is one of law only.**The plaintiffs sued the defendants to recover damages for the defendants' refusal to supply the plaintiffs with water by meter under sect. 41 of the New River Act 1852. The plaintiffs having filed no statement of claim, made an affidavit, which was not contradicted by the defendants, that no facts were in dispute between the parties, and that the only question to be decided was one of law.**Upon the application of the plaintiffs, a judge in chambers made an order that a special case should be stated between the parties in order to raise the point of law.**The Court of Appeal, affirming the decision of the Queen's Bench Division, refused to rescind this order.**This was an appeal from a decision of the Queen's Bench Division affirming an order made by Amphlett, B. in Chambers.**The plaintiffs sued the defendants in damages. The plaintiffs' writ of summons was indorsed "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter under sect. 41 of the New River Act 1852."**The plaintiffs put in no statement of claim, but they filed an affidavit that there were no facts in dispute, and that the sole question between the parties was one of law, viz., whether the defendants were bound under sect. 41 to supply water by meter for the plaintiff's use.**No affidavit in reply was filed by the defendants.**Amphlett, B., sitting in chambers, on the application of the plaintiffs, made an order under rule 2 of Order XXXIV., that a special case should be stated between the parties for the purpose of raising the point of law for the court.**The Queen's Bench Division (Blackburn and Quain, JJ.) affirmed this order, and the defendants now appealed.**By rule 2 of Order XXXIV. it is provided that "if it appear to the court or a judge, either from the statement of claim or defence, or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court or a judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court either by special case or in such other manner as the court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may therefore be stayed."**The Solicitor-General and A. E. Hardy, for the*

defendants.—First, it is contended that the defendants are entitled to have on the record what is relied upon by the plaintiffs as their case. The judge in chambers had no discretion to make the order appealed against here. Rule 2 of Order 34 says, "If it appear to the court or a judge, either from the statement of claim or defence, or reply or otherwise." The words "or otherwise" are not meant to apply to a case like the present where there have been no pleadings at all. It must mean "or other pleading," as for instance a rejoinder or reply. Construed with reference to the context "or otherwise," must mean after a statement of claim or defence has been put in. [COCKBURN, C. J.—I was inclined to agree with you at first, but I cannot see what practical difference it can make whether the point of law is raised by special case, or by statement of claim and demurrer.] It is submitted that the defendant ought not to be driven to a special case, which is a more cumbersome and expensive mode of raising the point than by statement of claim and demurrer. Secondly, if the judge in chambers had the power to make such an order he wrongly exercised his discretion in making it. Although the plaintiff's affidavit says that there are no facts in dispute, there may be, and probably are, facts which one side thinks material, and the other does not. Our statement of defence will contain some facts which the other side will not admit, and which may, or may not, be material.

Biron, for the plaintiffs, was not called upon.

COCKBURN, C. J.—I am bound to say that I think the application in the first instance was an idle one, and one which I should have refused if I had been sitting as judge in chambers, but it was in the discretion of the judge to make the order which is appealed against. He made the order, and it has been affirmed by the Queen's Bench Division. Having been so made and affirmed, I am of opinion that it is not for us in the exercise of our appellate jurisdiction to interfere, especially as I think it can make no practical difference whether the question of law is raised in one way or the other. I think the construction the defendants contend for, of r. 2, Order XXXIV., which limits the operation of the rule to facts appearing on the record, is far too narrow a construction. It is, in my opinion, in the discretion of the judge under what circumstances, and in what manner he will allow the point of law to be raised. Here the plaintiffs have made an affidavit that there are no facts in dispute between the parties, and we must take that statement (as the defendants have put in no affidavit to contradict it) to be the case. I am of opinion, therefore, that the judge in chambers exercised a discretion which he had, and that this appeal must be dismissed.

*BRAMWELL, J. A., concurred.**Appeal dismissed accordingly.**Solicitors for plaintiffs, the Solicitors to the Board.**Solicitors for defendants, Baxter and Co.*

CHAN. DIV.]

MANSFIELD v. CHILDERHOUSE—TRASDALE v. BRAITHWAITE.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON).

Saturday, Nov. 11.

MANSFIELD v. CHILDERHOUSE. (a)

Practice—Interrogatories—Order XXXI., rule 5—Specific performance, action for—Alleged breach of trust.

In an action to enforce specific performance of an agreement to sell an underlease, the statement of claim disclosed that the plaintiffs were trustees for a married woman. The defendant denied a binding agreement, did not admit that the plaintiffs were trustees, and alleged that she did not know the particulars of the trust, and submitted that if the proposed purchase was not authorised by the terms of the trust the action must be dismissed with costs.

Interrogatories delivered by the defendant to ascertain the particulars of the trust deed, and whether the proposed purchase was authorised by the terms of the trust, were, on the application of the plaintiffs, ordered to be struck out as irrelevant to the question at issue.

ADJOURNED SUMMONS.

This was an action by purchasers to enforce specific performance of an agreement to sell them the underlease of a house.

The plaintiffs in their statement of claim stated that they were trustees for one Emily Cuno, a married woman.

The defendant, in her statement of defence, denied that a binding agreement was entered into; did not admit that the plaintiffs were trustees for Emily Cuno; and stated that she had been informed and believed that they were trustees, but she did not know upon what trusts they held the money proposed to be applied in the purchase of the underlease, or whether the trusts upon which they held the same authorised the expenditure of the trust estate in the purchase of property held by way of underlease, and submitted that if such trusts did not authorise such expenditure the action should for that reason, if for no other, be dismissed with costs.

It appeared from an affidavit made by Emily Cuno, on a motion that had previously been made in the action, that the plaintiffs were the trustees of her marriage settlement.

The defendant subsequently delivered interrogatories to the plaintiffs inquiring, (1) whether the plaintiffs were not the trustees of Emily Cuno, and whether they did not intend to apply the trust funds of which they were such trustees in payment of the purchase-money for the underlease; (2) the particulars of the trust deed, and the trusts upon which the funds were held; (3) whether it was not a breach of trust to employ the trust funds in the purchase of the underlease; (4) in whose custody was the trust deed?

The plaintiffs thereupon took out a summons under Order XXXI., rule 5, to strike out these interrogatories.

Chester, in support of the summons, contended that the interrogatories were irrelevant and immaterial to the real point at issue in the action. Even assuming that the plaintiffs had no power

to make such an investment, the mere reference in the statement of claim to the plaintiffs as trustees would not fix the defendant with knowledge of the breach of trust.

Methold, for the defendant, argued *contra*, that there was sufficient notice of the trust to render the defendant liable for any loss that might arise from an improper investment of the trust fund (*Lewin on Trusts*, p. 441). *Prima facie* it was improper for trustees to invest in an underlease. The defendant, therefore, was entitled to know the particulars of the trust before completing the contract:

Bridgeman v. Gill, 24 Beav. 302;

Malpas v. Ackland, 3 Buss. 278;

Jones v. Smith, 1 Har. 43.

BACON, V.C.—There is no shadow of reason for allowing these interrogatories, which have nothing to do with the real matter in dispute. The simple question in this action is whether there is a binding agreement. One main object of the new procedure was to guard against that subtle and ingenious chicanery which formerly sometimes prevailed against justice, and to prevent the introduction into pleadings of anything which would tend to hinder or delay the progress of an action. In my opinion these interrogatories are wholly irrelevant, and must be struck out.

Order accordingly.

Solicitors for the plaintiffs, *Leathes and Maynard*.

Solicitors for the defendant, *Johnson and Master*.

Friday, Nov. 17.

TRASDALE v. BRAITHWAITE (a).

Husband and wife—Post-nuptial settlement of wife's property—Valuable consideration—Subsequent mortgages for value, without notice of settlement, postponed—27 Eliz., c. 4.

A testator devised his real estate to his daughter in fee, and declared his wish to be that in case she married she should "before marrying settle the same estate for her own separate use for life, independently of her husband, and to such uses as she shall by her will, and notwithstanding coverture, appoint." The daughter married. By a post-nuptial settlement, which was expressed to be executed in pursuance of the wish contained in the will, the property was settled on the wife for life for her separate use without power of anticipation, remainder to the husband for life, remainder for the children in the usual way. Subsequently the husband and wife mortgaged the property in fee for valuable consideration, the existence of the settlement being suppressed.

On bill filed by the mortgagees to set aside the settlement to the extent of his mortgage:

Held, that, independently of the will, the settlement was founded on valuable consideration and could not be set aside.

Hewison v. Negus (16 Beav. 594), followed.

JAMES SHEPHERD by his will, dated the 19th Feb. 1857, devised (*inter alia*) his estate situate at Ouseby Hole, in the parish of Ouseby, with the appurtenances, unto his daughter, Mary Shepherd, her heirs and assigns for ever, and continued as follows: "I declare it to be my wish that in case my said daughter shall marry that she shall

before marrying settle the same estate for her own use for life, independently of her husband, and to such uses as she shall by her will and notwithstanding coverture appoint."

James Shepherd died on the 6th July 1861, without having revoked or altered his will.

On the 10th Oct. 1861, Mary Shepherd intermarried with Robert Forrester, but no settlement or agreement for a settlement was executed previously to the marriage.

The Ouseby Hole estate was partly freehold and partly copyhold. By an indenture dated the 19th Sept. 1862, and made between William Crakanthorpe (the lord of the manor) of the one part, and Robert Forrester and Mary his wife of the other part, the copyhold portion of the estate was in consideration of the sum of 180*l.* duly enfranchised and conveyed unto Mary Forrester in fee simple. The 180*l.* was furnished by Mary Forrester out of her own moneys.

By an indenture of settlement, dated the 7th Oct. 1862, and made between Robert Forrester and Mary his wife thereafter mentioned as "the said settlors" of the one part, and Abraham Braithwaite and Thomas Forrester of the other part, after reciting that Mary Forrester was seized in fee of the Ouseby Estate, and that she became entitled to the same under the will of her father, James Shepherd, "who by the said will expressed his wish that the same hereditaments should be settled for the separate use of the said Mary Forrester in case of and prior to her marriage, and that the settlement now in statement was executed to give effect to the said wish as the said settlors respectively thereby declared," it was witnessed that "in pursuance of the said agreement and in consideration of the said marriage, the said settlors" did, and each of them did, thereby grant unto the said Abraham Braithwaite and Thomas Forrester, and their heirs, the said Ouseby Estate, to hold the same unto and to the use of the said Abraham Braithwaite and Thomas Forrester and their heirs during the life of Mary Forrester, upon trust during her life to permit her to receive the annual rents and profits thereof for her sole and separate use free from the debts and control of her husband and without power of anticipation; and after her decease, in case the said Robert Forrester survived her, to the use of Robert Forrester for his life, and after the decease of the survivor of them the said settlors upon trust for the children of the marriage in the usual way, with an ultimate trust in default of children, and in case Mary Forrester should survive her husband, to the use of Mary Forrester in fee. The settlement was duly acknowledged by Mary Forrester.

By an indenture dated the 14th Feb. 1865, and made between Robert Forrester and Mary his wife of the one part and George Teasdale of the other part, after reciting that Robert Forrester and Mary his wife were seized in fee of the freehold messuage and hereditaments thereafter described, Robert Forrester and Mary his wife conveyed the Ouseby estate by way of mortgage to George Teasdale to secure the repayment of 800*l.* then advanced to them by him. This deed was duly acknowledged by Mary Forrester.

By an indenture, dated 14th Feb. 1872, and made between Robert Forrester and Mary his wife of the one part, and George Teasdale of the other part, Robert Forrester and Mary his wife

further charged the Ouseby estate with the repayment of the sum of 600*l.* then advanced to them by him. This deed was also duly acknowledged by Mary Forrester.

On the occasion of the mortgage some of the title deeds were handed over to George Teasdale, but the existence of the settlement was suppressed. In fact, Robert Forrester, in answer to inquiries, had stated that no settlement had been made before the marriage in pursuance of the direction contained in the will.

On the 22nd Oct. 1874, Robert Forrester was adjudicated bankrupt, and John Kidd was appointed trustee of his estate.

At the times of the execution of the indentures of mortgage and further charge, neither the plaintiff nor his solicitors had (until the year 1874) any knowledge or notice of the existence of the settlement. The bill charged that the settlement (except to the extent of the limitation therein contained in trust for Mary Forrester for life for her separate use) was not made in pursuance of any direction or condition imposed upon her by the will of James Shepherd, and was altogether voluntary and void as against the plaintiff under the statute 27 Eliz. c. 4, and prayed for relief accordingly.

The defendants denied that the settlement was voluntary, and contended that it was executed for valuable consideration, and that such valuable consideration and the particulars thereof were fully set forth and appeared in the settlement.

Shebbeare (Kay, Q.C., with him) for the plaintiff. —Two questions arise on this settlement. First, how far it was compulsory on the parties by reason of the direction contained in the will; secondly, how far it was the result of a bargain between the parties. As to the first point, assuming the direction in the will to amount to an executory or precatory trust the settlement purports to be made in pursuance of it, but in fact goes far beyond it. The words in the will are very simple, and do not restrict Mary Forrester's life interest, for the words "independently of her husband" cannot be read to authorise a restriction on anticipation, nor do the words "to be settled" import that any special provisions shall be inserted in the settlement. Whatever is not compulsory against me is voluntary (*Head v. Godlee*, 1 John. 536); whatever therefore is introduced into the settlement beyond the limitation to the separate use for life of Mary Forrester, with a testamentary power of appointment is purely voluntary, and the limitation in favour of the husband, the children, and the restraint on anticipation are purely voluntary, and as against me must be set aside under the statute of Elizabeth. Next, if the settlement was not compulsory on Mary Forrester, which it would seem it was not (*Magrath v. Morehead*, L. Rep. 12 Eq. 491; 24 L. T. Rep. N.S. 868), then the settlement, being post-nuptial, is voluntary as against me, because no valuable consideration was given for it, and it is expressed to be merely in pursuance of the will. So far, therefore, as it conflicts with the mortgage it must be set aside.

Sir H. Jackson, Q.C. and W. W. Cooper, for the trustees of the will, Mary Forrester, and her infant children. —Whether the directions in the will amount to a precatory trust or not (and we say they do not), valuable consideration was given

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for this settlement, so that it is not within the statute of Elizabeth. First, we contend that, under the devise, Mary Forrester took an absolute fee simple in the property, which was in no way curtailed by the precatory direction subsequently contained in the will, and that she married being seised in fee both at law and in equity. As to the valuable consideration, it is well settled law that if by a post-nuptial settlement husband and wife agree materially to alter their interests, that is a sufficient and valuable consideration for the deed. Here the husband surrenders his marital rights and takes a deferred life interest, and the wife agrees to modify her absolute interest. The case is on all fours with

Hewison v. Negus, 16 Beav. 594;

Atkinson v. Smith, 3 De G. & J. 186.

So that if, on *Hewison v. Negus*, the deed is good it cannot be set aside except perhaps as regards the husband's life interest, and as to that the plaintiff can have no relief now. Secondly, if we are to fall back on the deed as a proper execution of the executory direction, then the limitation to the wife for life for her separate use without power of anticipation with remainder to the children is a usual and proper limitation.

Stanley v. Jackman, 23 Beav. 450;

Lock v. Bagley, L. Rep. 4 Eq. 122;

Parker v. Carlier, 4 Hare, 409;

Townend v. Toker, 14 L. T. Rep. N. S. 531; 1 L. Rep. Ch. App. 446;

Rasher v. Williams, 32 L. T. Rep. N. S. 337; L. Rep. 20 Eq. 218;

Sugden, V. & P. 14 edit. p. 718;

Turnley v. Hooper, 8 Sm. & Giff. 349.

The trustee in bankruptcy having disclaimed all interest in the subject matter of the suit, did not appear.

Shebbeare, in reply.

BACON, V.C.—I think the only question is whether or not there was a valuable consideration for the settlement; and I am bound to say reluctantly, as one always must be in such a case of fraud as this is, that I am bound by the law and the authorities. It is settled that if husband and wife, each of them having interests—no matter how much, or what degree, or of what quality—come to an agreement which is embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without valuable consideration. I quite agree, with regard to the testator's will, that what the wife was not obliged to do she could not be compelled to do, but was free to do of her own will. It was open to her to execute a voluntary settlement, or to enter into a bargain with her husband as to what limitations should be expressed in the settlement; and if it is made on a contract between husband and wife without giving the degree of value on one side or the other, that cannot be called a transaction without valuable consideration. But the settlement provides for an interest for life for the husband after the death of the wife, which would be as valuable for anything I know as his tenancy by the courtesy. They were the parties to settle that bargain between themselves, and in the absence of fraud (and there is no suggestion of fraud as far as this settlement is concerned) they have made that bargain. Whatever may have happened since, there is a good deed which carried the matter into effect, and it is for valuable consideration. It is only upon the ground

of its being not for a valuable, but for a voluntary consideration, that the statute of Elizabeth applies. Then, by the facts in this case it is established that there was a valid bargain between husband and wife which amounts to a valuable consideration from each of them, and that takes the settlement out of the statute and makes it valid, although the suppression of it was fraudulent. The bill therefore must be dismissed. As to the costs, the trustees of the settlement must have their costs. It was their duty to come here and maintain it, and they have done so. The plaintiff's right to a decree against the life interest of the husband in the event of his surviving his wife will not be prejudiced by anything done to-day.

Solicitors for the plaintiff, *Johnston and Harrison*.

Solicitor for the defendants, *T. L. Morris*.

(Before Vice-Chancellor HALL.)

Saturday, Nov. 11.

CHANDLER v. HOWELL (a)

Will—Mortmain Act—Interest in land—Mortgage of waterworks under Local Improvement Act.

A bequest of residuary estate to a charity included a sum of 400l., secured by a mortgage of such proportion of the works, rents, and rates, authorised to be made and levied by a Local Improvement Act, as the sum lent bore to the whole of the money borrowed or charged upon the security of the same.

Held, that this was an interest in land within the Mortmain Act.

ANNE PUGHE, who died in Jan. 1874, devised and bequeathed her residuary real and personal estate to the defendant, on trust to sell and convert and invest the proceeds, and out of the fund thus formed (in the will called "her general trust fund") to pay her funeral and testamentary expenses, debts, and legacies, and also two annuities, the principal sums producing which annuities were to sink into the general trust fund after the deaths of the respective annuitants. Subject to the above, the general trust fund was to be divided into moieties, one of which was to be paid to the Brompton Hospital for Consumption, on condition of that institution establishing and maintaining a ward to be called the "Maria Pughe Ward," and the other moiety to be paid to the National Hospital for the Paralysed and Epileptic, on condition of its establishing and maintaining a ward to be called the "Anne Pughe Ward."

The testatrix further devised and bequeathed all her residuary estate (if any) to the defendant, on trust for persons named in the will.

The suit had been instituted by the trustees of the National Hospital, for the administration of the testatrix's estate. The chief clerk had certified that the personal estate of the testatrix, at the time of her death, included a sum of 400l., due from the corporation of Aberystwith, and secured by a mortgage of such proportion of the works, rents, and rates, by the Act passed 5 & 6 Will. 4, intituled "An Act for Improving and Regulating the Town of Aberystwith, and for Supplying the Inhabitants thereof with Water," authorised to be erected, reserved, made, and collected, as the said sum of 400l. should thereafter bear to the whole

(a) Reported by H. C. DRAKE, Esq., Barrister-at-Law.

amount borrowed or charged upon the security of the same works, rents, or rates; together with a sum of 22l. 7s. 10d. for interest, which had accrued due thereon to the day of the testatrix's death.

The form of mortgage was given in the 150th section of the Act. By it, the commissioners, acting in execution of the Act, granted and assigned unto the mortgagee such proportion of the works, rents, and rates, as the sum lent should bear to the whole sum charged on the works, &c., to be had and holden from the date of the mortgage until the sum lent, with interest, should be fully repaid and satisfied.

The case now came on for further consideration, and the principal question was, whether this mortgage was, by virtue of the Mortmain Act, excluded from the bequest to the charities.

Dickinson, Q.C. and *J. A. Roberts*, for the National Hospital.—This security is not within the Mortmain Act. The object of it was to give the mortgagee, if unpaid, a right to impound the rents and tolls payable under the Aberystwith Improvement Act; but it was never intended that he should be able to seize the land and works themselves, and thus stop the supply of water to the town. The commissioners are in fact a trading company, and it is well settled that the debentures of such a company are not in any case within the Mortmain Act. The mortgage is a mortgage of the "undertaking" of the commissioners; and, consequently, as laid down by Cairns, L.J., in *Gardner v. London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 552; L. Rep. 2 Ch. 201), is only a pledge of a fruit-bearing tree, the produce of which alone is the fund dedicated by the contract to secure and pay the debt. Moreover, the 50th section of the Improvement Act imposes a penalty on the commissioners if they shall neglect or refuse to supply water on payment of the specified rates. So that, if a mortgagee were to take possession of the land under his mortgage deed, he, as a grantee of the commissioners, and standing in their place, would be liable to a similar penalty; and it is absurd to suppose that the Act contemplates such a state of things as that. They cited also

Myers v. Perigal, 2 De G. M. & G. 599;

Bunting v. Marriott, 19 Beav. 163;

Walker v. Milne, 13 L. T. Rep. 542; 11 Beav. 507;

Edwards v. Hall, 26 L. T. Rep. 170; 6 De G. M. & G. 74;

Holdsworth v. Davenport, 35 L. T. Rep. N. S. 319; L. Rep. 3 Ch. Div. 185;

Entwistle v. Davis, L. Rep. 4 Eq. 272.

Kekewich, for the Brompton Hospital, took the same line of argument.

Morgan, Q.C. and *Elphinstone*, for the defendant.—We admit that there are cases in which the mortgage debentures of a trading company are not within the Mortmain Act; but this is not one of them. Here, to use the illustration already given, there has been a mortgage of the tree itself, not merely of its fruits. The 25th section of the improvement Act vests in the commissioners all present and future squares, roads, streets, lanes, and ways within the liberties of the town and the ground and soil thereof; and the 46th section gives them power to distrain for the water and gas rents in arrear, in the same manner as rents in arrear upon common demises may by law be recovered. Then, the form of mortgage makes them "grant" and assign the works, &c., to the mort-

gagee, his executors, administrators, and assigns. The debenture of a railway company is altogether different; for instance, it does not include the surplus lands of the company. Hence *Gardner v. London, Chatham, and Dover Railway Company* (*ubi sup.*), and the other cases referred to by the other side, have no application here. They cited

Knapp v. Williams, 4 Ves. 429n.;

Howse v. Chapman, 4 Ves. 542;

Finch v. Squire, 10 Ves. 40;

Ashton v. Lord Langdale, 17 L. T. Rep. 175; 4 De G. & Sm. 402;

Ion v. Ashton, 28 Beav. 379.

Dickinson, Q.C., in reply.

HALL, V.C.—The question is, whether the securities given under this Act, in the form prescribed by it [His Lordship read the 150th section], are capable of being disposed of by will in favour of charities; that is, whether or not they come within the provisions of the Statute of Mortmain. Now, the cases on this subject are not very uniform. The earliest is that of *Knapp v. Williams* (4 Ves. 429n.), which was decided in the year 1798. In his judgment in that case, Lord Eldon says: "It occurs to me that it had been determined that a mortgage of turnpike tolls is within the statute. The mortgagee would have a right to come into this court to have an account and a receiver appointed. . . . Consider what the point of law is from the nature of the interest. It is not at all within the mischief; but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the Act, these tolls, granted in perpetuity, are certainly a hereditament; it is in its nature an interest affecting land." The next case is *Howse v. Chapman*, in the same volume (p. 542). One question there was as to a charitable bequest of bonds given by the Commissioners for the Improvement of the City of Bath, and according to the report, that bequest was held void. *Knapp v. Williams* is referred to as an authority for that decision. So there are two decisions of Lord Eldon, one on turnpike bonds, the other on city improvement bonds, both of which are against the plaintiff; and they were followed in *Finch v. Squire* (10 Ves. 40). The question was again considered in *Myers v. Perigal* (16 Sim. 532). There it was held that a debenture of a railway company was not within the Statute of Mortmain. But the Vice-Chancellor puts his decision on grounds which do not embrace the securities in this case; for in his judgment he says (p. 541): "The Act says that in case the same or any part of it (the interest) shall be behind and unpaid for the space of twenty-one days after demand thereof, two or more justices of the peace, on request to them made by or on behalf of any mortgagee whose interest shall be so in arrear, shall appoint one or more person or persons to receive the whole or such part or parts of the said rates as are liable to pay such interest so due and unpaid as aforesaid. The language, you will observe, is to receive such part or parts of the said rates as are liable to pay the interest. But by the debenture in question, the rates are not made liable at all. It contains nothing that amounts either to an assignment of rates or a declaration that they shall be liable." That being his view, the clause here is not within it; because this is a mortgage of the actual "works, rents, and rates" of the commissioners. That case is, therefore, no authority for holding that bonds

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such as these are not within the statute. On the contrary, it is an authority the other way. Then there is the case of *Ashton v. Lord Langdale* (17 L. T. Rep. 175; 2 De G. & Sm. 402), where it was held that railway debentures (not being mortgages) are not within the Act. But in a subsequent case of *Re Lungham* (10 Ha. 446) a bequest of securities upon the tolls, rates, and duties, and upon the general estate of a Canal Navigation Company, created by assignment thereof by way of mortgage, was held to be void. And a similar decision was come to by Wood, V.C. in *Thornton v. Kempton*. On the other hand, in *Walker v. Milne* (13 L. T. Rep. 542), Lord Langdale, M.R., held that dock and canal shares and bonds secured by an assignment of the rates were not an interest within the statute. But *Ion v. Ashton* (28 Beav. 379) a later case, is a decision the other way. *Bunting v. Marriott* (19 Beav. 163) and *Edwards v. Hall* (26 L. T. Rep. 170; 6 De G. M. & G. 74), were cases of bequests of improvement bonds, and of shares in an incorporated company, both of which were held to be good. In the absence of authority, I think it may be said that there may well be a difference between the shares of one company and those of another. An interest in a company consists generally of shares in a trading company; and the nature of these varies according to the constitution of the company. I need not say any more about the cases which form a series of decisions on this point, until I come to the case of *Holdsworth v. Davenport*, in which Malins, V.C. decided that a debenture of a waterworks company, by which the undertaking, including the town rates, was charged with the repayment of the sum advanced, was not an interest in land within the Mortmain Act. In commenting upon *Gardner v. London, Chatham, and Dover Railway Company*, the learned judge says that "it decided that a mortgage debenture made by a railway company in the form given in Schedule C of the Companies Clauses Consolidation Act 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys, or interim rents." And he went on to say that in his opinion the assignment in the case before him did not give the mortgagee a right to enter upon the land itself, and therefore left the parties in the same position as in *Gardner v. London, Chatham, and Dover Railway Company*. Now, in the last mentioned case the security was one which, according to the construction put upon it by the court, did not give to the plaintiff the right which he was seeking to enforce, of having a receiver of the undertaking appointed. To my mind that observation has an important bearing upon the question whether the case of *Gardner v. London, Chatham, and Dover Railway Company* applies here: because it seems to show that where a mortgagee is in a different position as to his remedies, and has a right to a receiver, he is substantially a person having an interest in land. Now, after the decision of Lord Eldon that a mortgagee of turnpike tolls has a right to have a receiver appointed, I cannot, consistently with authority, hold myself at liberty to say that the debentures by which these tolls are secured do not give the mortgagee a right to have a receiver appointed. It follows that, in my opinion, these

debentures are within the Statute of Mortmain, and I must decide accordingly.

Solicitors for the charities, *Barton and Pearson; Norton, Ross, and Co.*

Solicitors for the defendant, *Balton, Ebbins, and Busk, for Howell and Morgan, Machynlleth.*

QUEEN'S BENCH DIVISION.

Tuesday, Nov. 28.

REG. ON THE PROSECUTION OF OWEN v. MAYOR, ALDERMEN, AND BURGESSES OF WELCHPOOL. (a)

Municipal Corporations Act (5 & 6 Vict. c. 76) s. 52—*Debtors Act* 1869 (32 & 33 Vict. c. 62) s. 21—*Disqualification of town councillor by composition with creditors*—22 Vict. c. 35, s. 8, subsect. 4—*Retiring councillor—Election of town councillor—Corrupt Practices (Municipal Elections) Act* (35 & 36 Vict. c. 60), s. 12—*Avoidance of elections—Election petition—Mandamus.*

By sect. 52 of the *Municipal Corporations Act* 5 & 6 Will. 4, s. 76, it is enacted that a town councillor who becomes bankrupt or compounds with his creditors by deed shall "thereupon immediately become disqualified, and shall cease to hold the office of such councillor, and the council thereupon shall forthwith declare the office void, and shall signify the same by notice, under the hands of three or more them, countersigned by the Town Clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void," but that "every person so becoming disqualified and ceasing to hold such office on account of his being so declared bankrupt or having compounded with his creditors aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office." And by sect. 21 of the *Debtors' Act* 1869 (32 & 33 Vict. c. 62) those provisions are extended to persons who have compounded with their creditors "whether by deed or otherwise."

By 22 Vict. c. 35, s. 8, subsect. 4, it is enacted that if at any election of councillors to be held for any borough or ward, no person be duly nominated for election, "the retiring councillors shall be deemed to be re-elected, and the mayor, &c. shall publish a list of the names of all the persons so elected."

J., a town councillor of the borough of Welchpool, whose term of office would expire by lapse of time on the 1st Nov. 1876, on the 29th June in that year filed a petition for liquidation of his affairs by arrangement. On the 29th July a statutory majority of his creditors by special resolution declared that his affairs should be liquidated by arrangement, and his discharge was granted to him on the 29th Sept. No declaration was made by the council under sect. 52 that the office held by him was void under that section, but he did not, in fact, act as town councillor after the institution of these proceedings with his creditors until after the 1st Nov.

On the 1st Nov. the offices of three other councillors besides that of J. would become vacant by lapse of time, and for these four vacancies seven candidates presented themselves for election. In consequence of all the candidates being nominated by one and the same person, contrary to the provisions of the Act regulating the elections, the

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

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mayor declared no one to be duly nominated. Thereupon the returning officer, under 22 Vict. c. 35, s. 8, subsect. 4, declared that the retiring councillors, among whom he included J., had been re-elected to their offices. Upon a rule for a mandamus calling upon the mayor, &c. of Welchpool to declare the office of councillor lately held by J. void, as required by 5 & 6 Will. 4. c. 76, s. 52, and to proceed to the election of another person to supply such vacancy,

Held, on the first part of the rule, that the office "lately held by J." was in fact filled up, and that the time had, therefore, passed when it could be declared void.

Held also that the mandamus would not lie for a fresh election, for inasmuch as the council had not declared J.'s office void under sect. 52, the office was still full on the 1st Nov.; that J. was, therefore, a retiring councillor within the meaning of 22 Vict. c. 35, s. 8, subsect. 4, and under that section was properly declared to be re-elected to his office.

By the Corrupt Practices (Municipal Elections) Act (35 & 36 Vict. c. 60), s. 12, it is enacted that the election of any person at an election for a borough may be questioned by petition before an election court constituted under that Act on the ground that the election was wholly avoided because "he was, at the time of the election, disqualified for election to the office for which the election was held," and that "an election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a quo warranto or by or in any other process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act."

Held that if there were any remedy, it would have been under this section by petition and not by mandamus.

Quere, whether the mandamus should not have been addressed to the town council, instead of to the mayor, &c.

RULE calling upon the mayor, aldermen, and burgesses of the borough of Welchpool in the county of Montgomery to show cause why a writ of mandamus should not issue directed to them and every of them having a right so to do to declare the office of councillor of the said borough, lately held by Thomas Pugh Jones, void as required by the statute 5 & 6 Will. 4, c. 76, s. 52; and further commanding them, and every of them having a right to vote at or to do any act necessary to be done in order to the election of a councillor of the said borough, to proceed to the election of another qualified person as a councillor to supply such vacancy.

On the 1st Nov. 1873, Mr. Thomas Pugh Jones was elected a councillor of the borough of Welchpool for the term of three years; in due course, therefore, his term of office would expire on the 1st Nov. 1876.

On the 29th June 1876, at which time he was still a councillor of the said borough, Thomas Pugh Jones filed a petition for liquidations of his affairs with his creditors by arrangement and composition. On the 29th July a general meeting of his creditors was held, in which the statutory majority then assembled by special resolutions pursuant to sect. 125 of the Bankruptcy Act 1869 declared that his affairs should be liquidated by arrangement and not in bank-

ruptcy, and also that his discharge should be granted to him on the 29th Sept. His affairs were in consequence so liquidated, and he obtained his certificate of discharge, but through some delay or inadvertence his certificate was not granted him until the 6th Nov. No point, however, was raised on that, and in the argument of this rule it was taken that he had obtained his certificate on the 29th Sept.

On or about the 16th Aug., after these proceedings of Thomas Pugh Jones had been begun, D. Owen called upon the town council of Welchpool to declare the office held by Thomas Pugh Jones void under 5 & 6 Will. 4, c. 76, s. 52. (a)

The town council, knowing that the term of office of Thomas Pugh Jones would of itself expire on the 1st Nov. took no action under sect. 52 of 5 & 6 Will. 4, c. 76, but simply proceeded to the nomination of candidates to fill up the vacancies consequent upon the retirement of Thomas Pugh Jones and three other councillors whose term of office also expired on the 1st Nov. For these four vacancies seven candidates presented themselves; but in consequence of one nominator nominating all the candidates, contrary to the provisions of the Act regulating the elections, the mayor declared all the nominations bad, and that no one was duly nominated (b).

The returning officer, on the 1st Nov., declared the four retiring councillors, Thomas Pugh Jones being of the number, to be all re-elected to the

(a) Provided always and be it enacted, that if any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors or shall compound by deed with his creditors, or, being mayor, shall be absent for more than two calendar months, or, being an alderman or councillor, for more than six months, at one and the same time (unless in case of illness), from the borough from which he shall be mayor, alderman, or councillor, then and in every such case, such person shall thereupon immediately become disqualified and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid; and in the case of such absence shall be liable to the same fine, to be recovered in the same manner, as if he had refused to accept the said office; and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void; but every person so becoming disqualified and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any Act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office.

And by 32 & 33 Vict. c. 62, s. 21, it is enacted that The provisions of the Act of the session of the 5 & 6 Will. 4, c. 76, for the regulation of municipal corporations, sects. 52 and 53, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt, or having compounded by deed with their creditors, shall extend to every arrangement or composition by a mayor, alderman, or town councillor with his creditors under the Bankruptcy Act 1869, whether the same be by deed or otherwise.

(b) 22 Vict. c. 35, s. 4, enacts as follows: At any election of councillors to be held for any borough or ward, if no persons be so nominated, the retiring councillors shall be deemed to be re-elected, and the mayor or alderman and two assessors, as the case may be, shall publish a list of the names of all the persons so elected, not later than eleven o'clock in the morning of the said day of election

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office of town councillors, and made the following declaration to that effect:

Borough of Welchpool—Municipal Election 1876.

I, the undersigned Edward Thomas David Harrison, returning officer of the said election, hereby declare that Mr. Edwd. Maurice Jones, solicitor, Mr. Saml. Davies tailor and draper, Mr. Wilm. Beattie, farmer, and Mr. Thos. Pugh Jones, chemist and druggist, were this day elected councillors of the said borough.

Dated 1st Nov. 1876.

E. T. D. HARRISON.

After the said Thomas Pugh Jones had been so declared to be re-elected under the provisions of 22 Vict. c. 35, sect. 8, sub-sect. 4, D. Owen called upon the council to declare this election void, and to proceed to the election of another councillor in his place, upon the ground that he was not a retiring councillor within that section, seeing that by his proceedings in liquidation his office had become void, and that he could not therefore be re-elected under that section; and a rule *nisi* for a mandamus was afterwards obtained.

Mellor, Q.C. and *Channell*, now showed cause against the rule, nominally on behalf of the defendants, but virtually on behalf of Thomas Pugh Jones.—The election of Mr. Jones was in every way valid and cannot be impeached. The mere fact of his entering into an arrangement with his creditors does not make the office void, but simply disentitles him to act. The office is not void until the council have declared it to be void; "thereupon" it does become void, but not until that is done. It has been held that the fact of a man becoming bankrupt within sect. 42 of the Municipal Corporations Act does not make the office void, but that it remains full until it is declared void: (*Hardwicke v. Brown*, 28 L. T. Rep. N. S. 502; L. Rep. 8, C. P. 406.) As no such declaration was made, Mr. Jones's office remained full until the 1st Nov., although no doubt he could not, nor did he, act in his capacity of town councillor after he had begun his proceedings with his creditors. That being so, Mr. Jones—during the whole time up to the 1st Nov., on which day his term of office expired by lapse of time, and on which day the new election was held—was a "retiring councillor" within the meaning of 22 Vict. c. 35, s. 8, sub-sect. 4. There being then no one duly nominated at the fresh election, he would by that section be deemed to have been duly re-elected, and was so declared to be re-elected by the returning officer. Therefore the election was good and this rule for a mandamus should be refused. But then again this application is too late. It is an application for a rule for a mandamus to the Mayor, &c., of Welchpool to declare the "office lately held by Thomas Pugh Jones," void. But that office which they seek to have declared void is already a thing of the past. It has expired and has been filled up. What would be the use, if this mandamus were allowed to issue, of declaring that office void? Thirdly, a mandamus is not the proper remedy. If there be any remedy it is by a petition under the Corrupt Practices at Municipal Elections Act, 35 & Vict. c. 60, s. 12, which is as follows:

The election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the "court," on the ground that the election was as to the borough or ward wholly avoided by general bribery, &c., or on the ground that he was at the time of the election disqualified for election to the office for which the

election was held, or on the ground that he was not duly elected by a majority of lawful votes.

An election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a *quo warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act.

The effect of this section is to substitute a petition for any other process in cases within the section, which this obviously is; seeing that if they can impeach this election at all, it must be on the ground that "he was at the time of the election disqualified for the election." On this point he cited

Howes v. Turner, L. Rep. 1 C. P. D. 670.

Reg. v. Chitty, 5 A. & E. 609.

Charles and *McIntyre*, Q.C., in support of the rule. [*KELLY*, C.B.—Is this mandamus rightly addressed? Ought it not to be to the town council?] It is rightly addressed to the mayor, aldermen, and burgesses acting by their council. The town council are described in sect. 6 of the Act. In the analogous case of a mandamus to churchwardens it is addressed in a similar way. The practice always is to address a mandamus in this way. The corporation can do nothing without the town council, and in this case the mandamus is directed to "such of the burgesses who have a right to do the act." In *Reg. v. Mayor, Aldermen, and Burgesses of Oxford* (6 A. & E. 649), the mandamus was so addressed, and no objection taken. Now, as to the other points. In August Thomas Pugh Jones became disqualified to hold the office of town councillor. The town council ought to have declared the office void, and proceeded to a further election to fill the vacancy so caused. A substantial injustice has been done to the burgesses, which requires a remedy. It is contended on behalf of the plaintiff that this case may now be argued just in the same way as it could have been argued in September, and no act of the returning officer can affect that right. It is said the court will not make this rule absolute on account of what took place on 1st Nov. But there is no particular time mentioned in which the proceedings under sect. 52 are to be taken, and the town council can even now declare the office lately held by Jones void. Jones was not a retiring councillor at all within the meaning of sect. 8, sub-sect. 4 of 22 Vict. c. 35, but that is not enough to entitle them to proceed to a fresh election; they could not do so until they declared his office void. A retiring councillor within that section must mean one who is in reality a retiring councillor, and if the returning officer inserts in the list of retiring councillors the name of a man who is not a retiring councillor, we are entitled to ask for a mandamus. The election on 1st Nov. was only a colourable election, and the result of these proceedings will be to set it aside. As to the last point, there is nothing in the Corrupt Practices at Municipal Elections Act which precludes us from raising this question by mandamus. That Act applies only where the burgesses are assembled, and an election held, and a person is disqualified at the time of election. But it is not contended that Jones was disqualified on 1st Nov.; on the contrary, it is admitted that at that time he was qualified to be re-elected by a new election: but there was in fact no new election, the only election being the declaration by the returning officer that the retiring officers, among whom he named Mr. Jones, were duly elected.

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But we challenge that, in that he was not a retiring councillor. That being so, as Mr. Jones was not disqualified at the time of election, the Corrupt Practices Act does not apply, and we are entitled to proceed by mandamus. [KELLY, C.B.—But there has been an election in fact. Have you any authority for saying that a mandamus will lie where there has in fact been an election, and where the office is full, on the ground that the election was void?] *Reg. v. Mayor, &c., of Leeds* (11 A. & E. 512.) [CLEASBY, B., referred to *Reg. v. Mayor, &c., of Chester* (25 L. J. 61, Q. B.) to the contrary.] They also referred to
Cornar's Practice, 206, 207.

KELLY, C.B.—I am of opinion that the rule should be discharged. It is an application for a mandamus calling upon the mayor, aldermen, and burgesses of the borough of Welchpool to declare the office of councillor of the said borough lately held by Thomas Pugh Jones void as required by 5 & 6 Will. 4, c. 76, s. 52, and to proceed to the election of a new councillor. It may be doubted, perhaps, whether this mandamus is properly addressed to the mayor, aldermen, and burgesses, instead of being addressed to the town council, but I should be sorry to decide this case upon such a technical ground as that, even if it were quite clear that such was the case, and I therefore pronounce no opinion as to whom it should of right be addressed. The council are first called upon to declare the office of councillor lately held by T. P. Jones void. Now I am clearly of opinion that that part of the rule cannot be maintained. First, upon the ground that the time has passed; sect. 52 enacts, that upon the happening of the events in that section contained, the person doing them shall cease to hold the office, and "the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void." But of what use or consequence could such a declaration be now, when the office which the declaration is to make absolutely void is already an office which has ceased to exist? The power conferred on the town council, as provided for in sect. 52, is where the office has become vacant by reason of bankruptcy, &c., on the part of him who held the office, but now though he has ceased to have power to act in the office, yet the town council are called upon to make public declaration that it is void in order that, as provided by sect. 47, the borough may proceed to a fresh election. The office lately held by Jones, if not void, yet ceased to exist on the 1st Nov. It would be superfluous to allow a mandamus to issue for the purpose of having that office declared void. But, again, upon the terms of the Act, the office was an office which was conferred on Nov. 1, 1873; and it is the office conferred on him on that day that the council are called upon to declare void, not the office which he now holds, and which he was elected to on Nov. 1, 1876. Yet the terms of the mandamus would refer to that office. Therefore it is clear if the office had ceased already, it would be useless to declare it void. I think, on the ground that the time has passed when it is competent for the town council to give a declaration, the application for the mandamus cannot be maintained. But then comes the question whether

the mandamus will lie to declare "that the office is void, and further commanding them and every of them having a right to vote at or to do any act necessary to be done in order to the election of a councillor of the said borough to proceed to the election of another qualified person as a councillor to supply such vacancy." I am clearly of opinion that it cannot. Let us see what are the facts. First of all was this gentleman a town councillor, or had he ceased to be so on the 1st Nov.? If he still was a town councillor, then he was properly put among those who had retired under the provisions of the statute; and consequently no person being duly nominated, he, as well as the other retiring councillor by the terms of the Act, was deemed to be duly elected. The question then first arises, whether Jones did continue to be a town councillor on that day. Sect. 52 begins as follows: "If any person holding the office of town councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, &c., then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such councillor." Now if the provision had stopped there it might very reasonably have been contended that the office was at an end, and that he ceased to hold that office, but it goes on, "and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall 'thereupon' become void." How can it be contended that looking at the meaning of the word "thereupon" the office can be said to become void until all these acts have been done? For the statute says not only that the man shall cease to hold the office, but that a public notice is to be given that the office is void, and that "thereupon" the office shall become void. Therefore it does not become void until there has been a public declaration to that effect. When we look to the object of it all, it becomes clear. Sect. 47 provides that occasional vacancies of councillors shall be filled up by fresh election. Therefore, taking the sections together it really comes to this: if the man cease to hold the office, the council shall declare the office void, and that then within ten days a new election shall be held. The office here still existed until and on Nov. 1. The effect of this is that the term of office then ceased, and by the legal effect of that the officers retired, and on Nov. 1, a new election was held. I am clearly of opinion that all four still continued in the office of town councillor on Nov. 1, and the office only became vacant so as to authorise a new election on Nov. 1. But then there is this further question; supposing by reason of the words in sect. 52, it could be held that Jones had ceased to hold the office before Nov. 1, and was not a retiring officer on Nov. 1, and consequently this election might be questioned, can the validity of this election be impeached by mandamus, or must it be under the old law by a *quo warranto*, and now under the Corrupt Practices Act by petition? I asked the counsel for the applicant in the course of the argument if they could show me any authority for the proposition that a mandamus will lie to declare an election void, when there has been in

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fact an election. I was not aware that the contrary of that proposition had been so well put as it is in the case of *Reg. v. Mayor, &c., of Chester* (25 L. J. 61, Q. B.), to which my brother Cleasby has called my attention. There it was held that "it is an inflexible rule of law that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information; and that a mandamus will not lie unless the election can be shown to be merely colourable." It appears to me, therefore, that where there has been an election *de facto*, an election in fact acted on, that there is no authority for holding that it is impeachable by mandamus, but if can only be impeached by *quo warranto* under the old law or now by petition under the Corrupt Practices at Municipal Elections Act. If authority were wanting the case of *Hardwick v. Brown* (L. Rep. 8 C. P. 406) would be sufficient on the point whether the office was still full on Nov. 1. The facts in that case were totally different to those now before us, and were in substance as follows: B., a town councillor of Newcastle, in July, 1872, made a composition with his creditors under sect. 126 of the Bankruptcy Act 1869, under which a resolution was come to, and registered on the 23rd Sept. On the 4th Nov. B. placed the resignation of his office of councillor in the hands of the town clerk, and announced the resignation by advertisement on the 6th Nov., and by the same advertisement offered himself for re-election at the annual meeting of the town council. On the 9th Nov. B.'s resignation was accepted, and on the 18th, there having been no declaration by the council that the office was void, he was re-elected a town councillor. It was held that B., having by reason of his having compounded with his creditors, ceased to hold the office of councillor, was incapable of resigning it; and the council not having pursued the course pointed out by sect. 52 of the Municipal Corporations Act, the election was void. It will be seen, therefore, that though the facts were different, it was necessary to decide whether the office was void or not; and it was held that it was not void until so declared by the council, under sect. 52. Bovill, C.J. in his judgment expressly holding this. As there was no such declaration in this case, I am of opinion that this office was full up to the date of the new election, and that Mr. Jones was among the retiring officers on Nov. 1, and was re-elected on that day. His office, therefore, cannot be impeached.

CLEASBY, B.—I am of the same opinion. If the only application were for a mandamus calling upon the mayor, aldermen, and burgesses of Welchpool, to hold a fresh election, I cannot think it could be granted. Everything connected with this election was done quite regularly. The case is entirely distinguishable from that of *Reg. v. Mayor, &c., of Leeds* (11 A. & E. 512.) In that case the election was complete. The facts of that case appear to have been shortly these. On an election of councillors for a ward in the borough, the presiding aldermen and two assessors, before two in the afternoon of the day next but one after the election, published under 5 & 6 Will. 4, c. 76, s. 85, a declaration containing a list of the councillors elected, which declaration included the name

of P.; after two o'clock the aldermen and assessors, on the discovery of a supposed error in counting the legal votes, signed and published a second list, omitting the name of P., and substituting that of R. P. afterwards made the declaration required, and R. did the same afterwards; upon P. claiming to act, the mayor and town council refused to permit him to do so, and allowed R. to act. On application by P. for a mandamus to receive and count his vote, it was held that the office was not full; and that the proper remedy was by mandamus, the second publication and subsequent acting by or on behalf of R. being merely void, and P. being in *de facto*. The Attorney-General (Sir John Campbell) in showing cause cited *Reg. v. Mayor of Oxford* (6 A. & E. 349), where it was held that if a councillor be ousted and another elected, and such election be merely colourable, a mandamus will go to permit the ousted party to exercise his office, not to restore him to his office; though if the ousting and election be *bonâ fide*, the proper remedy is, not by mandamus to restore the ousted party, but by a *quo warranto* against him who is in *de facto*. To this Patterson, J. replied, "There the regular forms had been gone through. According to that the town council might admit a party who had not a single vote, and then say that the office was full. Potts was in *de facto*, and the *quo warranto* should have been against him." That was the real ground of their decision. I think, therefore, the mandamus to compel a fresh election will not lie. But that is not all. The mandamus also seeks to compel the town council to do this ministerial act, viz., to declare the office lately held by Mr. Jones to be void, or in other words to declare that on Nov. 1, this gentleman could not succeed to the office by virtue of being a retiring councillor. Now, in the first place, it is quite clear that this can only have reference to a declaration arising from Mr. Jones's bankruptcy during the period of his holding his office, and can have no reference to the election which took place afterwards. In fact the object of this mandamus is to compel the town council now to make a declaration which they ought to have made before. I quite agree with what has been said by the Lord Chief Baron, that this office was in contemplation of law full up to the 1st Nov. Now it is to be taken that before the 1st Nov. Jones had obtained his certificate, and therefore was capable of being elected on that day to his own vacant office, and therefore if, previous to the 1st Nov., the town council had in fact declared his office to be void, he might have been re-elected to the vacant post. Under these circumstances, there being no new nominations, the retiring councillors are by the statute declared to be deemed re-elected. Now I will not repeat what has been said by the Lord Chief Baron as to Mr. Jones's office being continuing and full up to 1st Nov., but will content myself by referring to the case of *Reg. v. Mayor, &c., of Leeds* (7 A. & E. 963), where the point appears to have arisen, and been discussed. For these reasons I think this rule ought to be discharged.

Rule discharged.

Solicitors for plaintiff, Jones, Blazland, and Son, for Charles Jones, Welchpool.

Solicitors for defendant, Milne, Riddle and Mellor, for E. Maurice Jones, Welchpool.

COMMON PLEAS DIVISION.

Friday, Nov. 17.

DAWSON (app.) v. ROBINS (resp.) (a)

*Parliamentary franchise — County vote — Rent-charge.**The grantee of a freehold rentcharge of the yearly value of 40s. or upwards issuing out of a reversion is entitled to vote at county elections.*

APPEAL from the decision of a revising barrister.

The following case was stated for the opinion of the court.

At a court held at Southampton on the 22nd Sept. 1876 by me, the barrister appointed to revise the lists of voters for the Southern Division of the county of Hants, objection was duly made to the claim of Oliver Robert Dawson to have his name inserted in the list of voters in the parish of St. Mary for the said Southern Division of the said county.

The qualification stated by the said Oliver Robert Dawson in his claim was a "freehold rentcharge" issuing out of houses and land Itchen Bridge-road and Dock-street, owner Henry Compton.

It appeared that by an indenture bearing date 29th Sept. 1874, the reversion in fee in the said premises was conveyed to the said Henry Compton, subject to certain leases of 1000 years each, created by indenture of demise bearing date 29th July 1864. In each of these leases a ground rent was reserved, and in each was contained a power of re-entry in default. These leases are still subsisting.

By indenture bearing date the 15th Jan. 1875, the said Henry Compton granted to the said Oliver Robert Dawson a yearly freehold rentcharge of 2l. 10s. charged upon the said premises. The said indenture also contained a power of distress in default of payment of the said rentcharge.

Copies of the aforesaid indenture of the 29th Sept. 1874, and of the 15th Jan. 1875, comprised in schedule B. are annexed to this case.

It was not disputed that the reserved groundrent was amply sufficient to meet this and other rentcharges granted about the same time and issuing out of the same premises, and that the amount due to the said Oliver Robert Dawson and the other grantees had been actually paid to each of them respectively by the agent of the said Henry Compton.

The claims of four other persons whose names are set out in the schedule A. hereunto annexed were objected to on the same grounds.

I was of opinion that considering the nature of Henry Compton's interest the power of distress contained in the indenture of the 15th Jan. 1875, was nugatory, and disallowed the claims of the said Oliver Robert Dawson and of the said four other persons to be inserted in the said list.

The cases of the four other persons mentioned in schedule A. depending upon the same decision are consolidated with this case.

If the court be of opinion that my decision was wrong the register is to be amended by inserting the names of O. R. Dawson and of the four other persons in the said list.

Ridley, for the appellant.—The appellant is entitled to have his name placed on the register.

A rentcharge is a tenement within the meaning of 10 Hen. 6, c. 2, and its nature is not altered by the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36.

Thomas v. Sylvester, L. Rep. 8 Q. B. 368; 42 L. J.

237, Q. B.; 29 L. T. Rep. N. S. 290;

Whitaker v. Forbes, L. Rep. 10 C. P. 583; 44 L. J.

332, C. P.; 33 L. T. Rep. N. S. 582.

[He was stopped by the court.]

Chester, for the respondent.—The grantee of such a rentcharge as this has merely a personal remedy against the grantor; he has no remedy against the land itself. [LINDLEY, J.—He might obtain a decree for a sale to raise the arrears *White v. James* (26 Beav. 191). Lord COLERIDGE, C.J. referred to *Dodds v. Thompson*, L. Rep. 1 C. P. 133; 35 L. J. 97, C. P.] *Thomas v. Sylvester* (*ubi sup.*) is distinguishable, because there a good rentcharge was created out of the seisin in fee by the Statute of Uses. [Lord COLERIDGE, C.J.—Can no one create a valid rentcharge except a yeoman farming his own land?] Not for this purpose. This is merely a payment in gross, and is not a tenement within 10 Hen. 6, c. 2, so as to confer a right to vote. He also referred to Bacon's Abridgment "Rent" B.; *Steele v. Bosworth* (34 L. J. 57, C. P.); Hopwood and Philbrick's Registration Cases 106 s. c.

Lord COLERIDGE, C.J.—In this case I am of opinion that the decision of the revising barrister was wrong, and ought to be reversed. We must look at the words of the statute in order to see whether the person objected to was qualified to vote. The statute 10 Hen. 6, c. 2 says that the persons who are to vote are those who have a "frank tenement" of the value of forty shillings a year. Now has the appellant in this case such a "frank tenement"? By the deeds which accompany the case it appears that Mr. Compton held the land in fee subject to certain leases, that is, he was the reversioner. Then he creates these rentcharges by conveyances each of which is sufficient to give a "frank tenement" of the value of 2l. 10s. a year issuing out of the land, for there is a good conveyance, and the grantee receives the profits of the interest conveyed, which is a rentcharge of 2l. 10s. a year, and the land is sufficient to pay the amount. I am, therefore, of opinion that the appellant was entitled to vote.

LINDLEY, J.—I am of the same opinion. There are two questions to be considered, first, what sort of interest does the appellant take, and secondly, what is the value of that interest? Can any conveyancer say that this is not a freehold interest, being a rentcharge in fee simple charged on the reversion? Then as to the value. The property is of ample value to pay the yearly sum which is charged upon it, the appellant is in receipt of the profits, he has remedies to enforce payment, and to my mind he has a remedy against the land, for I think he could, if it were necessary, get a sale of an aliquot part of the land to raise the value of the interest to which he is entitled. I am therefore of opinion that the decision of the revising barrister ought to be reversed.

Judgment for the appellant.

Solicitors for the appellant, *Roberts and Barlow*; for *Coxwell, Bassett, and Stanton*, Southampton.

Solicitors for the respondent, *Bradby, Robins, and Co.*, Southampton.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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HOLMES v. HARVEY.

[Ex. Div.]

EXCHEQUER DIVISION.

Tuesday, Nov. 21.

HOLMES v. HARVEY. (a)

Transfer of actions to Chancery Division—Specific performance of agreement—Fraudulent representation—Trial by jury—Judicature Act, sect. 34, Order LI., rule 2.

If in an action in a Common Law Division, where a cross action has also been brought in the Chancery Division, it appears that the whole dispute between the parties can be more conveniently disposed of in the Chancery Division, an order transferring the cause to that division will be made, even though there be a question in the cause which might be properly tried by a jury in the Common Law Division.

Therefore where an action was brought in this division for breach of a certain agreement, and for a fraudulent and false representation concerning the subject matter of that agreement, and a cross action was brought in the Chancery Division for the specific performance of the same agreement.

Upon an application to transfer the action to the Chancery Division the court made the order.

APPEAL from an order of Lopes, J., at chambers, refusing to transfer the action to the Chancery Division, under Order LI., r. 2 of the Judicature Act.

The action (writ issued 29th March) was for the breach by the defendant of an agreement for the sale of the business of a fellmonger and leather dresser, and to procure a lease for the plaintiff; and also for a false and fraudulent representation as to the extent and value of the said business. The defendant in his statement of defence besides denying the agreement and representation, answered: "That before the commencement of this action the defendant had threatened to commence proceedings against the plaintiff for specific performance of the said agreement, in the Chancery Division of the High Court of Justice, and the plaintiff has commenced this action in order to anticipate and embarrass the defendant in obtaining specific performance of the said agreement. The defendant is willing to have his claim to such specific performance or damages dealt with either by way of counter-claim in this action or in the action for specific performance, commenced in the Chancery Division as may be most convenient to this honourable court, and the defendant submits that this action should be transferred to the Chancery Division." On this statement of defence issue was joined.

On the 15th May, the defendant brought a cross action in the Chancery Division claiming by his statement of claim delivered about the end of May, a specific performance of the said agreement, an injunction to restrain the plaintiff from drawing out of the said business more than 200l. a year, an inspection of the books relating to the business, and damages in addition to or substitution for specific performance. To this the plaintiff answered on the 29th June. Issue was joined on the 7th Nov.

On the 13th Nov. a summons was taken out before Lopes, J., at chambers, to transfer the action to the Chancery Division, but the learned judge refused to make the order.

Poultier for the defendant now appealed from

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

that decision.—This case is clearly one which ought to be transferred to the Chancery Division under Order LI., rule 2. The claim in the Chancery suit is for specific performance of an agreement which, by sect. 34 of the Judicature Act 1873, is a proceeding specially assigned to the Chancery Division. The learned judge at chambers refused to make the order on the ground that the case involved a question of fraud, which ought to be tried before a jury. But fraud is one of the principal subjects of the jurisdiction of the Chancery Division, and could be as well dealt with there as it could be here. If the case be transferred, the whole dispute can be settled at once, while it certainly cannot if it remains in this court. He relied on *Hillman v. Mayhew* (34 L. T. Rep. N. S. 256; L. Rep. 1 Ex. Div. 132).

Hughes for the plaintiff.—The learned judge at chambers was right in not making the order. Here there is a question of fraud involved, and one, therefore, which should certainly be submitted to a jury. But if the case be transferred to the Chancery Division, it will not be so tried, as the Chancery Division judges have held that they have no power to try a case with a jury.

Clarke v. Cookson, 34 L. T. Rep. N. S. 646; L. Rep. 2 Ch. D. 746;

Cave v. Mackenzie, Weekly Notes, 18th Nov. 256.

CLEASBY, B.—I am of opinion that the order ought to be made to transfer this case to the Chancery Division, subject to its obtaining the consent of the president of that division. The proceedings are taken on the same agreement in two divisions: in this division an action is brought for a breach of that agreement, and for a false representation concerning the subject matter of it; in the Chancery Division the proceeding is for a specific performance of the same agreement. Issue has been joined in both actions, and both are ready for hearing. It is for us to say whether both these proceedings shall go on, or to which division the whole dispute shall be transferred. In the first place I am quite clear as to this, that the two proceedings ought not to go on simultaneously, a practice which the Court of Chancery, before the Judicature Acts, always prevented by invariably insisting, whenever a cause was commenced in their court, on having all the proceedings connected with the dispute brought in their court. Now unless there be some good and particular reasons to the contrary, I think that this dispute ought to go as a whole to the Chancery Division, because, and that is the main reason, there is a suit for specific performance of the agreement, which forms the subject of the dispute, a suit which, by the Judicature Acts, is specially assigned to the Chancery Division. In a considered judgment in this court, in the case of *Hillman v. Mayhew* (*ubi sup.*) it is said, "The specific performance of contracts is one of the actions specially assigned to the Chancery Division, and if it had been otherwise, from the machinery at the disposal of that division such actions would be more conveniently disposed of there." That being so, when we find there are two proceedings going on simultaneously, one being a suit for specific performance, the other being for a breach of that agreement, what reasons are there to prevent our adopting the usual course, and transferring the action in this division to the Chancery Division? The first reason urged upon us for not adopting this course

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GRAHAM v. WILCOCKSON AND MUNSLOW.

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is that the time for making the transfer has elapsed, and that it is now too late for us conveniently to do so. No doubt the time to make the application would have been when issue was joined, but both the cases are ready for hearing, and I see nothing in that objection. But then it is said that a question of fraud arises which ought to be tried before a jury in this division. Now fraud is, and always has been, one of the main grounds of the jurisdiction of the court of equity, and it certainly would have been surprising if it had been said that that court was not capable of dealing with a question of fraud. When we find the case is one properly cognisable in the Chancery Division, we ought not, I think, to hesitate to send it there, simply for the reason that a fact arising in it might be properly tried at Common Law. That is not the proper reason, and I confess I am not disposed to place so much reliance on that argument as was done by Mr. Justice Lopes at chambers. The reason for transferring it to the Chancery Division is that the fact that the whole question can be properly disposed of there is more weighty than that one issue in the case can be more properly tried here.

HUDDLESTON, B.—I am of the same opinion. By Order LI., r. 2, "any action may, at any stage, be transferred from one division to another, by an order made by the court or any judge of the division to which the action is assigned." Now I cannot agree with Mr. Justice Lopes' view of the case, but I agree with my brother Cleasby that this action ought to be transferred to the Chancery Division. Mr. Hughes, on behalf of the plaintiff, urged, and this was his only contention, that we ought not to do so because the action in this division was brought first, and because it involves a question of fraud which can be more conveniently tried by a jury. But as is urged on the other side, there is a claim for specific performance, and if the defendant fails as to that here, it will still have to be tried in the Chancery Division; whereas if it goes to Chancery the whole question can be tried together. That is true, the plaintiff says, with the exception that the case cannot be tried in that division by a jury. I do not wish myself to say without consideration that the Chancery judges are bound to try with a jury. Vice-Chancellor Hall and the Master of the Rolls entertain grave doubts whether they can, under any circumstances, try with a jury; but I feel myself justified in referring to the case of *Canot v. Morgan* (34 L. T. Rep. N. S. 402; L. Rep. 1 Ch. Div. 1), before the Lord Chancellor after the passing of the Judicature Act, in which, when upon an application similar to this, it was urged that the case should be transferred to a Common Law Division, Lord Cairns said, "As regards the argument connected with trial by jury, the action can be tried by a jury in the Chancery Division." Therefore Lord Cairns seems to have been of opinion that the Chancery judges could have tried the case with a jury. However, if any difficulty arises upon that, there could be none under Order XXXVI. r. 29, which enacts that "In any cause the court or a judge of the division to which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursu-

sance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly." I think, therefore, that the order should be made transferring this case to the Chancery Division, always subject, of course, to the consent of the president of that division being obtained.

Order made.

Solicitor for the plaintiff, *W. A. Halcombe* for *V. A. Julius, Abegervanny*.

Solicitors for the defendant, *Harston, Hunter, and Downes* for *James Gilbert Price*.

Tuesday, Nov. 14.

(Before CLEASBY, B.)

GRAHAM (Trustee, &c.) v. WILCOCKSON AND MUNSLOW. (a)

Bill of sale—17 & 18 Vict. c. 36—Receipt for the price of goods—Memorandum of sale—Past debt.

In an interpleader the claimant, W. Munslow, to prove the sale of the goods to him by the execution debtor David Wilcockson, relied on the following document: "Bought of Messrs. D. and J. W. [here followed the list of goods and prices set out.] 1866. May 5. Memorandum.—We acknowledge that we have this day sold and delivered to Mr. W. M. the above articles and effects for the prices above named, 163l. 13s., and that payment therefor has been made to us of that amount in account between us and under the agreement arranged to be made with respect to the amount owing by us to him for rent, interest, and expenses." The consideration was that stated in the memorandum; no money passed at the time, and the goods remained in the debtor's possession.

Held, that the document did not require registration under the Bills of Sale Act (17 & 18 Vict. c. 36).

Byerley v. Prevost (L. Rep. 6 C. P. 144) followed.

INTERPLEADER summons, before Lopes, J., at chambers, who referred it to the court.

David Wilcockson, a tenant of Mr. Munslow, the claimant, being in arrear with his rent, agreed in conjunction with his (the tenant's) partner, J. Wilcockson, to sell to the claimant certain furniture, and it was then agreed that the purchase-money should go in discharge of the rent which was then due. The goods were accordingly bought by the claimant, and the following document was accordingly drawn up:

Bought of Messrs. D. and J. W. [here followed the list of goods and prices]. 1866. May 5. Memorandum.—We acknowledge that we have this day sold and delivered to Mr. W. M. the above articles and effects for the prices above named, £163 13s., and that payment therefor has been made to us of that amount in account between us and under the agreement arranged to be made with respect to the amount owing by us to him for rent, interest, and expenses.

The claimant took possession of the goods, and then let them to his tenant David Wilcockson, who remained in possession of them until the 30th Oct., when they were seized by a sheriff on behalf of the plaintiff, the trustee under liquidation of William Waring and J. W. Sharples, execution creditors of David Wilcockson, for a judgment debt of 121l. 12s. 3d.

Glyn for the sheriff.

Hughes for the plaintiff, the execution creditor.

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

Ex. Div.]

SMITH v. FIELDHOUSE—THE CADIZ AND THE BOYNE.

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—This document is more than a mere receipt. It purports to transfer the property, and for a past consideration, and is therefore a bill of sale. As such it is void for want of registration. This case is distinguishable from *Byerley v. Prevost* (L. Rep. 6 C. P. 144). There the instrument was a mere receipt, but in this case the memorandum makes it much more than that. He relied on

Horsfall v. Kay, 17 L. J. 286, Ex.

A. L. Smith for the claimant.—The instrument here was a mere receipt, and therefore does not amount to a bill of sale within the Bills of Sale Act. The case of *Byerley v. Prevost* (L. Rep. 6 C. P. 144), following the decision in *Allsop v. Day* (5 L. T. Rep. N. S. 320; 31 L. J. 105, Ex.), is absolutely in point.

CLEASBY, B.—In this case it appears that a transaction between the claimant, the landlord, and the execution debtor, the tenant, was followed by a receipt given for money paid as part of that transaction. That transaction was a sale of goods to the claimant for valuable consideration, and at the time of the sale the following document was given: Now this document is said to be a bill of sale within the terms of the Bills of Sale Act, and the question therefore is whether this instrument, as intending to pass the property in the goods, is void as against the execution creditor as a bill of sale requiring registration within that Act. It appears to me to be clearly a receipt. The cases, especially that of *Byerley v. Prevost*, show that the courts treat such a document as a receipt, and I do not think that the addition of the memorandum makes it any the less a receipt, or that the words distinguish this case from that of *Byerley v. Prevost*. The document, apart from the memorandum, is a mere invoice of the furniture and goods sold, although in one sense it may be a record of the transaction. Then follows the memorandum, which to my mind is merely added in order to show that the money for the goods has not been paid in cash but by deduction from rent due, and that such was the case we know. In *Byerley v. Prevost* no money passed, as was the case here, and there the words of the receipt were, "Received of Mr. John Byerley, the sum of ninety pounds, being the amount agreed to be paid for the purchase of household furniture and effects," &c. The case of *Horsfall v. Key* (17 L. J. 266, Ex.) does not amount to an adverse decision, the ruling there being in effect the same. The question in that case was whether the instrument could operate as a conveyance, inasmuch as the words were in the past tense. That question does not arise here. I hold that the document was merely a receipt, notwithstanding the memorandum comprised in it, and that the sheriff must therefore withdraw.

Order accordingly.

Solicitor for the plaintiff, W. A. Holcombe.

Solicitor for the claimant, Phelps and Sidgwick.

SMITH v. FIELDHOUSE.(a)

Public Health Act 1875—Action for penalty under Schedule II., sect. 70—Consent of the Attorney-General under sect. 253.

The consent of the Attorney-General must be obtained before bringing an action for penalties under Schedule II., s. 70 of the Public Health Act 1875.

(a) Reported by HENRY F. DICKENS, Esq., Barrister-at-Law.

In an action in the County Court of Keighley, in Yorkshire, for penalties under Schedule II., sect. 70, the judge nonsuited the plaintiff on the ground that the action was brought without the consent in writing of the Attorney-General.

By the Public Health Act 1875, Schedule II. sect. 70, any person who, not being duly qualified to act as member of the local board, or not having made and subscribed the declaration required of him by this Act, or being disabled from acting by any provision of this Act, acts as such member, shall be liable to a penalty of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt.

By sect. 253 of the Act, part VII., proceedings for the recovery of any penalty under this Act shall not except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General, provided that such consent shall not be required to proceedings which are by the provisions of this Act relating to nuisances or offensive trades, authorised to be taken by a local authority in respect of any act or default committed or taking place without their district, or in respect of any house, building, manufactory or place situated without their district.

Forbes now moved for a rule to show cause why the nonsuit should not be set aside, and a new trial had on the ground of misdirection of the learned judge. The consent of the Attorney-General was not necessary, because sect. 70 provides that the action for such penalties may be brought by any person. It is different under Schedule II. ss. 68 and 69. An action to recover penalties under those sections would clearly be necessary, unless they were brought by the party aggrieved. [COLERIDGE, C.J.—The penalties under ss. 68, 69, are penalties imposed, not recovered. Sect. 253 deals with the recovery of penalties.]

The Court (Coleridge, C.J., and Pollock, B.) were clearly of opinion that the consent of the Attorney-General was necessary.

Motion refused.

Solicitors for plaintiff, J. F. Raw, for Robinson and Robinson, Keighley.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 8 and 9.

THE CADIZ AND THE BOYNE.(a)

Salvage, agreement for apportionment—Additional salvage outside agreement—Persons not actually engaged in—Costs.

When persons agree to render a salvage service and to apportion the salvage in a particular way, and further salvage services are rendered, not contemplated by the agreement, the whole body of salvors are entitled to share in the reward, and not only those actually engaged in the further salvage operations.

Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to the co-salvors.

This was a cause for the distribution of salvage

(a) Reported by J. P. ASPINALL and F. W. BAINES, Esqrs., Barristers-at-Law.

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earned by the plaintiffs and defendants in diving operations from the wrecks of the *S.S. Cadiz* and *Boyne*, near Brest, in France.

The *Cadiz* had gone on shore and sunk in May 1875, and in the same month an "Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property," engaged with defendant Samuel Edwards, who signed all agreements as Edwards and Co., and who was a diver belonging to Whitstable, to save the cargo in which they were interested, at the rate of 15 per cent. for quicksilver and lead, and 5 per cent. for specie, 5 per cent. on value of a hunting knife valued at 7000*l.*, and 30 per cent. on all other cargo, and the other parties interested in the cargo made similar agreements as to their portions.

Samuel Edwards communicated with people at Whitstable, who engaged at that place the persons requisite to enable him to carry out the service.

It appeared that there three methods in which was customary amongst Whitstable divers to portion salvage earned by diving operations.

(1.) That allowing three shares for those who were actually diving, three shares to the owner of each smack employed, and two to the owner of each diving apparatus; the other men should each take single shares, and boys a half or three-quarter share, according to their ability.

(2.) That the shares being estimated in the same way as above, the men and boys engaged to assist should only take half of the shares, and receive on those who had engaged them 10*s.* a week and allowance equal in amount to half their food in exchange for the other half.

(3.) That the shares being still estimated in the same way, the men engaged to assist should receive wages of 1*l.* per week and their food from the persons who had engaged them, who received the whole of the shares in exchange.

At first a smack called the *Romp*, with a crew six hands, was engaged to come out to Brest to assist, and there was a dispute between the parties as to whether her crew had been engaged in the first or second of the above methods.

After they had worked some time, another smack, the *Ann Elizabeth*, was also engaged to assist; her crew being, it was admitted, engaged by her owner on the 3rd method; whilst the salvage operations were proceeding, on the night of the 13th Aug. 1875, a light was seen and cries heard from a vessel apparently in distress; some of the men went off in the boats belonging to the smacks, and on the way met a barque standing to danger, which, after receiving notice of her position, put out to sea in safety, the boats afterwards met several boats with some passengers on board them, from the Royal Mail Steamship *Boyne*, and learnt that the light they had seen and cries they had heard proceeded from that vessel, which had run on the rocks; the smack's boats then went and piloted the *Boyne's* boats to the island of Malines, off which the smacks lay, for which service 20*l.* was paid to and shared by all the persons engaged.

In the morning the defendant, Samuel Edwards, drew up a contract on board one of the smacks to save specie and diamonds, of which there were a large amount on board the *Boyne*, at 10 per cent., and went on board that vessel and got the captain

of her to accept the contract; he then, with the assistance of some of the crew of the *Ann Elizabeth*, and, as it was subsequently proved, two of the crew of the *Romp*, got one of the diving apparatus on board the *Boyne*, and began to dive, and in a very short space of time, about an hour, succeeded in recovering 24,700*l.* worth of specie and diamonds; during that day the rest of the crews of the two smacks were employed, some in getting their smacks in readiness to convey the passengers from Malines to La Couquète, the nearest town on the main land, and others in navigating the *Romp* to the *Boyne*, and keeping her in readiness to assist in any way that might be necessary. On the next day the crews saved the mails and a large portion of the passengers' baggage; subsequently the salvage operations on the *Cadiz* were resumed.

The plaintiffs, a portion of the crew of the *Romp*, not being satisfied with the accounts rendered to them, on the close of the operations for the year, commenced proceedings for an account in the High Court of Justice, and assigned the cause to the Chancery Division in the Rolls Court.

On the 13th Nov. 1876, the Master of the Rolls ordered the cause to be transferred to the Admiralty Court: (*Humphrey v. Edwards*, Weekly Notes 1875, p. 208.)

On the 16th Dec. 1875, a statement of claim was delivered on behalf of William Humphrey and three others of the crew of the *Romp*, praying for an account on the basis of division (No. 1), and claiming to divide the total salvage into 16½ shares against Samuel Edwards, the Royal Mail Steam Packet Company, who were owners of the *Boyne*, and the Association for the Protection of Commercial Interests, as respects wrecked and damaged property.

The 16½ shares were made up as follows:

The owner of the smack <i>Romp</i>	3 shares
William Higden (diver)	3 "
Samuel Edwards (diver), defendant	3 "
William Humphrey, plaintiff	1 "
William Ashby, plaintiff	1 "
George Humphrey	1 "
John Humphrey, plaintiff	1 "
Ethelbert Edenden, plaintiff	1 "
Richard Edwards	1 "
Joseph Day (boy)	½ "
Frederick Pierce	1 "

Total.....16½ shares.

It subsequently appeared that Joseph Day was not a boy, and, therefore, was entitled to a full share, and that the diving apparatus employed entitled its owner to 2 shares, so making up a total of 19 shares, and the statement of claim was amended accordingly. The plaintiffs also allowed that such sums as had been paid or were due to the crew and owner of the *Ann Elizabeth* should be taken into account.

On the 21st Dec. 1875, the statement of claim was ordered to be amended by adding the five other persons above enumerated as defendants. Three of them had been co-adventurers with Samuel Edwards from the beginning, and the other two were persons belonging to the *Romp*, who raised no objection to the accounts rendered by Samuel Edwards.

On the 6th Jan. the defendant salvors delivered statement of defence, claiming to have the amount arising from the *Cadiz* divided into 31½ shares, to be distributed, as to the *Romp's* crew on plan

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(No. 2), and as to *Ann Elisabeth* on plan (No. 3), and that that from the *Boyne* should only be divided amongst those actually engaged in the operation. The 31½ shares were made up as follows:

The owners of the smack <i>Romp</i>	8 shares
The owners of the <i>Ann Elisabeth</i>	3 "
The owners of the two diving apparatus	4 "
William Rigden (diver), defendant	3 "
Samuel Edwards (diver), defendant	3 "
Frederick Pearce, defendant	1 "
Joseph Day, defendant	1 "
Richard Edwards, defendant	1 "
William Humphrey, plaintiff	1 "
William Ashby, plaintiff	½ "
John Humphrey, plaintiff	½ "
Ethelbert Edenden, plaintiff	½ "
George Humphrey, defendant	½ "
The remaining ½ shares to the four last mentioned persons to be taken by the original adventurers	4 "
Five persons crew of <i>Ann Elisabeth</i>	5 "
One boy	½ "
Two French pilots	2 "

Total 31½ shares.

On the 9th March the plaintiffs replied, joining issue on the statement of defence, and denying the employment of the French pilots except on ordinary wages.

On the 5th May 1876 the pleadings were further amended by joining the owner, master, and crew of the *Ann Elisabeth* as plaintiffs, and adding two more shares in respect of a second diving apparatus. The sums of money due for salvage from the various parties interested in the *Cadiz*, and from the R. M. Steamship Co. under the agreements were paid into court, and on 2nd and 5th May 1875 the case came on for hearing. After hearing the opening statement for the plaintiffs and the partial examination of one witness on each side, the case of the salvage of the *Cadiz* as distinguished from the *Boyne* was referred to the registrar to report "on the basis or modes of calculation adopted by the plaintiffs and by the defendants respectively, or any modification of the said respective bases or modes of calculation rendered necessary by the accounts and vouchers produced." The registrar sat on the 12th and 13th July, and on 25th July 1876, made his report, disallowing 7 per cent. out of a claim of 10 per cent. on the whole salvage for commission (as it appeared that only 3 per cent. was actually paid to other parties, the defendant, Samuel Edwards, reserving 7 per cent. for himself and his original co-adventurers, but not giving the other salvors any notice of their intention, but charging the whole 10 per cent. as Kerros, the agent's, commission), making some other deductions, and finding that the number of shares into which the amount due for salvage before the arrival of the *Ann Elisabeth* should be divided was nineteen, made up as follows:

The owner of the smack <i>Romp</i>	8 shares
William Rigden (diver), defendant	3 "
Samuel Edwards (diver), defendant	3 "
William Humphrey, plaintiff	1 "
William Ashby, plaintiff	1 "
George Humphrey, defendant	1 "
John Humphrey, plaintiff	1 "
Ethelbert Edenden, plaintiff	1 "
Richard Edwards, defendant	1 "
Joseph Day, defendant	1 "
Frederick Pearce, defendant	1 "
Owner of diving apparatus	2 "

A total of 19 shares.

And after the arrival of the <i>Ann Elisabeth</i> , in addition to the above	19 shares
The owner of the <i>Ann Elisabeth</i>	3 "
Master of ditto	1 "
Four men crew of ditto	4 "
One boy crew of ditto	½ "
Owner of second diving apparatus	2 "

A total of 29½ shares.

Disallowing altogether the claim for two shares in respect of the French pilots, as it appeared they had been paid by the day. He further reported as follows:

"I do not mean to say that the several persons whose names are set forth are entitled to take in their own right the amount of the shares set opposite their respective names. If any of them has assigned one of his shares to some other person that is a matter between the parties themselves, and with which I have at present nothing to do. All that I need say here is that no such assignment appears to have been made of the shares due to the master and crew of the *Romp*, but that some arrangement was made by the owner of the *Ann Elisabeth* with the master and crew that he should receive their shares in lieu of certain payments to be made to them."

The report then proceeded to show the value of a share in the salvage earned before and after the arrival of the *Ann Elisabeth*. On the 8th Nov. 1876, the case came before the court again.

After the examination of witnesses on both sides, it appeared that both the diving apparatus had been in use from the first, and that the owners of each were entitled to two shares as well before as after the arrival of the *Ann Elisabeth*, and it was admitted that the value of the shares should be ascertained before making a deduction for provisions supplied to the men employed, which deduction could only be made from the shares of the men, and not from those of the smacks or apparatus, and it was agreed that whoever might be found to be the salvors of the *Boyne* should divide that salvage on the plan which the court should decide it had been the intention of the parties to adopt in the *Cadiz*, except that the owner of the *Ann Elisabeth* waived any claim he might have to any shares the crew of that smack might be found to have in the *Boyne*.

R. E. Webster and *F. W. Raikes*, for the plaintiffs, contended that they were entitled to a full share of the *Cadiz* salvage, and that being all engaged in a joint operation, whether of salvage or for any other purpose, they were all entitled to share in the *Boyne*, whether actually present or not. The fact of the diving apparatus and divers being engaged at the *Boyne*, delayed the work on the *Cadiz*, and so entitled all those engaged in that salvage operation to share. On grounds of public policy it was desirable that they should share, or else in a case where life was in danger, as well as property, there would be a strong temptation for all to try and save the latter even at the expense of the former. In this case all were really engaged, either directly or indirectly. It was the universal and recognised rule of the Admiralty Court that all should share even if not actually engaged.

Watkin Williams, Q.C. and *W. Phillimore*, for the defendants, contended that the crew of the *Romp* had been engaged on the second method, and were therefore only entitled to half shares in the *Cadiz* salvage, and that the salvage of the *Boyne* was done under an engagement made by Edwards, and on behalf of himself and his original co-adventurers, and that therefore it was quite independent of the agreement with the *Romp* and *Ann*

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Elizabeth, and that only those actually employed by him in the operations should share at all, and that those persons were a portion of the crew of the *Ann Elizabeth*, and only engaged at weekly wages to do anything they were ordered by the original co-adventurers, and therefore not entitled to a share of the salvage at all.

Biron for the crew of *Ann Elizabeth* and owner of *Romp*.

E. C. Clarkson for the owner of *Ann Elizabeth*, who was also owner of one diving apparatus.

Webster in reply.

Sir ROBERT PHILLIMORE.—This is a case which has been sent to this court by the Master of the Rolls on the ground that it related to a salvage service, and that it must be decided by me upon the usual principles of salvage law. The first question is one of fact, and partly also of law, namely, whether the plaintiffs were, as the registrar represents, engaged to perform the service on the principle of what must be called the share, or that in which the half share goes to the men and a certain fixed amount of money to their wives and families. Now this is a question of evidence, and I am of opinion that it is established by the evidence on both sides, and especially by the evidence relating to the case of Ashby and George Humphreys, that these plaintiffs were engaged to serve upon the whole principle, and they ought to receive remuneration accordingly. That is as to the *Cadiz*. With regard to the other point, whether in the matter of the *Boyne* the plaintiffs were salvors; I have also arrived at the conclusion that they are. It is proved before me that nine or ten of the men who belonged to the *Romp* and the *Ann Elizabeth* were employed in various ways in assisting; and it is proved that without their assistance the work could not have been satisfactorily carried out; they assisted in bringing the machinery to the vessel, and it is not necessary to refer to the principles so well known in this court in respect of the rule regulating salvage service; that not only those who are actually employed, but also those who stay behind; are entitled to participate. Applying those principles and the principles of common law, I am of opinion that the plaintiffs are to be considered as salvors in the case of the *Boyne*; and that the contract for the salvage service rendered by them to the *Cadiz* has been made out. There then remains the question of costs, as to which I have entertained some doubt, but upon the whole, and especially taking into consideration the conduct of the defendant Edwards, the agent of all engaged in this matter, I shall not do justice, I think, without giving the salvors their costs. They are to receive their costs out of the funds in court, but the defendant Edwards is to pay his own costs.

Solicitor for the plaintiffs, A. R. Steele, agent for J. Minter, Folkestone.

Solicitors for the defendants, Lowless and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Tuesday, June 27.

(Before JESSEL, M.R., MELLISH, L.J., and DENMAN, J.)

PUENELL v. GREAT WESTERN RAILWAY COMPANY AND HARRIS. (a)

Practice—Two defendants—Verdict for one defendant and against the other—Motion by one defendant for new trial—New trial ordered against successful defendant—Power of Court of Appeal—Judicature Act 1875, Orders XXXIX., rule 1, LVII., rule 6, and LVIII., rules 3, 5.

In an action for negligence against a railway company and also against H., the verdict was in favour of H. and against the company. Notice of an order nisi for a new trial, obtained by the company, on the ground that the verdict was against the weight of evidence, was, by direction of the court, served on H. The order nisi was discharged by the Queen's Bench Division, and the company appealed, but gave no notice of the appeal to H.

At the hearing, the Court of Appeal directed notice of the appeal to be served by the plaintiff on H., and also notice to him to show cause why a new trial should not be had against him. H. accordingly appeared, but under protest, alleging that the court had no jurisdiction to call on him to show cause, since he had been discharged by the finding of the jury and the order of the court below, and since the four days within which, under Order XXXIX., rule 1, a motion for a new trial ought to be made had elapsed:

Held, that the court had jurisdiction.

After hearing H. show cause, the court made the order absolute for a new trial against both defendants.

The Court of Appeal has power, under Order LVIII., rule 5, to enlarge the time for moving for a new trial.

Quære, per Mellish, L.J., whether, under the practice since the Judicature Act, the court might not, if the justice of the case required it, grant a new trial against one defendant without the other.

APPEAL from a decision of the Court of Queen's Bench Division; reported 34 L. T. Rep. N. S. 126.

Action against the Great Western Railway Company and a contractor in their employ, named Harris, for damage for injuries caused by the defendants' negligence in unloading timber lying on a bridge belonging to the company, so that a balk of timber fell over the bridge and struck the plaintiff.

The action was tried before Pollock, B. at Monmouth in 1875, when the jury found that there had been negligence, but that the persons who caused the negligence were servants of the company, so that the company were liable and not Harris.

An order nisi for a new trial was obtained by the company on the ground of misdirection, and

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that the verdict was against the weight of evidence. By direction of the court, notice of the order nisi was served on Harris, and the matter was argued on 1st and 2nd Feb. 1876 before the Queen's Bench division (Blackburn and Lush, J.J.) when the court, being equally divided in opinion, the order was discharged.

The company appealed, but served no notice of appeal on Harris.

On 22nd and 23rd May the appeal was heard, but the Court of Appeal held that they could not decide the question in the absence of Harris, and directed notice of the appeal, and also notice to shew cause to the Court of Appeal to be served upon him by the plaintiff. The proceedings before the Court of Appeal on that occasion are reported in 34 L. T. Rep. N. S. 822.

Staveley Hill, Q.C. and *Jelf* now appeared for Harris, but protested that the court had no jurisdiction to require him to shew cause. The verdict of the jury, as well as the order of the court below, had absolutely discharged him, and no application had been made to extend the four days within which a motion for a new trial against him ought to have been made, and that four days had long since elapsed, see Order XXXIX. rule 1. The cases under the old practice no doubt decided that there could not be a new trial at the instance of one defendant without notice of the rule for a new trial being served on the other defendant in whose favour the verdict had been found. But the plaintiff had not taken any steps to get the verdict in Harris's favour set aside, and it was then too late for him to attempt to do so, and it was not competent for the Court of Appeal to reopen the case against Harris. They referred to

Price v. Harris, 10 Ring. 331;

Doe v. Martin, 13 M. & W. 811;

Mundlay v. Bush, cited 13 M. & W. 813 N.; *Wakley v. Healey and Cooke*, 18 L. J. N. S. Ex. 426.

Powell, Q.C. and *Bosnquet* for the Great Western Railway Company, and *Matthews*, Q.C., and *T. S. Pritchard* for the plaintiff, were not called upon.

JESSEL, M.R.—In this case an objection has been taken to the jurisdiction of the Court of Appeal to call upon the defendant Harris to show cause why a new trial of the action in question shall not be had. The action was brought by the plaintiff against the Great Western Railway Company and Harris for an injury done or occasioned by the negligence of persons who were the servants either of the Great Western Railway Company or of Harris. The jury found in effect that at the time they were servants of the Great Western, and therefore, found a verdict against the Great Western and in favour of Harris. The railway company moved for a new trial before the Queen's Bench Division. The company was directed by that division to serve notice of the rule upon the defendant Harris. When the rule came on for argument, the court being equally divided in opinion, one judge being in favour of the company and the other in favour of the plaintiff, the rule was discharged, and the counsel for Harris of course was not called upon to argue, the decision being in fact in his favour. At the same time it may be observed that the costs of attending on that occasion were refused to him. When the case was appealed by the company, and came before the Court of Appeal, the Court of Appeal, think-

ing there was a serious question to be argued as to whether the servants who were guilty of the negligence were or were not the servants of Harris, before proceeding to decide the question between the company and the plaintiff directed that notice of the appeal should be given by the plaintiff to Harris, so that he might show cause why a new trial should not be had, and Harris has appeared under protest on the present occasion, and insisted that the Court of Appeal had no jurisdiction to make that order, the four days having elapsed, within which, as a matter of course, the order to show cause why a new trial should not be had should have been moved, and it is insisted that this court should not now entertain the application. I myself have no doubt as to the jurisdiction of the court. I think it is given in the plainest possible terms. But before considering what the jurisdiction is, it is necessary to consider what the practice at common law was before the Judicature Act. It seems to be established by the two cases to which our attention has been directed, viz., *Doe v. Martin* and *Belcher v. Magnay*, that where a verdict has been found in favour of one or more defendants, and against another, and the defendant against whom the verdict has been found shall move for a new trial, he is bound to serve a notice of the rule for a new trial on the defendant in whose favour the verdict was returned, and that no new trial should be granted unless that proceeding was adopted. That seems to me a very reasonable rule, and entirely coincides with the similar rule in the Courts of Equity. That being so, in this present case it appears to me that the railway company did all which they could reasonably be required to do; they obeyed the direction of the court in serving a notice of the rule on Harris, and, therefore, it seems to me that the only point now to be considered is whether in Harris's presence a new trial should or should not be granted. Now, it is quite true that there is no appeal by the plaintiff, nor is there any cross-rule moved for, and it is said that if the plaintiff had anticipated the moving of the court for a new trial by the defendant against whom he had obtained a verdict, he should have moved for a cross-rule against the defendant who was absent, and in whose favour the verdict had been found. But under the old practice the defendant who moved the rule was bound to serve notice of it on the other defendant. Therefore, as the plaintiff did not desire a new trial except in the event of the defendant moving for a rule and obtaining one, the court had full power, on that event happening, to grant a new trial generally. The question now is, what are the powers of the Court of Appeal? Under Order LVIII., rule 2, it will be found that appeals to the Court of Appeal are to be by way of re-hearing; that is, they are not to be confined to the points mentioned in the notice of appeal. The 3rd rule is that "Notice of appeal shall be served on all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action. Harris is a party to the action and the rule has been exactly applied. Then the 5th rule is, "The Court of Appeal shall have all the power and duties as to amendment and otherwise of the court of first instance." We could, therefore, enlarge the time or do any other

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act that is necessary. Then it says, "The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." Larger words, I think, could not be inserted, and it is not disputed, as I understand the argument, that the words are large enough to authorise what has been done; but it is said that it is not just that such a jurisdiction should be exercised. I am at a loss to see why. It is our duty to do that which the court below ought to have done; and assuming for the present purpose that Harris is *prima facie* liable and the Great Western is not, and that the court below should have granted a new trial, surely the court below, before granting a new trial, would have heard the counsel of Harris to show cause, and, as they ought to have done, so we ought to do. I think that it is quite clear that the principles upon which justice ought to be administered manifestly call upon us to pursue the same course, and, now that Harris has been brought before us on appeal, to hear his counsel to show cause why a new trial should not be granted. I think there is no good objection to be urged against the exercise of the jurisdiction of the court.

MELLISH, L.J.—I am of the same opinion. In order to determine whether the court has jurisdiction to order a new trial as against Harris, it is necessary to consider whether the Queen's Bench had any such jurisdiction. If the Queen's Bench had no such jurisdiction it would be a question whether the Court of Appeal could do what the Queen's Bench could not do, but if they had power the Court of Appeal can do what the court below ought to have done. Now, the authorities which have been cited seem to show very clearly that under the old practice the court could not grant a new trial as against one defendant, even in an action of tort, without granting it to all. That was decided in the two cases which have been referred to by the Master of the Rolls. In *Price v. Harris*, where the plaintiff was obliged to discharge some of the defendants, she got a new trial against one defendant only, the court putting her under terms; but, in general, it appears that the court has never granted a new trial as against one defendant without granting it as against all. Since the Judicature Act, I rather think, if the justice of the case required it, the court might grant a new trial against one defendant without the other, if the court was satisfied that the defendant was properly omitted, and that there was no necessity for him to be harassed by having a new trial. This is a case where the very essence of it is that if one is liable the other is not liable, and, *vice versa*, if one is not liable the other is liable. Assuming the verdict is right in saying it was a negligent act, and assuming that this is a case in which the court is of opinion that the Great Western are entitled to a new trial, they cannot have a new trial unless there is a new trial against Harris also; and it would be very unjust, as against the plaintiff, to go to a new trial against the Great Western without having a chance of getting a verdict against Harris if the jury should take the view that the Great Western are not liable and Harris is. When the motion was made in the Queen's Bench for a new trial, an application was made to the court whether Harris should be served. The court said, "You need not make him formally a party so as to show cause why there

should not be a new trial, but let the rule be served upon him, so that he may have notice of it." What was the effect of that? The court having come to the conclusion that that rule ought to be discharged, the court had no occasion to call upon Harris, because in the verdict which they, the Great Western, objected to, Harris was in no respect prejudiced. But I cannot help thinking that if the Queen's Bench Division had come to the conclusion that there ought to be a new trial, they would not have gone to a new trial without Harris. It would have been manifestly unjust to grant a new trial against Harris without hearing him. The Queen's Bench Division had jurisdiction, on this very rule, to order Harris to show cause why there should not be a new trial, and to hear him show cause before they made the rule absolute; and when the case came before us we might think it right to order a new trial as against the Great Western, and that ought not to be done without hearing Harris. Harris not having been made a party to the rule, we thought there might have been a technical question whether he was before the court, and, in order to save that difficulty, we gave leave to serve him with a fresh rule, but we did not say that was necessary to be done. We think the cases cited show that the old rule might have been applied. In my opinion we have jurisdiction to order a new trial if we think the verdict against the Great Western is against the weight of the evidence. The effect of that would be that there would be a new trial against Harris also, and it would not be right to order that new trial without first hearing Harris.

DENMAN, J.—I am of the same opinion. I think this objection ought to be overruled, and that Harris is right in appearing before this court to show cause, if he shall be so advised, why a new trial should not be granted. I do not wish to add anything to the judgments of the Master of the Rolls and the Lord Justice beyond this. In the argument Mr. Jelf seemed to catch at an expression of mine that there was no trace in any of the cases cited of the cases being decided on the ground that it was after the four days within which a new trial should be moved for. I did not intend that that should be used as an argument, as he ingeniously seemed inclined to use it, that that might show that the matter had been disposed of. On the contrary, it appears to me a strong argument, that there is nothing in the objection. After looking at the several cases in which this course has been taken, I see that it never occurred to any of the learned judges who acted in those cases that there would be any such objection available, and that, I think, is a strong ground for thinking that there is nothing in that additional argument. It does not appear to have influenced the minds of any one of the several counsel or judges in the numerous cases in which the course we are now adopting was adopted before the Judicature Act. That that Act does not limit the power of the court is too obvious to require any argument at all. If the Court of Queen's Bench had power before, I think it is quite clear *a fortiori* that they and this court have power now.

Slavesley Hill and *Jelf* then argued the case for Harris upon the merits; but the court, without calling upon *Powell*, Q.C. to reply, were of opinion that the verdict was against the weight of evidence, and that the jury ought to have found for the company, and against Harris.

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The costs of the appeal and in the court below were ordered to be costs in the action.

Judgment reversed, and order made absolute for a new trial.

Solicitor for the appellants, *B. Nelson.*

Solicitors for the plaintiff, *Johnson and Wetherall,* for *W. J. and H. G. Lloyd,* Newport, Mon.

Solicitors for the defendant *Harris, Taylor, Horne, and Taylor,* for *Cooke,* Gloucester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before The MASTER OF THE ROLLS.)

Saturday, Nov. 4.

MIDDLETON v. POLLOCK; *Ex parte* WETHERALL. (a)
Representation—Trust money—Following money into land—Statute of Frauds—Solicitor and client.

Money was advanced to a solicitor by A. for the purpose of being invested on mortgage security. The solicitor wrote that he had invested the money on mortgage to Messrs. M. on leaseholds in Camden Town, and that A. was receiving interest at the rate of 5 per cent. The solicitor in fact, subsequently to this, advanced large sums on mortgage to Messrs. M., but no specific mortgage was made in favour of A. The draft, however, of a mortgage for the sum advanced in favour of A. was found unexecuted after the solicitor's death. The solicitor had died insolvent. A. applied that a sum equal to the sum advanced by him should be paid to him out of a large fund in court representing the moneys advanced by the solicitor to Messrs. M.

Held, that the solicitor was bound by his representation; that the money was trust money, and that A. ought to be paid in priority to the general creditors.

The suit was for the administration of the estate of the late Alfred Atkinson Pollock, and the petition was to obtain payment out of a fund in court of a sum of 7700*l.* which the petitioner claimed to belong to him under the following circumstances: Mr. Pollock was a solicitor in extensive practice, and a member of the firm of Messrs. Parke, and Pollock. He had acted as the petitioner's solicitor, and the petitioner consulted him in all his money affairs.

In the year 1870 the petitioner sold some property at Ealing belonging to him to various purchasers, leaving three separate sums of 2498*l.* each on mortgage of parts of the property. At the beginning of 1871 there was a sum of 826*l.* due from Messrs. Parke and Pollock to the petitioner; and on the 29th of March in that year Mr. Pollock wrote to the petitioner that he had made an arrangement with the mortgagors of the Ealing property for the payment of the mortgage debts, and that he proposed to re-invest the money at 5 per cent. Some further correspondence passed, and on the 27th April Mr. Pollock's clerk called on the petitioner with reconveyances of the mortgaged property which the petitioner there and then executed. The petitioner then asked the clerk what the proposed investment was, and the clerk replied that he was authorised by Mr.

Pollock to ask the petitioner's authority to advance the money to Messrs. Mansbridge, builders, on mortgage of leasehold property at Camden Town, at 5 per cent., and the petitioner agreed to such investment on condition that Mr. Pollock was satisfied that the security was ample.

On the 5th May 1871 Mr. Pollock received in respect of the said sums of mortgage money and interest, sums amounting to 7468*l.* 19*s.* 3*d.*, and paid the sum to the credit of the firm of Parke and Pollock into Messrs. Coutts's bank. He subsequently received and paid various sums on account of the petitioner; and on the 30th June 1871 there appeared on the books of the firm a balance due to the petitioner of 8201*l.* On the 26th June Mr. Pollock wrote to the petitioner to say that his income would be made up to 30th June, and a statement sent, and that they were only waiting for the valuations to complete the investments of the money at 5 per cent. "In the meantime," he added, "You are not losing interest, and have not been for a day."

In Jan. 1872, the petitioner wrote to Mr. Pollock asking for information as to the state of his account, and in reply, on the 24th Jan. 1872, Mr. Pollock wrote to the petitioner a letter of which the following was the substance:

I will have your account made up and sent to you. The principal sums were all put on 5 per cent. mortgage, as arranged by Mr. Honour with you, and you have been having interest at that rate from the date of the receipt of the money.

In Feb. 1873 Mr. Pollock wrote to the petitioner, telling him that he had a balance (which was exclusive of the 7700*l.*) of 378*l.*, and in Aug. 1873, at the petitioner's request, Mr. Pollock promised to have ready in September a sum of 150*l.* for the petitioner. This money has never been paid; and Mr. Pollock died suddenly on the 10th of Aug. 1873. The executors of his will renounced probate, and on the 10th of Sept. 1873, administration with the will annexed was granted to his widow, the defendant in this suit.

On investigating Mr. Pollock's affairs, it was found that no mortgage existed in favour of the petitioner, but that considerable property belonging to Messrs. Mansbridge was, at Mr. Pollock's death, mortgaged to him for sums in the aggregate many times exceeding the amount of the petitioner's claim.

Mr. Pollock intended that mortgages in the petitioner's favour for 7700*l.* should be executed by Messrs. Mansbridge, he, by arrangement with them, first releasing his charge over a number of houses in Ospringle-road, Kentish Town, and such release was actually prepared and engrossed ready to be executed, and proper mortgages were to have been effected in the petitioner's name. The petitioner did not know whether this proposal was ever communicated to Messrs. Mansbridge, or that the latter had ever been informed that any part of the money so advanced to them was not Mr. Pollock's money.

Messrs. Mansbridge became bankrupts, and portions of the property comprised in the charges to Mr. Pollock were sold, including the houses in Ospringle-road, Kentish Town, and various sums were paid into court from the proceeds of these sales to the credit of this cause. After various payments and deductions, there was a sum in court amounting to 17,468*l.* 19*s.* 3*d.* Consolidated Three per Cent. Annuities, out of which the

(a, Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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petitioner claimed such an amount of annuities as was equivalent on the day of investment to 7700*l.* and certain further sums.

The plaintiff claimed the whole of the fund in court on behalf of himself and the general creditors of Mr. Pollock as being part of his general personal estate. No other person except the petitioner claimed any priority over the general creditors.

Chitty, Q.C. and *Ward*, for the petitioner.—Mr. Pollock clearly represented to the petitioner that his money was invested in the mortgage. There is a distinction made between a declaration and a representation. It may be that if this were a mere statement or declaration, it would be void under the Statute of Frauds. But if it be a representation, on the faith of which a man acts, the law will estop the man making the representation from saying contrary to it. [*JESSEL*, M.R.—But if the representation relate to land, can it stand either as a representation or as a declaration of trust, unless it be in writing?] There are three things: contract, declaration of trust, representation. The House of Lords has upheld the distinction between these, and that a representation may be inferred even if not in writing. [*JESSEL*, M.R.—But the representation of a contract and a contract amount to the same thing.]

Chitty referred to

Evans v. Bicknell, 6 Vesey, 174;

Burrows v. Lock, 10 Vesey, 470;

Jordan v. Money, 5 H. L. Cas. 185.

Fry, Q.C. and *Bomer*, for Lord Middleton, representing the unsecured creditors.—The case is clearly within the Statute of Frauds. [*JESSEL*, M.R.—But in cases of following money into land the courts of equity have disregarded the statute.] They referred to *Benbow v. Townshend* (1 My. & K., 66.)

W. Barber, for the defendant, the testator's administratrix.

JESSEL, M.R.—In the particular case before me, Mr. Pollock, acting as agent and solicitor for the petitioner, was authorised to receive 7700*l.* for the purpose of being laid out on leasehold security, and of being advanced to Messrs. Mansbridge on property in Camden Town. Mr. Pollock accepted the money, and the arrangement was made through his clerk. On the 5th May 1871 he received the money, and in Jan. 1872 the petitioner wrote to Mr. Pollock asking for information as to his account and the interest due to him; and on the 4th Jan. Mr. Pollock wrote to say that all the money was put on mortgage at 5 per cent. It is also an evidence that between the 5th May 1871 and the 4th Jan. 1872 Mr. Pollock had advanced money more than sufficient to cover 7700*l.*, in addition to other sums, to Messrs. Mansbridge on mortgages in Camden Town. That money so received by Mr. Pollock from Mr. Wetherall was trust money. Mr. Pollock did in fact advance large sums of money to Messrs. Mansbridge. The mere fact of his making these advances in his own name cannot make any difference if he advanced other moneys at the same time. He is bound by the representation that the money so advanced was given him for this purpose. I am not prepared to say if he had made no representation he would not have been bound. It is impossible to think that he has not actually made this advance, and this being so, the money belongs to the petitioner, and he

must have priority over all the subsequent moneys advanced. He will also have priority over some of the previous debts. The petitioner, therefore, must produce evidence that between 5th May 1871 and 24th Jan. 1872 at least 7700*l.* was advanced to Messrs. Mansbridge on mortgage or a grant of mortgage of property at Camden Town, and then I shall make an order for payment of the fund to the petitioner together with his costs.

Solicitors: *Newman, Stutton, and Hilliard; Bidsdale, Oraddock and Bidsdale; Farrer, Ouwry, and Co.*

Friday, Nov. 10.

GORDILLO v. WEGUELIN. (a)

Deed—Construction—Bonds drawn for payment but unpaid—Interest—Priorities.

Railway contractors issued a public loan secured by mortgage of their railways, and concessions, in bonds bearing 7 per cent. interest, redeemable in ten years by semi-annual drawings, at each of which drawings at least 5 per cent. of the loan was to be paid off. By clause 15 of the mortgage deed the trustees were to apply the residue of the moneys come to their hands, first, in payment of arrears of interest actually due on outstanding bonds; secondly, in redemption of any such bonds as ought to have been redeemed at the previous drawing but were not so redeemed; and thirdly in payment of future interest and future redemption of bonds. The plaintiff, the holder of bonds which had been drawn for payment, but were unpaid, sought to recover interest on the bonds from the time at which they were drawn for payment, until payment.

Held, that he was not so entitled, and that he could not recover at law by an action on the bond under 3 & 4 Will. 4, c. 42, s. 28.

By an indenture, dated 28th June, 1872, and made between Ramon Montero, Esteban Montero, Terribio Montero (since deceased), and Juan Manuel Montero, then carrying on business as Montero Brothers, of the one part, and the defendants Christopher Weguelin and Alexander de Gessler of the other part, after reciting three supreme decrees or concessions of the Peruvian government in favour of Montero Brothers for the construction of certain lines of railway in Peru, and that certain progress (therein described), had been made in the said work, it was recited as follows:

Whereas Messrs. Montero Brothers have made arrangements for the issue by Messrs. J. Thomson, T. Bonar, and Co. (hereafter called the contractors) for the issue of a public loan of one million pounds in mortgage bonds of two series, to be denominated series A and series B, of which series A will consist of mortgage bonds of 500*l.* each, and series B of mortgage bonds of 100*l.* each.

And whereas it is intended that the said mortgage bonds shall be in the form set forth in the schedule to these presents, and that the principal thereof shall be payable in ten years from the 1st Nov. 1872, at the latest by means of semi-annual payments of sums at least equal to 5 per cent. on the nominal amount of the said loan.

And whereas it is further intended that the bonds to be redeemed in each half year shall be determined by drawings which shall take place at the counting-house of the contractors in London on or before the 1st May and the 1st Nov. in each year, commencing on the 1st Nov. 1873, and that the bonds drawn for redemption shall be redeemable on the following 1st June and 1st Dec. in each year.

It was also recited that the interest on the said

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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mortgage bonds at 7 per cent. per annum should be payable half yearly at the counting house of the contractors on the 1st of June and the 1st of Dec. in each year.

By the said deed Montero Brothers granted, assigned, and transferred the said concessions, privileges, railway, tolls, profits, and other appurtenances belonging to them, which then were or should at any time during the continuance of the said security be placed upon or used in connection with the said railways, unto the defendants Christopher Weguelin and Alexander de Gessler, their heirs, executors, administrators, and assigns. And Montero, Brothers after covenanting for certain monthly payments to be made by them to the contractors, covenanted as follows :

Clause 2. The sum to be remitted to the contractors as aforesaid shall be applied in payment at the counting-house of the contractors in London, on the 1st June, 1873, of the half-yearly interest on the said mortgage bonds, which will become payable on the 1st June, 1873, upon presentation, and against delivery of the corresponding coupon, and the sum so to be remitted as aforesaid shall be applied in payment at the counting-house of the contractors, in London, on the next following 1st Dec. and 1st June (as the case may be), of the principal sum secured by such of the said mortgage bond as shall have been drawn for redemption on the preceding 1st Nov. and 1st May (as the case may be), upon presentation and against delivery of the bonds so drawn, and of the half-yearly interest on each of the said mortgage bonds as shall be outstanding and bearing interest which will become payable on such 1st Dec. or 1st June (as the case may be), upon presentation and against delivery of the corresponding coupon. But no interest shall be payable on any drawn bond after the day fixed for its redemption.

It was further covenanted that the trustees of the indenture should, after providing for certain payments there mentioned,

Clause 15. Apply the residue of the said moneys in or towards payment of the principal moneys and interest secured by the said mortgage bonds in the following order (that is to say), first, in payment of all arrears of interest actually due on such of the said bonds as shall be outstanding, and bearing interest. Secondly, in redemption of such an amount of the said mortgage bonds as ought to have been redeemed on any previous 1st June, or 1st Dec., but may not have been redeemed in consequence of any default of Messrs Montero Brothers, to provide the necessary funds for that purpose pursuant to their aforesaid covenant in that behalf; and lastly in the payment of the future instalment on the said bonds, and the redemption of the same in any future half year in manner heretofore provided, and after full payment and satisfaction of all the principal moneys and interest secured by the said mortgage bonds, the trustees or trustee shall hold the surplus (if any) of the said moneys so to be received by them or him as aforesaid, in trust for Messrs. Montero Brothers, their heirs, or assigns.

In the bonds it was stated (*inter alia*).

Messrs. Montero Brothers hereby bind themselves, their heirs, representatives, estates, and effects, with the payment to the bearer of this bond at the counting-house of Messrs J. Thompson, T. Bonar and Co., in the city of London, of the principal sum of £1, on the 1st June, or the 1st Dec. (as the case may be) next following the day on which this bond shall be drawn for redemption upon presentation, and against delivery of this bond, and also of interest on the said principal sum of £1, at the rate of 7½ per cent. per annum semi-annually, on every 1st June and 1st Dec. up to and including the day on which the said principal sum shall become payable upon presentation, and against delivery of the corresponding coupon.

The said deed was duly registered and perfected according to the law of Peru.

The bonds were accordingly issued, subscribed for, and fully paid up. The plaintiff subscribed

for certain of them, and was the holder of such unpaid bonds for the aggregate sum of 30,000*l*.

By an agreement, dated 1st Oct. 1873, and made between Montero Brothers and the defendants, the Anglo-Peruvian Bank (Limited), for the consideration therein mentioned, purchased as annuity of 216,000*l*. for thirteen years, to be paid out of the profits of the said railways. And by the said agreement it was provided that a company should be formed either in England or Peru for the purchase and working of the said railways. Accordingly the company so contemplated was shortly afterwards duly constituted and established as a Sociedad Anonima in Peru under the name of the National Nitrate Railways Company of Peru. The said company, which was a defendant in the action, and is hereinafter referred to as "the defendant company," took over the commissions, undertakings, and liabilities of the defendants Montero Brothers. Various subsequent transactions took place not material to this report.

In or about March, 1875, default was made by the defendant company in providing the funds necessary for the service of the loan of 1873; and thereupon the defendants Weguelin and De Gessler sent out powers of attorney to an agent on their behalf to take possession of the said railways, which was done; and the defendants have ever since been in possession, and have received large sums, representing the profits of the same.

Payments in respect of the said loan of 1873 became due from the said defendants on the 1st June, 1875, the 1st Dec. 1875, and the 1st June, 1876.

On the 10th May, 1875, the defendants Weguelin and De Gessler advertised in the London papers, giving the numbers of the bonds drawn for payment to the amount of 50,000*l*., nine of which, for 3300*l*. in the aggregate, belonged to the plaintiff. It was stated that funds were on the way for payment of the coupons due 1st Jan. 1875, and that Thomson, Bonar, and Co. had been requested to effect the half-yearly drawing, and that the drawn bonds would be paid out of the first funds remitted.

The coupons due 1st June, 1875, were paid in due course; but the bonds drawn for payment were not paid till on or after the 24th Sept. 1875, but no further interest was paid after 1st June, 1875. The plaintiff and other persons interested in the bonds claimed to be entitled to interest thereon up to 24th Sept. 1875.

The payment of coupons due 1st Dec. 1875 was delayed. But the half-yearly drawing of bonds to the amount of 50,000*l*. was held on the 3rd Nov. 1875, and their numbers advertised on the 3rd Nov. 1875, and the bondholders were informed that the coupons and the bonds would be paid out of the first funds applicable for the purpose, of which due notice would be given.

The coupons due 1st Dec. 1875, including those on the drawn bonds, were paid on the 5th Jan. 1876. Of these, six for 500*l*. and six for 100*l*. were held by the plaintiff. Similarly bonds to the amount of 50,000*l*. were drawn in May, 1876, of which 4100*l*. were held by the plaintiff. Consequently there was now 100,000*l*. worth of bonds drawn for payment and unpaid. The trustees declined to pay interest, and said that none was payable in respect of any bond drawn as aforesaid, whatever time may elapse before it is actually

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paid, and although no funds have ever been provided for its payment.

The amount stated by the plaintiffs to be due for interest or coupons which the trustees decline to pay is: Interest from 1st June to 24th Sept. 1875, upon 50,000*l.*; interest from 1st Dec. 1875, to the present date, on 50,000*l.*; interest from 1st June, 1876, to the present date, on 50,000*l.* The trustees declined to permit any drawing till this question was settled.

The plaintiff claimed that interest was payable on all the bonds whether drawn for payment or undrawn until the principal sums should be fully paid; and that interest and arrears of interest should be paid on unpaid bonds drawn for payment funds being provided for such payment, in priority to or at least rateably with the interest on the undrawn bonds which accrued due on the 1st June, 1876.

That the defendants the trustees should be restrained by injunction from dealing in any other manner with the funds in their hands; that the principal of the said bonds so drawn should be paid according to their respective priorities; that any surplus in the trustees' hands should be applied in the payment of the bonds drawn, and that the drawings should be proceeded with; and that the trusts of the said deed of 28th June, 1872, so far as necessary, should be executed under the direction of the court.

Chitty, Q.C. and Everitt, for the plaintiff.

Fry, Q.C. and J. J. Prior, for the defendants, the trustees.

Cookson, Q.C. and Rawlins, for a holder of undrawn bonds.

Davey, Q.C. and Stirling, for the assignees of Montero Brothers.

W. J. H. Clark, for other parties.

JESSEL, M.R.—My view of this case is a very simple one. No doubt by law one could on this bond bring an action both for the arrears of interest and interest on the capital. Therefore if the agreement is good for anything, it secures as much interest upon the arrears of interest as it secures interest upon the capital. It is impossible to stop and say that what is secured by the bond is not as much the one as the other. When you come to look at the statute (3 & 4 Will. 4, c. 42), it is a sum certain payable on a day certain, as to which a jury is entitled to give damages. Now the interest, the coupon, is as much a sum certain, payable on a day certain, as the capital of the bond itself. And, therefore, if what is secured by the bond is the sum recoverable by law, under the bond it would include, as I said before, principal, arrears of interest, secured *eo nomine* by the bond, interest upon the principal not paid to the date, interest upon the interest of arrears secured by the bond which is also payable on a day certain. What we have to consider, therefore, is: What is the meaning of clause 15—for really it depends upon clause 15, and to a certain extent upon clause 2? It is applied in this way, "In or towards payment of the principal moneys and interest secured by the said mortgage bond in the following order." Now the first observation one has to make is, what is claimed now is not interest according to our law. If you look at what the statute says—for we must not alter words—you will find that when there is no bargain to pay interest, what you recover is not the interest at all, but what the jury choose to

give you. The words are these (3 & 4 Will. 4, c. 42, s. 28): "Be it further enacted upon all debts or sums certain, payable at a certain time, the jury on the trial of any issue or at any inquisition of damages, may, if they should think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts were payable." Therefore, the interest which the jury may allow, must not exceed 5 per cent. It is a mere accident that the rate of interest secured by the bond is more or less than 5 per cent. If the rate of interest secured by the bond had been 7 per cent., as it is here, you cannot get more than 5 per cent. under the statute any how. Therefore, it is a fallacy to say that you can recover by law interest on the bond, because you cannot. It is "not exceeding the current rate of interest;" and the current rate of interest is 5 per cent. So that you would get 5 per cent. from the jury, and you have got 7 per cent. on your bond. You really do not recover the same thing as interest; and though I am anxious, as I said before, if I could to do something for these creditors, who I think are hardly dealt by, I must not depart from the terms of the instrument. It shows, therefore, that what is secured by the bond, 7 per cent. interest, is not the interest which is recovered by action on this bond; and consequently, when I come to read the words, "interest secured," knowing that it cannot mean 7 per cent. interest, but could only mean something not exceeding 5 per cent. interest, I have at once something to show me that the "interest secured" means the interest named in the bond. It goes on a little further: "First, on payment of all arrears of interest, actually due on such of the said bonds as shall be outstanding bearing interest." That is, "arrears of interest." On these drawn bonds which may be outstanding, and bearing interest up to a given rate, they are arrears of interest due, i.e., they are arrears of interest at 7 per cent., and those are to be paid. "Secondly, in redemption of such amount of the mortgage bonds, as ought to have been redeemed by any previous sum." Of course you cannot get it under those words. If you get it at all you get it under the words "arrears of interest." It does not appear to me that that is a proper description of the 5 per cent. which a jury may give, and could only apply to the 7 per cent. which is in fact secured by the bond. That interpretation is of course dependent, first of all upon the words of the bond itself. What is secured by the bond? It is to pay "the principal of *l.* on the 1st June or the 1st Dec. (as the case may be) next following the day upon which the bonds shall be drawn for redemption upon presentation and against delivery of this bond, and also of interest on the said principal sum of *l.* at the rate of 7 per cent. per annum, semi-annually on every 1st June and 1st Dec., up to and including the day on which the said principal sum shall become payable." Now, we also have the 2nd clause. I agree the 2nd clause only applies to the sum remitted. Perhaps that cannot be finally decisive of the question; but it is very strong. After saying the sums remitted shall be applied in a certain way, it goes on to say: "No interest shall be payable on any drawn bond after the day fixed for its redemption." These bonds are drawn, and the day fixed for redemption has passed. In addition to that there is again the observation, which I am afraid I am repeating, although it comes in a dif-

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ferent shape, i.e., if this argument were worth anything, it would carry under the words "arrear of interest," not merely what is legally and properly described by that term, but also the 5 per cent. interest on the arrears of interest to all the bondholders. When people borrow at 7 per cent. in this way, they do not generally intend to pay compound interest. It is a very uncommon thing to do. Still if the argument is worth anything, it must be carried to that extent, because the right to recover the interest upon the interest unpaid, is identical with the right to recover interest upon the coupon unpaid. I feel bound to construe the deed, as I find it according to its natural meaning, and in my opinion arrears of interest do not include anything but the 7 per cent. expressly secured.

Solicitors: Clarke, Bawlings, and Clarke; Norton, Rose, and Co.; Clements.

Nov. 4 and 11.

Re VEALE'S TRUSTS (a).

Will—Construction—Power—Exclusive or non-exclusive power.

A testatrix after giving a life estate to a daughter in a certain fund, gave her a power to appoint the fund, "to and amongst (the testatrix's) other children or their issue in such parts, shares, and proportions, manner and form as her said daughter . . . should by deed or will appoint."

Held that this was an exclusive power and was well exercised by an appointment to one only of its objects to the exclusion of the rest.

Garthwaite v. Robinson (2 Sim. 43) disapproved; remarks on Stolworthy v. Sanicroft (10 L. T. Rep. N. S. 223, 10 Jur. N. S. 262).

PETITION.

Mary Veale by her will, dated the 18th Aug. 1823, whereby after certain bequests she gave and bequeathed unto William Veale, and George Cumming Rashleigh all the residue of the capital stock in the 4l. per cent. Bank annuities that might be standing in her name in that fund, at the time of her decease, in the books of the Governor and Company of the Bank of England, and also the principal sum of 900l. which she had lately lent to her said son William Veale, and which was sold out of the said 4l. per cent. stock for the purpose of enabling her to accommodate him with it upon trust that they should hold this last-mentioned capital stock with the said principal sum of 900l., with all interest and dividends to accrue thereon to and for the several uses, trusts, and purposes thereafter mentioned, that was to say, upon trust to pay the interest and dividends thereof to the separate use of her daughter Mary Elizabeth Veale and her assigns during her life, and from and immediately after her decease, if there should be no child or children of her said daughter Mary Elizabeth Veale (which was the case), then upon trust to pay and apply all the same trust moneys, and to assign and transfer the security and stock in and upon which the same should be then invested to and amongst her (the said testatrix's) other children or their issue in such parts, shares, and proportions, manner, and form as her said daughter Mary Elizabeth Veale should by deed or will, to be attested in the presence of three or more credible

witnesses, direct and appoint; and in default of such directions and appointment the said testatrix directed that the same should fall into and become part of her residuary estate and effects, and as to all the rest, residue, and remainder of her personal estate, subject to debts and legacies, she bequeathed the same to her son Wm. Veale, absolutely, whom she appointed sole executor of her will. The said Mary Veale died in 1825, and her will was duly proved. She left two daughters and her son Wm. Veale her surviving. The income of the said fund was duly paid by the trustees to the said Mary Elizabeth Veale during her life. She died on or about the 18th Jan. 1865 without ever having been married.

At her death the said fund was represented by a sum of 1500l. new 3l. per cent. Bank annuities standing in the names of the said William Veale and George Cumming Rashleigh.

The said Mary Elizabeth Veale by her will, dated the 3rd of June 1856, gave the whole of the money she might be possessed of or entitled to in the 3l. per cent. Consolidated Government Annuities (afterwards converted into New 3l. per cent. Bank Annuities), and at the date of the said will standing in the names of the said William Veale and George Cumming Rashleigh unto her executors thereafter named, upon trust to pay the dividends thereof unto her said niece Emilia Mary Butler during her life for her sole use and benefit free from all control of her then present or any future husband; and from and after her decease the said testatrix directed that the whole of the said stock should be for the sole use and benefit of any child or children, or issue of any child or children, of her said niece who should be living at her said niece's death to be equally divided between them if more than one, the issue of a deceased child or children of her said niece taking the share or shares only of their deceased parents, and in case there should be no child or children or issue upon the trusts therein mentioned. And she thereby appointed the said William Veale and Edmund William Paul executors of the will.

The will of the said Mary Elizabeth Veale was duly proved by the executors named therein, and the fund, after payment of legacy duty, was transferred into the names of the trustees of her will.

The dividends on the said fund were duly paid to the said Emilia Mary Butler until the payment into court next hereinafter mentioned.

On the 25th July 1876, the Hon. St. John Butler, the then trustee of the will of the said Mary Elizabeth Veale filed an affidavit made by him in the above-mentioned matters, stating that under the provisions of 10 & 11 Vict. c. 96, he proposed with the privity of the Paymaster General to transfer into court the sums of 1404l. 9s. 5d. Bank 3l. per cent. annuities which represented the original sum of 1500l. bequeathed by the will of the said Mary Veale; and that to the best of his knowledge and belief the only persons interested, or claiming to be interested, in the said sum were the said Emilia Mary Butler and her children and issue, and the representatives of the said William Veale the residuary legatee under the will of the said Mary Veale.

It was contended on behalf of William Veale's representatives that the appointment made by the will of the said Mary Elizabeth Veale was an invalid exercise of the power given to her by the

will of the said Mary Veale; that the said power was non-exclusive, and that on failure of issue of the said Mary Elizabeth Veale, and in default of appointment, the said trust funds fell into and became part of the residuary estate and effects of the said Mary Veale.

The said William Veale made his will on the 22nd Nov. 1865, of which he constituted the said George Cumming Rashleigh, Sir Augustine Fitzgerald, Glynn Grylls, and Frederick Hill, executors. The residue of his personal estate he bequeathed to the said G. C. Rashleigh, Sir A. Fitzgerald, and G. Grylls.

The testator, William Veale, died on the 8th Sept. 1867; this said will, with two codicils, not materially varying the same, was duly proved.

The petition was presented by Edward Hearle Rodd and Frederick Vivian Hill, the present trustees of the estate of the said William Veale, which was being administered by the court; and prayed that the residue of the said sum of 1404*l.* 9*s.* 5*d.*, after payment of costs, might be transferred to the petitioners as trustees of the will and codicils of the said William Veale, to be held by them on the trusts thereof.

Bagshawe, Q.C. and *Method* for the petitioner.—The power is non-exclusive. The appointment, therefore, in favour of Mrs. Butler and her children to the exclusion of the other objects of the power was invalid, and the fund consequently passed into the residue and belonged to William Veale's representatives, to whom it was given in default of appointment. The words "to or amongst" imply a non-exclusive power. This is a well-established rule, and is laid down by the late Master of the Rolls in *Robinson v. Sykes* (23 Beav. 40). See also *Fox v. Gregg* (Farwell on Powers, p. 410; Sugden on Powers, p. 946). In *Mayitson v. Hall* (9 L. T. Rep. N. S. 755; 10 Jur. N. S. 89) there was a substitutionary gift, but there is none here. *Garthwaite v. Robinson* (2 Sim. 43) was a case in which the power was to appoint among testator's grandchildren or their respective issue, and the power was held to be non-exclusive. [JESSEL, M.R.—But that case turned upon a question of grammatical construction of the particular words used, and does not govern this case.] *Stodwoitley v. Sanncraft* (10 L. T. Rep. N. S. 223; 10 Jur. N. S. 762) is almost exactly on all fours with the present. A power in case the donee should leave issue to appoint among such of the issue as she should appoint was held to be a non-exclusive power. This case is really *Brown v. Higgs* (4 Vesey 708; 8 Vesey 562). [JESSEL, M.R. referred to Farwell on Powers, 294; *Spring v. Biles* (1 T. R. 435 note), *Harley v. Milford* (21 Beav. 280).]

Northmore Lawrence, for Mrs. Butler and her children, was not called upon.

JESSEL, M.R.—This case has been elaborately argued. I do not intend to lay down any new rule upon this question, but I will take the principle which governs the case as stated in the latest text book on Powers. Mr. Farwell says, (p. 294): "Each case must depend on the intention expressed in the particular instrument creating the power; no general rule can be laid down, except perhaps that the words 'all and every' are mandatory, and make it necessary that each object should have a share (5 Vesey 857), and that 'such' authorises exclusion, unless a contrary expression appear." That I think is a correct

statement of the law. I must construe the particular words of this instrument. It is not to the purpose to quote cases in which other words have been held to create a non-exclusive power. The words in those cases, though they may have been similar to the words here, are not identical. The question is one of construction. In the instrument before me are there any words which prevent the power from being exclusive? It is not sufficient to say that such and such words, in such or such an instrument, have been held to create a non-exclusive or simply distributive power. It is true that the words "all and every" and "unto or among" have been held to create a non-exclusive power. But what have we here? The testatrix gives the fund to her daughter Mary Elizabeth Veale for life, and after her decease, "if there should be no child or children of her said daughter Mary Elizabeth Veale (which event happened) then upon trust to pay and apply the same trust moneys, and to assign and transfer the security and stock in and upon which the same shall be then invested to and amongst the testatrix's other children or their issue in such parts, shares, and proportions, manner, and form, as her said daughter Mary Elizabeth Veale should by deed or will . . . direct and appoint." In default of appointment the fund falls into the residue. The power is to appoint to "children or their issue." Now it was argued, but the argument was abandoned, that "issue" must be confined to those living at the death of the donee of the power. But I find in the power no such limit. "Issue" must mean issue for ever. But in the appointment the rule against perpetuities must be observed. Consequently the donee was bound to appoint to all the issue of the testatrix living at her own death or who should be born within twenty-one years afterwards. The result is equally absurd if the power was to be exercised in favour of the issue who might be living at the moment of the donee's death. And issue *en ventre sa mère* must be included. Therefore the donee was bound, *in articulo mortis*, to ascertain whether any of her female relatives was in an interesting condition. Unless therefore, I am actually driven by authority, I cannot hold this power to be non-exclusive. Is there, then, authority for holding that a power of appointment is exclusive where the objects are not readily or, as in this case, cannot possibly be, ascertained? Yes: there is the case of *Mahon v. Savage* (1 Sch. & Lef. 111) where a direction to distribute among "poor relations" was held exclusive: and a direction to appoint to "children" has also been held exclusive. This is all the stronger, because there is a reason for holding a power of appointment among children non-exclusive because it was held to be a provision for appointments in the nature of portions. I will refer to the case of *Spring v. Biles* (1 T. Rep. 435). There the power was by will to the testator's wife "to appoint to and amongst such of my relations as shall be living at the time of my decease." There was nothing indefinite in the class, as it was amongst such persons as should be living at the testator's, not at the wife's decease. It was held, however, that the power was exclusive. Buller, J. said: "The cases of powers to distribute among children stand on very different grounds; for the courts have considered them as portions to the children." *Mahon v. Savage* (1 Sch. & Lef. 111)

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was decided on the same principle. I confess that in the case of *Garthwaite v. Robinson* (2 Sim. 43) I should not have come to the same conclusion as Vice-Chancellor Shadwell. But it is not to be expected that different judges should always come to the same conclusion in the construction of particular words used by a testator. There the power was to appoint among the testator's "present or future grandchildren or their respective issue," and it was held to be badly executed on account of the exclusion of the children of a deceased grandchild living at the donee's death. I must adopt the rule laid down by the House of Lords in *Jenkins v. Hughes* (8 H. L. Cas. 571) that on questions of mere verbal interpretation one judge is not bound to follow the decisions of another. In that case the effect of a power to appoint among issue indefinitely was not discussed. But the other case, in which that question was raised, *Stodworth v. Sanicroft* (10 L. T. Rep. N. S. 223; 10 Jur. N. S. 762) requires more serious consideration. That case was more like the present. The power was, after a trust estate to A. for life, and after A.'s decease, in case she should have issue upon trust to dispose of the said estate in such manner among such issue, as A. by deed or will should appoint, and an appointment by A. among some only of her issue was held bad. There was this peculiarity in that case. The power was exercisable by A. in case she should leave issue. Now the absurdity was involved that the power could only be exercised on her death. And if "issue" meant "issue" indefinitely, if the power was non-exclusive, the donee was bound to appoint to issue born after her death, and if the objects were restricted to those who were living at her death, she was bound to ascertain in *articulo mortis*, how many children, grandchildren, and great grandchildren she had, and to appoint to every one of them who might be living at the actual moment of her death. But these considerations do not seem to have been pressed on the Vice-Chancellor. He says in his judgment: "It is contended that if the objects of the power are confined to issue living at the death, it was absurd to give a power by deed as well as by will, because if there was a partial exercise of the power by deed in favour of one object, raising the question of exclusive appointment in the lifetime of the donee, then if that person died before the donee, the appointment would fail, as that person would not be an object of the power. I agree in the justice of that observation; but I am at a loss to see why that is more absurd than that the power was not to arise unless she left issue living at her death." But the Vice-Chancellor only gets rid of one absurdity by showing another. I cannot, therefore, hold that case to be authority bearing in the case before me. The words in the particular instrument before me are not the same as the words in the case before the Vice-Chancellor. I do not consider that that case stands in my way when I can put a rational construction on the instrument which I have to construe. I decide, therefore, that the power in this case was an exclusive one and has been well exercised by the donee.

Solicitors: Bolton and Co.; Kendall and Congreve.

Saturday, Nov. 18.

COLEMAN v. JARROM. (a)

Will—Real estate—Class gift—Devise to persons living at testator's death or who should have died leaving issue living at his death—Lapse—Title.

A testator devised real estate to the children of his brother who should be living at his decease or who should have died leaving issue living at his decease as tenants in common.

Four of the children of testator's brother survived testator, and one had died leaving issue living at testator's death.

On a sale, it was objected by the purchaser that a good title could not be made to the whole of the property, as one undivided fifth part was vested in the issue of the child who had died and had lapsed to the testator's heir-at-law, as under a partial intestacy:

Held, following and approving Fell v. Biddolph (32 L. T. Rep. N. S. 864; L. Rep. 10 C. P. 701) that this was a class gift; that the class to take were those who were capable of taking; that there was no lapse to the heir-at-law, but the four surviving children took the whole, and could give a good title to a purchaser:

Remarks on Shaw v. MacMahon (4 Dr. & War. 431) and on Fell v. Biddolph (32 L. T. Rep. N. S. 864; L. Rep. 10 C. P. 701).

This was a summons taken out to be heard in chambers, under the Vendors and Purchasers Act of 1874.

By his will, dated the 14th July 1868, Samuel Coleman, amongst other specific devises, gave and devised his messuages or tenements, with the shops, outbuildings, and appurtenances thereto respectively belonging, situate in Asylum-street, Leicester, unto and to the use of all and every the children of his late brother, Joseph Coleman, who should be living at his decease, or who should have died in his lifetime leaving issue living at his death, in equal shares as tenants in common in fee simple, with cross executory limitations of the shares original and accruing of each of the said children in the event of his either dying under the age of twenty-one years without having been married, to the use of the others or other, in equal shares as tenants in common in fee simple.

By a codicil the testator gave a power of sale to the trustees of his will over the said messuages.

By a second codicil, after reciting that some of the children of his said brother, Joseph Coleman, had lately died without issue, he revoked the above demise of the said messuages, and after devising one of them to his wife's grandson, he devised the remaining four "unto and to the use of all and every the children of his said late brother, Joseph Coleman, who should be living at his (the testator's) decease, or who should have died in his lifetime leaving issue living at his death, in equal shares, as tenants in common in fee simple."

The testator's brother, Joseph Coleman, had six children, of whom four were living at the testator's decease, and are still alive and of full age. One had died without issue, and the remaining child, Thomas Hunt Coleman, had died leaving seven children.

The trustees of Samuel Coleman's will proposed to execute the power of sale, and the property was

accordingly sold by auction at Leicester, and the defendant was the purchaser. The defendant objected to the title, on the ground that the vendors, the children of the said Joseph Coleman, had not the whole property vested in them, but that one-fifth thereof was either vested in the issue of Thomas Hunt Colman or in the residuary devise of the testator.

A summons was therefore taken out by the vendor in the chambers of the Master of the Rolls, where the question was argued, and the case was adjourned into court for judgment.

Cozens-Hardy for the vendors.—The only persons included in the class are children. The issue of a deceased child takes nothing by implication. If this devise had been to the testator's own children, the devise would have been good, and the property passed to the vendor's four children and the heir or devisee of the deceased child. But the nephew, having predeceased the testator, cannot take: (*Browne v. Hope*, 26 L. T. Rep. N. S. 688; L. Rep. 14 Eq. 343.) The general rule must apply that in a gift to a class, those members only of the class can take who survive the testator, and are capable of taking the whole:

Diamond v. Bostock, 33 L. T. Rep. N. S. 217; L. Rep. 10 Ch. 355;

Fell v. Biddolph, 32 L. T. Rep. N. S. 864; L. Rep. 10 O. P. 701.

Liebstein, for the purchasers.—The language in this devise is different from that in the cases referred to; for here the gift is really to two classes. First, children living at the testator's death; secondly, children who predeceased the testator but left issue living at his death, and one of the classes being incapable of taking, there is an intestacy as to the gift to that class. There was manifest intention, from the fact that after the death of one of the children without issue, the testator by this codicil withdrew one of the houses from the devise to them, that children living at the death should not take the whole. The issue take by implication; if not, the one-fifth vests in the heir or devisee of the deceased child, or it passes to the residuary devisee. In any view the vendors alone cannot make a title, or at best the title is too doubtful to be forced on the purchaser.

JESSEL, M.R.—I have adjourned into court for judgment, a summons which I heard in chambers under the Vendors and Purchasers Act of 1874. I am in the habit of hearing summonses in court when this can be done with safety to the parties. It is obvious that there are cases when to do so would be to defeat the object of the Act, and to bring about the publication of facts which would produce the very mischief which the Act was intended to prevent. If it be sought to ascertain where the legal estate in property is—and the declaration of this cannot injure anybody—if the purchaser desires a confirmation of his title, at the request of the purchaser, I may give him that confirmation, and as some of the points involved are of general interest, I may fitly do so in open court. The real question in this case arises on a gift by will in which the testator seems to have taken trouble to do that which the law will not allow him to do. He has given property to the children of his brother who should be living at his decease, or who should have died in his lifetime leaving issue living at his death. One of those children died leaving issue at the testator's

death, and this was an attempted gift of the share of that dead child to his issue. The testator intended somehow to provide for the case of a child leaving issue, but he did not know how to do so. In ordinary cases a gift to a person leaving issue lapses on the death of that person. The exception is under the clause in the Wills Act, by which such a gift, if made to the testator's own children, does not lapse. The question is whether I could presume or infer from the form of this gift, a gift to an individual and a substitutionary gift to his issue. I cannot do so. This is a plain gift, a common form of gift under which no one could have dreamt that the issue could take. It is only a gift to a member of a class. The law in this case does not allow the child to be a member of the class. The remaining question was this: whether as the child could not take, the remaining children take, or by operation of law there is an intestacy as to that child's share. These rules of construction are differently stated. No doubt, as a general rule the class takes which is alive or capable of taking at the death of the testator. The first point is what is the true rule? It is sometimes stated that those take who survive the testator. But the true rule is that those take who are capable of taking. The rule has regard not only to survivorship but also to capacity. In many cases the rule does not depend on construction. With great respect to those who have so stated it, I do not think that is the meaning of this rule. The testator often does not know—he did not know in this case—the difference in point of law between a child of his own and a child of his brother's. Now I think the rule may be stated as a mode of carrying out the intention of the testator in a most ingenious way. The testator must be supposed to have had two intentions—a primary and a secondary intention. The primary intention is that all shall take. The secondary that if all cannot take, those shall take who can take. Both intentions co-exist. Take the case of a testator who knows the law, and who has given property to a charity, not knowing whether he shall have sufficient pure personality to satisfy the gift. His primary intention is that the charity shall take if it can. His secondary intention is that if the charity cannot take, his residuary legatee shall take, the primary and secondary intentions co-existing in his mind. In the same way when there is a gift to a class, the testator is presumed to intend that the property shall go to that class so far as the law will allow. If any member of it dies or becomes incapable of taking, then those who are capable of taking, shall take. That is the true view, and seems to be laid down by the authorities of which I only refer to three. It is stated more broadly than I have stated it in the case of *Shaw v. Macmahon* (4 Dr. & W. 431). That was a singular case. It was the case of the will of a former Master of the Rolls in Ireland, and came before the Lord Chancellor, Sir Edward Sugden. There was a gift of a surplus fund to be divided in equal parts among all his children living at his death. By a codicil he revoked the gift to W., one of his children. The question was whether the other children took, or there was an intestacy, so that the share of W. devolved on the heir-at-law and next of kin of the testator. It was decided that the other children did take. At p. 438 the Lord Chancellor says: "It is now well settled, and

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in my opinion upon very reasonable grounds, that when there is a gift to a class, and one dies in the testator's lifetime, his share will not lapse, but the whole will be divided among the survivors. If, therefore, I can discover in this instrument sufficient evidence of the testator's intention that the remaining children should take the share of the residue originally bequeathed to his second son, there is authority to give effect to that intention." And at p. 440 he says: "A large provision is made in his will by a parent for his child, subject to a certain clause of forfeiture; by his codicil he revokes that large provision, substitutes for it a smaller gift, and says that the latter is to be subject to the same condition. Under the will, in the event of a forfeiture taking place, the gifts so forfeited, and amongst them the share of the residue, would go to the other children. Can I then construe differently the substituted gift? The effect of such a construction, as far as it relates to the personal estate, would be that Beresford, as one of the next of kin, would take a portion of it, and not only Beresford, but also William, the very son whom he intended to exclude from all interest except the 300*l.* per annum. This clearly was not his intention, and there is no rule of law which compels me to adopt this construction. On the contrary, the authorities are in favour of the opposite construction. The gift is to a class, and the time of the death of the testator is the period when the objects included in that class are to be ascertained, and at that time William is excluded by the codicil. I am clearly of opinion that I disturb no rule of law, and give effect to the plain intention of the testator in deciding that William is excluded from any share of the residue, the whole of which must go to the other residuary legatees." In other words, having excepted one of his sons in the substituted gift, he is in the same position as if he had been originally excepted. Now in the case before the Common Pleas of *Fell v. Biddolph* (32 L. T. Rep. N. S. 864; L. Rep. 10 C. P. 701) there was a devise of lands to the testator's niece for life, and after her death to the niece's husband for life, and then "to be equally divided among the children of the above-named Joseph and Sarah." There were eight children living at the death of the testator, of whom one, Thomas, was an attesting witness of the will. He consequently lost his share, and the question was whether the other children took, or there was an intestacy as to Thomas's share. The Court of Common Pleas held that the other children took, and not the heir-at-law. Lord Coleridge refers to *Young v. Davies* (2 Dr. & Sm. 167), which was a case of joint tenancy, and where Kindersley, V.C., stated the rule of law to be that where there is a gift to A. and B., and A. dies or becomes incapable of taking, the whole goes to B. But my impression is that there is another case before Kindersley, V.C., of a gift to a class, where he came to an opposite conclusion. Lord Coleridge quotes from the judgment in *Young v. Davies*, where Kindersley, V.C. (p. 710), says: "With regard to the question upon the gift to the daughter surviving the tenant for life, who was an attesting witness to the will, I am of opinion that though the statute avoids the gift to her, and renders her incapable of taking, it does not sever the joint tenancy; it does not render the testator intestate as to the share intended for her; but the whole goes to her sisters, who alone were capable

of taking." It is clear to my mind that the Vice Chancellor decided on the joint tenancy only. Lord Coleridge does not seem to be aware of certain other judgments, or of the extremely technical character of the decision. He goes on: "It would fairly seem from this that the Vice-Chancellor regarded one incapable of taking at the time of the death of the testator as not one of the class, the members of which were to be ascertained at this period. We certainly are of this opinion. By the operation of the statute, the names of Thomas and Sarah (assuming the latter to be an attesting witness as the plaintiffs contend) are struck out of the will; they are rendered incapable of taking, and therefore in our judgment are not to be reckoned in the class ascertained at the testator's death." I think that is the true rule, though I should not have deduced the rule from the case before Kindersley, V.C. Then Lord Coleridge goes on, p. 710: "This case, no doubt, shows that the class is to be ascertained at the death of the testator, but it is a strong case to show that, in gifts to a class, the class as a whole is to be regarded, even though such rule conflicts with the express words of the testator, some of those included in the bequest there being incapable of taking." The rule is only in apparent conflict with the testator's intention, as I have already shown in the case of the gift to a charity. The rule may be so expressed as to make the whole consistent. The intention is that the legatee takes if he can. I thoroughly agree with the decision in the Court of Common Pleas on the will in that case, and with the reasons assigned. Then we come to the case of *Dimond v. Bostock* (L. Rep. 10 Ch. App. 358; 33 L. T. Rep. N.S. 217). The testatrix in that case gave personal estate in trust for all the nephews and nieces of her late husband, who were living at the time of his decease, except A. and B., as tenants in common. Two of them who survived the husband died in the lifetime of the testatrix. The gift was to the class living at her husband's decease, not hers. But Vice-Chancellor Malins held that the fund was divisible among those of the class who survived the testatrix. This decision was affirmed. It was a gift to a class, and the members of the class had to be ascertained at the death of the testatrix, though the gift was to the class which survived the husband. The only effect of that was to show that the class could not be increased. Lord Justice James then says: "I am of opinion that the construction which the Vice-Chancellor has put upon this will ought not to be disturbed. The rule of the court with regard to lapse very often operates against the intention of a testator, and this court has made this modification of the rule, that when there is a gift to a class the rule of lapse does not apply. In that case the fund is to be divided among the members of the class living at the period of distribution, unless the words describing the class are used for mere brevity instead of designating the persons by name. If this had been the first occasion on which the point had arisen, there might have been good ground for contending that the legatees in such a gift as the present were *persons designata* just as if the testator had mentioned their names. But we have first the authority of *Viner v. Francis* (2 Bro. C. C. 658), in which there was a gift to the "children of my late sister." It was impossible that there could be any fluctuation in that class; it was just the same as

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if it were a gift to the persons by name who answered that description. They were *personae designatae* quite as much as the members of the class in the present case." Lord Justice Mellish concurred. I am quite satisfied that the Lord Justice did not mean that that was the whole rule, that it was a mere question of survivorship. The true rule is that the members of a class who are capable of taking, take, whether the incapacity of those who cannot take arises from their death in the testator's lifetime, or by operation of law, or by attesting a will, or by some other operation. Therefore, I think that this requisition is not well founded, and that the vendor's construction is right.

Solicitors: *Field, Roscoe, and Co.*, for *Stone, Billson, and Stone*, Leicester; *Harvey*, Leicester.

Nov. 23 and Dec. 7.

(Before Vice-Chancellor MALINS.)

Re BLAKELY ORDNANCE COMPANY (COATES'S CASE). (a)

Charging order—Judgment debtor—1 & 2 Vict. c. 110, ss. 14, 15—Stock "standing in his name in his own right"—Beneficial owner—Notice.

The liquidator of the B. Co. obtained a charging order on the 24th Oct. 1876 against C. on certain stock of the O. Co. standing in the name of C. The stock had been lent to C. by his father, merely to qualify him to be a director of the O. Co.

On the 17th Oct. C. had retransferred the stock to his father, but the transfer was not registered until the 25th Oct.

On the application for the charging order, notice was given to the liquidator that the stock belonged beneficially to the father. C. moved to discharge the order:

Held, independently of the question of notice, that the stock was not standing in C.'s name in his own right, within 1 & 2 Vict. c. 110, s. 14. Order discharged.

This was a motion on behalf of Frederick Coates to discharge an order made in the above matter by Huddleston, B., sitting as Vacation Judge, dated the 24th Oct. 1876, whereby it was ordered that 1000*l.* Stock of the London General Omnibus Company, standing, at the date of a balance order of the 9th May 1876, in the name of Frederick Coates, a contributory of the Blakely Ordnance Company, notwithstanding any transfer thereof, should stand charged with the payment of 3000*l.* due from Frederick Coates to the liquidator of the Blakely Company in respect of calls, unless the said F. Coates should show good cause to the contrary.

The Blakely Company was in course of being wound-up in the Rolls Court, and Frederick Coates had been settled on the list of contributories. A call order had been made on the 2nd July 1870, and eventually on the 9th May 1876 a balance order for payment of 3000*l.* was obtained against him by the liquidator.

On the 24th Oct. 1876, the above-mentioned order was obtained against Coates by the liquidator of the Blakely Company.

Coates now moved to discharge the order, on the ground that the stock charged by the order really belonged not to Coates but to his father,

who had lent him the same for the purpose of qualifying him to become a director of the Omnibus Company, and that the stock had in fact been retransferred to the father before the date of the charging order, though, the transfer not being completed, it still stood in the son's name in the books of the omnibus company.

The important dates with reference to the case were as follows:

The balance order was dated the 9th May 1876, and was served on the day following. The transfer by Coates to his father was executed on the 17th Oct. 1876, registered by the Omnibus Company on the 25th, and sanctioned by the board on the 26th. The charging order, as above stated, was obtained from Huddleston, B. by the liquidator of the Blakely Company on the 24th Oct. The charging order was served upon the Omnibus Company on the 31st Oct.

The application by the Blakely Company to Huddleston, B. on the 24th Oct. was not made *ex parte* but upon notice, and at the time the order was obtained, notice was given to the Blakely Company by affidavit that the stock in reality belonged to Coates's father, though still standing in the son's name.

With reference to the circumstance of the loan and retransfer of the stock, Coates, the son, by his affidavit on the motion, stated as follows:

On the 28th Oct. 1874, my father, Thomas Coates, transferred into my name 1000*l.* Stock of the London General Omnibus Company for the purpose of enabling me to attend the meetings of the said company on his behalf, and also to qualify me to act as a director of such company in the event of an opportunity arising for the election of a new director, when it was my intention to present myself as being eligible for the office. There was no consideration paid or given by me or on my behalf for such transfer, and I did not derive any beneficial interest whatever in the said stock, or hold the same in my own right. The said stock was only lent to me by my father, and I agreed to retransfer the same to him at any time on request, and on the 17th Oct. inst. I duly retransferred and assigned the same to him at his request in pursuance of such agreement. During the time such stock stood in my name, the dividends which accrued due in respect thereof were never received by me, but the warrants were upon every occasion indorsed by me and afterwards handed to my father, who duly received the amount of such dividends.

There was also an affidavit of Coates, the father, confirming that of the son. It was not disputed that the stock formed part of a larger sum previously belonging to the father.

J. Pearson, Q.C. and *J. Wilkinson*, now moved as above.—This charging order cannot be deemed operative against the stock. There is no dispute between the father and the son as to the nature of the transaction. We submit that the son was simply a trustee for the father. At the time when the liquidator made the application for the charging order, he had notice that the stock belonged to Coates the father. Instead of getting the order *ex parte*, as he might have done under the Act, he gave notice; the result of which was that he had affidavits disclosing the facts as between the father and the son. It is true that joint stock companies are shielded from taking notice of trusts, and some *obiter dicta* in *Cragg v. Taylor* (13 L. T. Rep. N. S. 756; L. Rep. 1 Ex. 148) are relied upon as showing that a shareholder must be treated, as regards third persons, as if he held the property in his own right, that is, that he cannot, as regards third persons, be a trustee. This proposition is a fallacy; it is every day's practice in this

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court to have trustees holding shares in different companies in such a way as that this court would enforce the performance of the trusts on which they hold.

Higgins, Q.C. and Whitehorne, for the Blakely Company.—The words of 1 & 2 Vict. c. 110, s. 14 (a) are, "standing in his name in his own right or in the name of any person in trust for him." These shares were, we submit, standing in the name of Coates the son in his own right. *Cragg v. Taylor* explains that "not in his own right" would mean a case where, for instance, the shares were in the name of a person as trustee or executor, or where there is a transmitted interest, and the meaning of the words must be the same in equity as at law. The owner who appears on the register must be taken as the owner for all purposes. If there had been a winding-up of the Omnibus Company, the son would have been put upon the list of contributories. The charge is completed when the order is made absolute. They cited also

Muckleston v. Brown, 6 Ves. 52;

May v. May, 33 Beav. 81.

Birch v. Blagrave, Amb. 264;

Childers v. Childers, 29 L. T. Rep. O. S. 141; 3 K. & J. 310.

J. Pearson, Q.C. in reply.—It is clear from the very words of the statute that the words "in his own right" mean "beneficially" because these words are contrasted with the words which follow "or in the name of any person in trust for him," thus excluding the case of stock standing in a person's name as trustee for another. Moreover the Act says that such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. The effect, therefore, is to give the judgment creditor no greater rights in the property than the judgment debtor could legally and equitably dispose of. He cited also

Symes v. Hughes, 22 L. T. Rep. N. S. 462; L. Rep. 9 Eq. 475;

Whiteorth v. Gaugain, 1 Ph. 725.

MALINS, V.C.—The case which I have to deal with is one as to which for some time

(a) 1 & 2 Vict. c. 110, s. 14.—That if any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditors to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

SECT. 15.—And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance, *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only. . . .

I entertained considerable doubt, but upon the whole I am able, I think, to come to a conclusion without any very considerable hesitation. [After referring to the circumstances of the transaction between Coates and his father, his Lordship continued.] There is no question whatever that, as between the father and the son, the stock continued always to be the property of the father. The son admits that fact and desires that the father should have it. But the son had been a shareholder in the Blakely Ordnance Company, and a call had been made upon him in May 1870. For some cause or other it was thought worth while to obtain what is called a balance order on the 9th May last, and a balance order is equivalent to a judgment. Having, therefore, a judgment against Captain Coates, that balance order was served on the 10th Oct. last, and Captain Coates, knowing that the stock in the omnibus company belonged not to him but to his father, and being desirous that his father should repurchase his property, executed a transfer to him on the 17th Oct. last, and that transfer was registered by the omnibus company on the 25th. Now, if nothing more had taken place, the father would have got his stock back again, and things would then have been as they were before the transaction took place. But the transfer having been executed by the son on the 17th Oct. which was registered on the 25th, a charging order was obtained on the 24th Oct. from Mr. Baron Huddleston, the vacation judge. That was granted without argument, as I understand, the learned judge expressing no opinion and giving no judgment upon the subject; he merely protected the property, directing any argument to be heard before the court, and therefore I have now to decide the question between the parties. Now, it is to be observed, first, that the official liquidator of the Blakely Company has not, in any way, dealt with the son on the faith that the property was his. I quite adhere to what I said in the opening of the argument that, as between the father and the son, the father has, up to a certain extent, put the son in the position of having the ownership of the stock, and if the son had sold the stock to a person who had no notice that the son was not the real owner of it, that purchaser would, in my opinion, have acquired a good title against the father. So also, if the son, dealing with the stock, had said to a person, "I do not want to sell the stock, I wish particularly to keep it; I have a promise or a probability of being elected a director if I retain it; I have various reasons for desiring to retain it; will you, therefore, let me have 500*l.* upon my giving you a charge upon the stock?" and accordingly, on the faith of that, had got 500*l.* borrowed upon it and charged upon it, that in my opinion would have been binding on the father, because he ran the risk; he trusted his son with the stock; he has run the risk of the son's dealing improperly with it; and therefore, if the son, in defiance of the rights of the father, had sold or mortgaged it, or dealt with it specifically, I am of opinion that his dealing with it would have been binding on the father. He has, however, never dealt with the stock, but the official liquidator of the Blakely Company, finding that the son had in his own name this stock, applied for a charging order. The effect of a charging order is defined by 1 & 2 Vict. c. 110, s. 14. [His Lordship read the section.] Therefore, if this stock had really belonged to the son, but was

standing in the name of another person, then it would have been liable to be charged, because it would have been in the name of another person in trust for him; the very words of the Act are "standing in his name in his own right or in the name of any person in trust for him." Now, does that stock stand in his own right? As between himself and the omnibus company undoubtedly it does; as between himself and his father, undoubtedly it does not, for the right is in his father. Then Mr. Pearson referred me to the case of *Whitworth v. Gaugain*. I have not heard that cited for many years. Some years ago it came constantly before the court, and one was very familiar with it. Its principle is now so thoroughly well settled and so well understood that it is scarcely ever cited. The principle is this: that a judgment or execution creditor in this court can take only that which a judgment debtor has; therefore, a man having mortgaged his property by a deposit of title deeds, and having a judgment against him, the mortgagee by the deposit of the title deeds has a good equitable title to the whole of the property so far as is necessary to satisfy the mortgage debt. Then a judgment creditor obtaining a judgment after that, what does he get? He gets only that which the judgment debtor can give him, namely, the equity of redemption which remains after the payment of the mortgage debt. Lord Cottenham, in confirming the judgment of Wigram, V.O. says (1 Ph. p. 730), "It can only attach upon the interest which remains in the debtor, viz., the legal estate, subject to the equitable charge upon a judgment obtained against a mere trustee; a court of equity would never permit the trust property to be applied in satisfaction of the judgment; and for the same reason, if the property is subject to a trust short of its full value, the judgment can only in equity affect that which remains after the trust is satisfied, for this alone is the property of the debtor." Now, it appears that this official liquidator (who I am bound to say has only done his duty in endeavouring to obtain the property), when he obtained the charging order had distinct notice. He was told that the stock did not belong to the son but to the father. The official liquidator has dealt with anyone on the faith of that stock. Mr. Whiteborne read to me a passage from the Master or the Rolls' judgment in *May v. May*, a case in which a fraudulent object was contemplated, but it had not been carried into effect, and therefore the Master of the Rolls said, "What harm has been done to anybody?" So I say, what harm has been done to any body? The father, by allowing the stock to stand in the name of the son, has done the Blakely Ordnance Company no harm; they never dealt on the faith of this property, and they had no chance of getting anything from the son before the transfer took place, so that they are not worse off, for they had nothing from 1870 to 1874, when the transfer to the son took place, to which they could resort. Therefore, it appears to me that there is no equity and no justice in holding that the official liquidator of the Blakely Company should obtain this stock. He knew that it did not belong to the son when he took the proceedings; he had no equity, for they had never dealt on the faith of the stock. The charging order was made after the execution of the transfer for the execution was, on the 17th Oct., being perfected on the 25th. Can I, under these circumstances, consider that this stock was standing in the name of the son in his own

right? I confess I am not inclined to concur in the narrow view of the Act, which was very much relied upon and expressed by Baron Martin in the case of *Cragg v. Taylor*, that the words "in his own right" are referable only to one particular case, namely, that of executor. I think that, as between a judgment creditor and a person who has a general lien upon the property, the judgment creditor, as decided in *Whitworth v. Gaugain*, can take only that which properly belongs to the judgment debtor. Here nothing can belong to the judgment debtor, because father and son both concur in saying that the son held the stock in trust for his father. Therefore, in my opinion, it cannot be considered that this property was standing in the name of the son in his own right, but that he was a trustee for his father, and his debts cannot, in my opinion, be enforced against this stock. The stock, therefore, having been transferred to the father, I have only to decide that the charging order must be discharged. I think I cannot give costs; I think it is not a question so absolutely free from doubt that it was not proper to come here; I think the liquidator was justified in raising the question.

Solicitors for the liquidator, *Lewis, Munns, and Longden*.

Solicitors for Captain Coates, *Stevens, Wilkinsons, and Harries*.

Nov. 7 and 8.

UNGLEY v. UNGLEY (a)

Statute of Frauds—Parol promise to give a house—Agreement in consideration of marriage—Entry—Part performance—Incumbrances.

A., whose daughter was about to marry B., verbally promised them that he would give them a leasehold house as a wedding present for his daughter. A. had recently purchased the house, which was subject to a charge in favour of a building society. Immediately on the marriage B. and his wife entered into possession and remained there until A.'s death, they paying the ground rent, rates and taxes. No rent was ever demanded by A. A. died shortly afterwards intestate, at which time there was still 110l. owing to the building society.

Held, that the entry into possession by B. and his wife was a part performance sufficient to take A.'s verbal promise out of the operation of the Statute of Frauds, and that B. and his wife were entitled to an assignment of the house and to have the balance due to the society paid out of the intestate's estate.

THIS was a suit to administer the estate of William Ungley who died intestate on the 10th Aug. 1875. The plaintiff was his eldest son and administrator, and the defendants were his widow, his daughter Margaret Kendall, and her husband William John Kendall.

The whole estate was of the value of about 1500l. only, and part of it consisted of a leasehold house in Westbourne-road, Barnsbury, worth about 400l.

The only question in the suit was as to this leasehold house, which was claimed by the defendants Kendall and his wife under an alleged gift to them by the intestate on the occasion of their marriage on the 16th Dec. 1871.

There was no evidence in writing of the gift, but the defendants Kendall and his wife rested

(a) Reported by F. GOULD, Esq. Barrister-at-Law.

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their claim on the following circumstances, which the Vice-Chancellor held to be proved by the evidence.

Mr. and Mrs. Kendall were married on the 16th Dec. 1871. Previously to their marriage Ungley had told them that he had purchased the house, which should, in the event of their marriage taking place, be the wedding present of his daughter. The house had been purchased by Ungley from the secretary to a building society. At the time of the purchase there were certain charges on the property in favour of the building society. Immediately on the marriage Mr. and Mrs. Kendall entered into possession of the house, after which time they paid the ground rent, rates, and taxes, and they continued ever after to reside there, no rent being demanded from them by Ungley. There was evidence of statements by Ungley at the time of the purchase, and previously to the marriage, that he intended the house for his daughter, and there was also evidence that he had made inconsistent statements after the marriage. At the time of his death there was still 110*l.* due on the property to the building society.

The cause now came on for further consideration, the contention of the plaintiff being that the intention was only to allow Mr. and Mrs. Kendall to occupy the house rent free during the life of the intestate while Mr. and Mrs. Kendall claimed to treat the possession as a part performance of the verbal promise. They also claimed to have the balance of the charge due to the building society paid off out of the intestate's general estate.

Glasse, Q.C. and Russell Roberts, for the plaintiff.

J. Pearson, Q.C. and Speed, for the defendants Mr. and Mrs. Kendall.

Mitchell, for the widow.

The following cases were referred to

Taylor v. Beech, 1 Ves. Sen. 297;

Surcome v. Pinniger, 3 De G. M. & G. 571;

Caton v. Caton, L. Rep. 2 H. L. 127;

Coles v. Pilkington, 31 L. T. Rep. N. S. 423; L. Rep. 19 Eq. 174;

Warden v. Jones, 29 L. T. Rep. O. S. 139; 23 Beav. 487.

MALINS, V.C.—This is a litigation which is most unfortunate for the parties, involving as it does a very small amount in value, but raising questions of the utmost importance in point of law and of the utmost importance to the interests of society. The whole of the property is not worth more than 400*l.*, and in respect of that sum no less than ten witnesses have been examined in court. The question I have to decide is one of law and fact, and I will first deal with the law. Assume that the intestate Ungley did, upon the marriage of his daughter or in contemplation of her marriage, say to her or to her intended husband, "Upon your marriage I will give you a house," that is to say, of course, a leasehold house. Well, in pursuance of that intention, it is said, he bought the house now in question and it is undisputed that on the very day of the marriage the husband and wife were put in possession of the house. It is also distinctly proved that they have resided there ever since. Now, it is beyond all doubt that there was no writing in the matter; that it was a mere verbal promise followed by a part performance, namely, by putting into possession. Now, under those circumstances what is the law? The Statute of Frauds has provided that all promises

in consideration of marriage shall be void unless the same be in writing, and I must say here, in this case, as I have said on similar occasions before, I think it is to be regretted that the decisions have been uniform in this respect, namely, in holding that marriage is not part performance, so as to take parol contracts out of the statute. But, at all events, that is thoroughly settled, and, in this case, if old Mr. Ungley had simply said to his daughter, "I have bought this house and intend to give it to you on your marriage," that would have been absolutely void, because that would have been a parol agreement merely; and marriage having been decided not to be part performance, there would have been nothing to take it out of the statute. But a parol promise followed by possession is taken out of the operation of the statute, and therefore, assuming the promise to have been made in this case, there is a promise to give the leasehold house, and that promise followed by putting the parties to whom it was made into possession. Accordingly, I take it to be perfectly clear that it is analogous to that which is done between landlord and tenant, between whom agreements for tenancies exceeding three years are void if not in writing, but as to which it is well settled that where there is an agreement for more than three years, and the tenant is put into possession, the mere fact of his entering into possession, without anything more, is part performance, and that part performance takes the case out of the Statute of Frauds, and the tenant who has entered is in just as good a situation on proving the agreement as if he had it in writing. I should say, therefore, if A. is about to marry, and proves a parol promise on behalf of his intended wife's father that he will give him a house on his marriage, that is a void contract, because it is not in writing; but if that promise is followed upon the marriage by possession, that simple fact, if it be for an hour only, ought, in my opinion, as being a part performance of the promise, to take the case out of the Statute of Frauds, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father saying, "In consideration of the marriage, I will give or settle upon you a house," because the part performance is equivalent to writing. Now, that would have been my opinion, I confess, on principle, if the case had come before myself originally; but, I am relieved of all difficulty on the subject, because, on the very high authority of Sir John Stuart, whose decision was confirmed by those two eminent judges, Lords Justices Knight-Bruce and Turner, on appeal, those principles have been settled. On the most thorough consideration they have settled those principles on this basis, and they are the principles by which, as it seems to me, men ought always to be guided. Now, assuming the facts to be proved, as they are here, the case of *Surcome v. Pinniger* in some respects is rather stronger than this. [His Lordship stated the facts of that case.] Now, then, assuming the facts to be as they have been given in evidence, the state of the case is this: The old man, the father, Mr. Ungley, was, at the time of this transaction, a widower (his wife had only recently died), with a son and a daughter, and it seems that he was contemplating a second marriage himself, while his daughter was also going to be married. What was his position?

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CARGILL v. BOWER.

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He was a small tradesman; perhaps, like a good many other people, he thought himself richer than he was, because it now turns out that his property did not exceed in value some 1500*l*. Now, as he was a widower with a son and a daughter only, and the son was engaged in his own business, he desired to provide for them, and it is plain that he intended, from the beginning, that the son should succeed him in the business. Then, having only a daughter besides, was there anything unreasonable or improper in his making some kind of provision for his daughter? Certainly it was not incommensurate with his position in life, and there would be nothing in that that would be deserving of anything but commendation if he desired to do it. Then, did or did not old Mr. Ungley hold out and make a promise to his daughter, and her intended husband, to give them a house, and did he buy this house or not with the intention of giving it to the daughter? [His Lordship then reviewed the evidence on the part of Mr. and Mrs. Kendall, and continued.] Now in opposition to this, witnesses were called to give evidence as to statements by the old man that he had no intention to give the house. I am not in the least disposed to believe that those witnesses came to state what they did not believe to be true, but I believe the whole thing is reconcilable with what was said before the marriage, and all those conversations subsequent to the marriage, which are perfectly intelligible, cannot have the slightest influence on the case, because if Mr. Ungley bought this house, and expressed his intention of giving it to his daughter, and immediately after the marriage the husband entered into possession of it, the day he entered into possession the thing was complete, and nothing that Mr. Ungley could say afterwards could really have any effect in undoing what he had done for valuable consideration. Therefore all these conversations which are alleged to have taken place at a subsequent period are utterly inadmissible. Upon the whole case I, therefore, come to the conclusion that the intestate, Mr. Ungley, did deliberately intend to purchase this house, and did purchase this house, for the purpose of giving it to his daughter as a marriage portion, as a place in which she was to reside, and, having done so, the contract which he entered into, to give it to her, was completed by the entry into it on the day of the marriage, and the contract was then in every respect complete, so that instead of being (as it is) a suit to undo that which had been done by the legal personal representative, it might have been a bill by Mr. Kendall and his wife to compel specific performance of a contract which is taken out of the Statute of Frauds, and is just as good as if it was in writing. They would have been entitled to succeed, in my opinion, in a bill for specific performance; and if, on the other hand, this had been a bill filed by the legal personal representative of the intestate claiming to have possession given up to him, I should certainly have dismissed such a bill with costs. Is there any justification for such a bill? Mr. Kendall pledges his oath to this transaction, and his wife also, and here is a brother who has his own sister's oath against him. Mr. Kendall is put in possession by the father, and the brother knew that their father had never demanded any rent for the house. If he did not know the law, those who advised him did know the law,

and this is a contest which should never have been entered into. Mr. and Mrs. Kendall are entitled to possession of the house, and they must be paid by the plaintiff personally their costs, and they must have their title perfected by an assignment of all the interest in the house. There is only one question remaining, viz., with regard to the mortgage for 110*l*., the portion of the purchase money remaining unpaid. Now I think it has been admitted in the course of the argument that if a man says "I settle Blackacre for a sum of money" that means he will settle it free from incumbrances. If he says in writing "I agree to settle Blackacre upon the marriage of my daughter," that means he will settle Blackacre free from all incumbrances. If, therefore, Mr. Ungley had said in this case, "I will settle this house upon you upon the marriage of my daughter," it would of course be free from incumbrances. I have already pointed out that promise followed by possession puts the parties in the same position as if there had been writing, and, therefore, I take it these parties are in the same position as if Mr. Ungley had said, "in consideration of your marriage I will give you a house, a leasehold house. As a leasehold house it is subject to the ground rent upon which I hold it, and thus subject I settle it upon you otherwise free from incumbrances." There will accordingly be payment of 110*l*. and a proper assignment made of the house.

Solicitors for plaintiff, *Rooks, Kenrick, and Co.*

Solicitor for defendants, *Henry Kelley.*

Thursday, Nov. 16.

CARGILL v. BOWER.(a)

Practice—Leave to amend defence—Rules of Court. —Order XXVII., rule 6—Costs.

H., one of several defendants, who had put in a joint statement of defence, subsequently changed his solicitor, who advised him that he had additional grounds of defence. The defendant, therefore moved for leave to amend the statement of defence so far as it related to him, or to deliver a fresh or supplemental statement of defence on his own behalf.

The only affidavit filed by H. in support of his application was one by his solicitor stating that H. had additional grounds of defence but not showing the nature of the proposed amendments.

Held, that no further affidavit was under Order XXVII. necessary. Leave given accordingly.

The plaintiff had instructed two Queen's Counsel and a junior to oppose the application, and the other defendants were represented by a junior counsel and supported the plaintiff.

*The court in ordering H. to pay the costs of the application allowed the costs of only one counsel on behalf of the plaintiff, and 40*s.* costs to the other defendants.*

This action was brought in Nov. 1875 against the directors of the British Imperial Insurance Corporation, of whom the defendant Hanson had been one, the plaintiff claiming that the defendants were jointly and severally liable to repay to him a sum of money and to indemnify him against all further liability on the shares held by him in the company. The statement of claim was delivered on the 3rd April 1876. A joint statement of defence was put

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in by the defendants on the 30th June 1876, but since that time the defendant Hanson had employed a separate solicitor, who advised him that he had additional grounds of defence. Hanson, therefore, moved under Order XXVII., rule 6, that he might be at liberty to amend the joint statement of defence so far as it related to him, or deliver a fresh or supplemental statement of defence on his own sole behalf.

The defendant Hanson had filed an affidavit by his present solicitor, stating that he had additional grounds of defence, but the affidavit did not state the nature of the proposed amendments.

Locock Webb, Q.C. and Brett, for the motion.—In *Budding v. Murdoch* L. Rep. 1 Ch. D. 42) leave to amend was given at the hearing where (the amendments would raise an entirely new case. In *King v. Corke* (33 L. T. Rep. N. S. 375; L. Rep. 1 Ch. D. 57) leave was given to the plaintiff at the hearing to amend his bill, and in *Roe v. Davies* (L. Rep. 2 Ch. D. 729) leave to amend was also given although the hearing had been fixed. This case is therefore stronger than those, as it is not yet arrived at the hearing. They cited also

Caldwell v. Pagham Harbour Reclamation Company, L. Rep. 2 Ch. D. 231.

Glasse, Q.C., Higgins, Q.C. and Grosvenor Woods, for the plaintiff.—The old practice was that the defendant on such an application should file an affidavit showing the nature and object of the proposed amendments. The new orders leave the old rule undisturbed. In the cases cited the court knew what would be the nature of the amendments. The motion ought to be refused, but if acceded to it ought to be only on payment of costs.

Rigby, for the other defendants, supported the plaintiff.

Locock Webb, Q.C., in reply.—*King v. Corke* is the only one of the cases cited in which the costs were given on the application.

MALINS, V.C.—The old practice was productive of great injustice, and the new rules have entirely altered it. In this case, since the defendant Hanson put in his joint defence, he has consulted another solicitor, who says there are omissions of several important grounds of defence. It is clear that there may be omissions made by a solicitor in putting in a defence which the client, who is ignorant of the law, may not have detected, and the mistake of a solicitor ought not to deprive a defendant of the advantage of putting in a new defence where another solicitor has discovered the omission within due time. No harm will arise from allowing the amendment. The plaintiff will have an opportunity of meeting it. The 27th Order makes no mention of an affidavit showing the nature of the new defence, and as it is not required by the Order, I should not think it necessary. I think the application is reasonable and proper, and within the rule. I think the defendant should indemnify the plaintiff against any reasonable costs rendered necessary by his not having put forward his full defence. In this case I can see no ground whatever for the plaintiff having instructed two Queen's counsel and a junior, and I shall direct that the costs of one counsel only be allowed, a Queen's counsel or a junior as the plaintiff thinks fit. As to the other defendants I think they should not have raised

any objection to the application, and a consent brief would have been sufficient. I shall allow them only 40s.

Solicitor for plaintiff, *J. Vernon Musgrave*.

Solicitors for defendant Hanson, *Stokes, Saunders, and Stokes*.

Solicitors for other defendants, *Roberts and Barlow*.

Thursday, Dec. 7.

(Before Vice-Chancellor BACON.)

WILKINS v. BEDFORD (a).

Practice—Counter-claim—Application for leave to file—Delay—Foreclosure suit—Order XXXVI., rule 20, Order LVII., rule 6.

Where the defendant in a foreclosure suit obtained an order for leave to file a counter-claim by way of set-off, and through the negligence of his solicitor, no counter-claim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counter-claim was refused on the ground of delay.

THIS was an application by the defendant for leave to proceed by filing a counter-claim pursuant to an order made by the Queen's Bench Division, on the 11th Jan. 1876. It was a foreclosure suit, the plaintiff being mortgagee of the equity of redemption of the City of London Baths, subject to a first mortgage of 16,000l.

In July 1875, the defendant brought an action in the Court of Queen's Bench against the plaintiff, for damages for breach of a contract for the supply of bricks.

On the 14th Oct. 1875, the defendant filed his answer in the foreclosure suit.

On the 11th Jan. 1876, the action in the Queen's Bench was stayed with leave to defendant Bedford to raise his claim under the contract by way of counter-claim in the foreclosure suit. On the 11th March 1876, through the gross neglect of the defendant's solicitor, a decree for foreclosure was made, no one appearing for the defendant, and no counter-claim having been delivered.

In November the defendant changed his solicitors, and then for the first time was made aware of the condition of the suit.

Kay, Q.C. and Ebbton now moved on behalf of the defendant for leave to file the counter-claim notwithstanding the foreclosure decree. Although under Order XXXVI., r. 20, the application ought to have been made within four days, yet the court has under Order LVII., r. 6, a discretion to extend the time. We submit that under the circumstances of the case the court should exercise its discretion in favour of the defendant.

Freeling (Henning, Q.C. with him), for the plaintiff, was not called upon.

BACON, V.C. was of opinion that the delay which had occurred was fatal to the application, and dismissed the motion with costs.

Solicitor for plaintiff, *Vanderpump*.

Solicitors for defendant, *Terrell and Honey*.

Thursday, Nov. 9.

HOPE v. THE INTERNATIONAL FINANCIAL SOCIETY. (a)

Company—Resolutions for diminishing capital by buying up shares—Ultra vires—Action by shareholder—Forfeiture of shares—Injunction—The Companies Act 1862, s. 6—The Companies Act 1867, ss. 9, 13.

The shareholders of a company passed a special resolution authorising the directors to expend a large portion of the company's assets in purchasing the shares of those shareholders who desired to withdraw from the concern, the avowed object of the resolution being to effect a gradual winding-up of the company. The articles of association contained no clause authorising any such diminution of the company's assets, but contained a clause empowering the directors with the sanction of a general meeting to forfeit the shares of any shareholder who directly or indirectly commenced or carried on any action against the directors or the company. A shareholder having commenced an action against the directors and the company to restrain the carrying out of the above resolution, his shares were forfeited.

Held, that the resolution was ultra vires, and that it was the duty of the shareholder to prevent the directors from carrying it into effect.

Held, also, that the forfeiture of the shares did not deprive the shareholder of his right to prevent the application of the company's assets to an illegal purpose.

MOTION.

The International Financial Society (Limited) was duly incorporated under the provisions of the Companies Act 1862 & 1867 in the month of May 1863 with a capital of 3,000,000*l.* divided into 150,000 of 20*l.* each.

The material clauses of the articles of association were the following:

23. Subject to the provisions of the statute and with the authority of a special resolution and the consent of three-fourths in value of the holders of all the shares, or as the case may be, all the shares of any class may be consolidated into a smaller number of shares or divided into a larger number of shares or be thereby or otherwise increased or reduced in nominal amount or in aggregate nominal amount.

31. An extraordinary meeting may at any time be called by the directors of their own accord.

55. The company may, in general meetings from time to time by special resolution, alter and make new provisions instead of or in addition to any regulations of the company whether contained in the articles of association or not.

56. The authority of general meetings from time to time by special resolution, to alter and make new provisions instead of or in addition to any of the regulations of the company, shall extend to authorise every alteration whatsoever of these presents except only the regulations of the company which provide for the limitation of the liability of these shareholders, and for the proportionate equality of the liability of the shareholders and of their interests in the profits of the company and for the minimum remuneration of the directors, and for the share of profits to be given to the directors; which excepted regulations shall accordingly, except as provided by Article 108, be deemed the only fundamental and unalterable regulations of the company, but the company shall be bound by all their special resolutions under which any shares were issued with special privileges and all new regulations of the company shall have effect accordingly.

170. The shares of any shareholder who directly or indirectly carries on, commences, supports, or threatens any action, suit, or other proceeding at law or in equity

against the company or against the directors or any of them in their capacity of directors, may and notwithstanding the pendency of any such proceeding and whatever may be the ground or alleged ground of any such proceeding, be, on the recommendation of the board and with the sanction of a general meeting, absolutely forfeited for the benefit of the company; but in any such case the company shall, within fourteen days after the forfeiture, pay to him the full market value of the shares at the time of the forfeiture thereof, the value in case of difference to be settled by arbitration.

On the 6th March 1868, a special resolution was duly passed and subsequently confirmed and registered by which the capital of the company was reduced to 1,500,000*l.* divided into 150,000 shares of 10*l.* each with 5*l.* per share paid thereon.

The plaintiff, William Hope, was the holder of five shares in the company.

On the 19th July 1876, William Hope commenced an action of *Hope v. Gibbs*, to which the company were defendant, and in which he claimed damages for the non-performance of a sewage contract.

On the 12th Aug. the directors of the company issued the following printed report to the shareholders:

Since the last general meeting in January the directors have carefully considered various plans which have been proposed or have occurred to them for meeting the wishes of those shareholders who at various times have expressed their desire to withdraw from the society without the sacrifice which a pressure of the sales on the market would involve. The board have arrived at a definite conclusion on the subject which they submit to the shareholders for their approval, with a statement of the reasons by which it is supported. The actual condition of the society's affairs was explained and fully discussed at the last general meeting, and the reasons were then pointed out which prevented (even if it had been thought desirable) any other than a gradual liquidation. These reasons still exist . . . There are two sections of the shareholders in the society; one desiring to withdraw from the society, and for that purpose suggesting a winding-up, and the other strongly objecting to the expense and risk of loss attached to that step and desiring, until the outstanding assets can be realised, to reserve their decision as to the continuance of the business.

The report then set forth the objections to a winding-up, and to a partial return of capital (which had also been suggested), and continuance:

The plan which the directors have determined to recommend will be free from the difficulties attending either a winding-up or a partial return of capital.

They propose to apply a considerable part of the cash and easily convertible assets of the society to purchasing on behalf of the society the shares of those who wish to retire altogether from the undertaking. They think that the disposable funds will be sufficient to purchase from 80,000 to 100,000 shares out of the 150,000 issued. In order that the purchase may be made with perfect fairness to all parties, a maximum price (above which no tenders would be accepted) would be announced by circular to all the shareholders. A certain period would be allowed for sending in tenders stating the number of shares offered and the price that would be accepted for them. The tenders would be opened and read on a day to be named in the presence of the board, a notary and such shareholders as might think fit to be present. If the number tendered should not exceed the number to be purchased all those at or under the maximum would be accepted, but if there were any excess the tenders would be accepted in order of price beginning at the lowest and if necessary making an allotment *pro rata* among those tendering at the highest price accepted. On surrender to the society of the shares tendered and accepted the purchase price would be at once paid in cash.

The shareholders will see that by this plan those who retired would be saved the delay and uncertainty of a winding-up being immediately paid off in cash, while those who remained would be freed from the difference of opinion as to future policy which now exists. The plan

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

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proposed has been put into effect in at least one similar case with satisfactory results to all parties; and the directors have a strong conviction that if it is carried out by this society it will be the best solution of the difficulties which now present themselves.

As some shareholders may desire to know what the action of the directors themselves would be, they would state that they propose to tender in common with others; but in order not to stand in the way of the shareholders at large, they will give a preference to the tenders made by other proprietors, and will withdraw their own tenders wholly or in part as occasion may require for that purpose.

The directors have given their best attention to a difficult subject, and they hope to receive the unanimous support of the shareholders in dealing with it in the way they have explained in this report.

Accompanying this report was a notice convening an extraordinary general meeting of the shareholders for the 24th Aug., and stating that the following resolution would be proposed at the meeting:

1. That the board be and they are hereby authorised to purchase from any shareholder willing to sell the same such number of the shares of this society not exceeding 100,000*l.* as the board shall think fit, subject to the following terms and conditions. . . .

2. That the shares so surrendered shall not be released by the board without the authority of a general meeting.

3. That the Board be and they are hereby authorised to do all things necessary or expedient for the purpose of carrying the foregoing resolutions into effect.

On the 17th Aug., William Hope commenced an action on behalf of himself and all the other shareholders of the society, other than the directors, against the company and the directors to restrain the directors from carrying the proposed resolutions into effect if they should be passed at the meeting of the 24th Aug.

An application to the Vacation Judge for an injunction stood over by consent, it being arranged that the society should be allowed to confirm the resolution, but not to carry it out till after the vacation.

The meeting of the 24th Aug. was duly held, when the resolutions were carried with but four dissentients, of whom the plaintiff was one.

On the 21st Sept. the resolutions were unanimously confirmed, the plaintiff not being present. At the same meeting the shareholders, acting on the recommendation of the directors, passed a resolution confirming the forfeiture by the board of the shares held by the plaintiff.

On the 2nd Oct. the market value of his shares was tendered to the plaintiff, but was refused.

The plaintiff now applied for an interlocutory injunction to restrain the directors from acting on the resolutions of the 24th Aug., alleging that the plan proposed by the directors was illegal, and infringing a rule of the Stock Exchange, which provided that no company should have a settlement day, nor should its shares be quoted if by its constitution it had power to purchase its own shares.

Kay, Q.C., Hemming, Q.C. and E. Outler, for the plaintiff.—These resolutions are *ultra vires*, and incapable of confirmation by a general meeting. Even if they were within the articles of association, the company cannot go beyond its memorandum of association, which contains no such power. A power to reduce capital must be exercised subject to the provisions of the Act of 1867 (ss. 9, 13), and the General Order (Buckley on Companies, p. 549), and with reference to the rights of creditors. Here no such steps were taken. Further,

the forfeiture clause was only intended to prevent useless litigation between shareholders and the company in respect of acts which were capable of confirmation by a general meeting. If such acts could not thus be sanctioned, it was the duty of a shareholder to prevent them from being carried out. If the forfeiture clause could be exercised in any event, it would operate to oust the jurisdiction of the court in cases where its interference would be a matter of course. They cited

Lindley on Partnership, p. 757;

Foss v. Harbottle, 2 Har. 461;

Scott v. Avery, 5 H. of L. Cas. 811;

Ashbury Railway, &c. Company v. Riche, L. Rep. 7 E. & I. App. 653; 33 L. T. Rep. N. S. 450.

Cotton, Q.C., Sir H. Jackson, Q.C. and Macnaghten, for the directors.—The clause as to forfeiture is valid and quite analogous to the usual clause in private partnership deeds for buying out objecting partners. The plaintiff, therefore, has no *locus standi*. As to the proposed scheme, it is perfectly *intra vires*, and the only available means of deferring an immediate winding-up, which would be injurious to the interests of the shareholders, and there is no suggestion that the company is unable to pay its debts. If a power to buy up and accept surrenders of shares had been inserted in the original articles it could not have been impugned, and there is nothing in the Companies' Acts which prohibits such a course from being adopted. They referred to

Buckley on Companies, p. 77;

Teasdale's case, 29 L. T. Rep. N. S. 707; L. Rep. 9 Ch. 54;

Snell's case, 16 L. T. Rep. N. S. 36; L. Rep. 5 Ch. 22;

Wright's case, L. Rep. 12 Eq. 336.

Kay, Q.C., in reply.

BACON, V.C.—It always happens that in these winding-up cases there are considerable difficulties, but the institution and intention of the company must be kept in view. The principles which regulate the interest of the shareholders *inter se* seem by the statute to have been as carefully provided for as it was supposed they could be at that time. This company having been established now a good many years, and being in a somewhat embarrassed state, I do not know whether peculiarly or otherwise, and being involved in litigation, and for some reason or other finding it necessary to change the course of their business entirely, and in fact to diminish their capital, resort to the contrivance which is contained in these resolutions, and they do it in the frankest manner possible. The report which is sent to the shareholders represents no doubt what were the circumstances of the company and what were their intentions. What they announce is that having considered the plans which have been proposed to them for meeting the wishes of those shareholders who at various times have expressed their desire to withdraw from the society without the sacrifice which a pressure of the sales on the market would involve, that is the thing which sets them going, and that is their motive. Then they state that the Board have arrived at a definite conclusion on the subject, which they submit to the shareholders for their approval. "The actual condition of the society's affairs was explained and fully discussed at the last general meeting, and the reasons were then pointed out which prevented, if it had been thought desirable, any other than a gradual liquidation." Then reference

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is made to a suit which was pending in the High Court of Justice, and it says, "Another action has however since that decision been commenced, and some time must still elapse before the matter is finally disposed of. In addition, proceedings have recently been issued against the company by Mr. William Hope for alleged claims in respect of the sewage business, which, as the shareholders will recollect, was entered upon at his instance and by his advice whilst filling the office of general manager of the company. The Board are advised that Mr. Hope's proceedings must fail; but in that case, as in the Moscow Gas business, some time must necessarily elapse before final decision. The state of the financial business since the last general meeting and the depression in the price of securities have not been without their effect on the society's position; but the directors, acting in accordance with the policy enunciated at the meeting, have kept the society free from any new business likely to lead to further complication, and have proceeded as far as they prudently could do to place the assets in an easily realisable position." Then it adverts to there being two sections of the shareholders, one desiring to withdraw, and for that purpose suggesting a winding-up, and the other strongly objecting to the expense and risk of loss attached to that step, and desiring until the outstanding assets can be realised to reserve their decision as to the continuance of business. Whether any business is being carried on or not I am unable to tell exactly; and the defendants have thought it fit to bring this motion on for hearing without affidavits or explanation relating to these circumstances, and to leave it solely upon these statements contained in the report from which, as I have said before, I conclude that the company is in some embarrassment in carrying on its business in the manner which it was originally contemplated, and having claims against them which it may be some time before they are ascertained. Then they discuss the question about winding-up, and say that it would be injurious to the shareholders. Another course is the division of the assets among the shareholders, but that is objected to for the reasons given, and then the plan which the directors propose is this: "To apply a considerable part of the cash and easily convertible assets of the society to purchasing on behalf of the society the shares of those who wish to retire altogether from the undertaking." They think that the disposable funds will be sufficient to purchase from 80,000 to 100,000 out of the 150,000 shares issued. This scheme then is proposed which I have just stated. Now what is that, in the plain sense of the words, but a diminution of the capital by applying the assets, or so much of them as they think fit, for the purpose of buying out the shareholders who may be desirous of retiring and at the same time avoiding the inconvenience of winding-up? Is there any authority in the articles of association, is there any power contained in the Acts of Parliament, or either of them, except under the conditions of the Act of 1867, which are there imposed, which enables this company with the money which is subscribed by the shareholders for the purposes of carrying on the business, to divert it from the ordinary purposes for which it was subscribed and for which the shareholders are liable, and apply it in buying up the shares of the shareholders who wish to withdraw? I am at a loss to find any such. The authorities which have

been referred to—*Teasdale's case* and *Snell's case*—do not in the slightest degree justify that. All we have had decided by those cases is, that the court, finding that what had been done had been done in good faith and without any intention of diminishing the capital of the company, and that the company had made certain arrangements for the cancellation or purchase of shares, did not think fit to disturb those arrangements after the length of time that had elapsed. Beyond that there is no authority to be derived from these cases nor from any other that I know of. But the law I take to be plain, and covered by many decided cases, that it is not competent to a company to take the moneys which have been subscribed for its capital for the purpose of buying up the shares of that company. Now that is what is done in this case. That is what the plaintiff here desires to prevent, and he says, and I think says justly, that the general meeting could not by their resolutions do that which is not contemplated by the articles or by the memorandum of association, and which has no authority but the authority which is given by the resolutions then passed. The plaintiff, therefore, asks that the defendants may be restrained from acting upon this resolution and from purchasing any shares of the society with money belonging to the society. The argument on the part of the defendants has failed to convince me that there is any authority, either in the articles or to be derived from the nature of the transaction, which justified them in placing out of their control moneys which, among other purposes, were applicable to the payment of their debts, and letting off those shareholders who desired to withdraw. If they could do that, it would be a ready means for companies not intending to act honestly (although I have no doubt this company did intend to act honestly—I would not be understood to express a suspicion or doubt upon that subject), by proxies and voters at a general meeting to dispose of the whole of the assets of the company in favour of favoured shareholders, and exhaust the whole of the funds, leaving the creditors unpaid or to get what they could by whatever means were open to them. That will be the result of this case if the money required to purchase these shares should exhaust the whole of the resources of the company. What state are the creditors in? I cannot disregard their interests. It is true I entertain no complaint made here by creditors, nor do I for that purpose consider the fact asserted by the plaintiff that he is a creditor. But he is also a shareholder, and as a shareholder it is his right, and it is also his duty to see that the moneys of the company are applied to their legitimate purpose. From the memorandum and articles of association, and having regard to the Act of Parliament and to the cases which have been decided, I cannot think that it is a legitimate purpose that these assets of the company, not wanted as it seems for any present purposes of business, as far as I can gather (although upon that subject, as I have said, there is no evidence), are going to be parted with in the purchase of those shares. In my opinion that is an unlawful thing for them to do; and although this question can only be decided properly at the hearing, I think, upon the balance of convenience, although I have had several things pressed upon me, it would be more convenient, and I feel that it would be much more just, that

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the proceeding which was about to be taken under this resolution should be suspended until the rights of the parties can be more deliberately and conclusively determined. Then, with respect to the 170th article, which no doubt is open to grave consideration, I cannot conceive that the meaning of the article is that if the company held a general meeting and sanctioned a most unlawful thing, a most unlawful and dishonest thing, and because a shareholder complained of that and took proceedings, he is precluded by the 170th articles, which strips him of his shares and deprives him of any right in respect of his shares. His rights as a member of the constitution still remain; and, as I have said before, I think his duty as well requires that he should interfere to prevent an improper application of the funds of the society. I think, therefore, it is right and proper, having regard to the nature of the case and the necessity that there should be a final decision upon it, to grant an injunction in the terms in which I am asked, which are to prevent the application of the society's money in buying up any of the shares of the shareholders of the society.

Solicitors for the plaintiff, *Kynaston and Gasquet*.

Solicitors for the defendants, *Bircham, Dalrymple, and Co.*

QUEEN'S BENCH DIVISION.

Wednesday, Nov. 15.

LONDON AND NORTH-WESTERN RAILWAY COMPANY
v. OVERSEERS OF WALSALL. (a)

Railway, rating of to improvement rate—Quarter rating under Local Act—Effect of Public Health Acts upon local Act.

By the Walsall Improvement and Market Act 1848, commissioners had power to levy an improvement rate within a district not comprising the whole municipal borough as afterwards constituted, but the Act contained a proviso that the occupiers of land used as a railway should be assessed in proportion only of one-fourth part of the net value. The Public Health Acts 1872 and 1875 formed the whole municipal borough of Walsall into an urban sanitary district.

Held that the assessment ought to be made under the local Act and not under the Public Health Acts.

This is a case stated on an appeal against a borough rate laid on that part of the foreign of Walsall which is situated within the municipal borough of Walsall.

The said rate was made on the 12th Nov. 1875, and on the hearing of the appeal by the recorder of the borough at the quarter sessions held on the 31st Jan. 1876, the court, after hearing the arguments on both sides, decided in favour of the respondents, and confirmed the said rate subject to a special case stated by consent for the opinion of this court on the points hereinafter raised.

CASE.

1. The appellants are the London and North-Western Railway Company. The respondents are the parish officers of the township of the foreign of Walsall and the corporation of the borough of Walsall.

2. The borough of Walsall is an ancient borough in Staffordshire having a separate court of quarter sessions. It forms a part of the parish of Walsall, and comprises the whole of the township of the borough of Walsall, and a part of the township of the foreign of Walsall. Each of the said townships has its own overseers and maintains its own poor.

3. The appellants are the owners and occupiers of land within that part of the foreign of Walsall which is within the borough, part of which land is used as a railway constructed under the powers of an Act of Parliament for public conveyance.

4. By an Act of Parliament passed on the 31st Aug. 1848 called the Walsall Improvement and Market Act 1848, commissioners were appointed for improvement and sanitary purposes over a district consisting of the whole of the said township of the borough, a part of the said township of the foreign lying within the borough, and part of the adjoining parish of Rushall lying without the said borough, but it does not include the whole of the municipal borough.

5. The 7th section appointing such commissioners is as follows:

And be it enacted that the mayor and town council of the borough of Walsall aforesaid together with three such other person, as shall be elected by the owners of property and ratepayers within such part of the limits of this Act, as are situated within the parish of Rushall in respect of the same part of the said limits shall be and are hereby empowered to act as commissioners to carry this Act and the several Acts incorporated therewith, and the several powers thereof respectively into execution.

6. By the 40th section it is enacted as follows:

For the purposes of defraying the costs and expenses of carrying this Act and of the powers and provisions thereof into execution (except the purposes to which any rates to be made for sewers, drains, and private improvement are hereby or by any Act incorporated herewith directed to be applied), and including the costs and expenses of making and maintaining and promoting such gas works as are herein mentioned and of defraying the expenses of and incidental to the obtaining of this Act which shall be charged on the improvement rate, it shall be lawful for the said commissioners from time to time to make, assess, and levy such equal rate to be called the improvement rate, as may be necessary for the purposes aforesaid not exceeding in any one year 3s. in the pound of the full net annual value of the property included in such rate. Provided always that the occupiers of any land used as arable meadow or pasture ground only or as woodlands, market gardens, or nursery grounds, and the occupier of any land used as a railway constructed under the powers of any Act of Parliament for public conveyance shall not be assessed to any rate or assessment made by virtue of this Act or any Act incorporated therewith in any greater proportion in respect of the same than in proportion of one-fourth part only of the net value thereof.

7. By an Act of Parliament passed on the 31st May 1850 called "The Walsall Improvement and Market Amendment Act 1850," certain modifications were made in the powers of the commissioners appointed under the Act of 1848 which do not affect the questions in dispute in the present case.

8. Up to the passing of the Public Health Act 1872 improvement rates were levied under the above-mentioned local Acts for the purpose of meeting the expenses of their execution, and to all such rates, the railway of the appellants was rated at one-fourth of its full value in accordance with the 40th section of "The Walsall Improvement and Market Act 1848."

9. By the Public Health Act 1872, urban and rural sanitary districts were constituted throughout

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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England, and the 4th section of that Act provides what places shall be urban sanitary districts, and who shall be urban sanitary authorities in such districts respectively.

10. By the 7th section it is provided :

Subject to the provisions of this Act the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act there shall be transferred and attach to an urban sanitary authority to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities, and obligations within such district exercising or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilisation Acts and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Act, the Artisans and Labourers' Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts or any Acts amending such Acts.

11. By the 16th section it is provided as follows :

All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall, if the Local Government Acts or the provisions of those Acts with respect to rating were at or immediately before the passing of this Act in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that is to say :

1. In the case of a council of a borough out of the borough fund or borough rate.

2. In the case of improvement commissioners out of any rate in the nature of a general district rate leviable by them, as such commissioners throughout the whole of their district.

Provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paving, sewerage, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate in which case such expenses shall continue so chargeable.

12. By the Sanitary Law Amendment Act 1874, s. 3, it is provided as follows :—

Whereas doubts have arisen as to the extent and meaning of the 7th section of the principal Act, Be it therefore declared and enacted that the provisions of the said section shall be deemed to have applied to every authority acting at the time of the passing of the principal Act under the powers conferred upon them by a local Act with respect to any sanitary purposes, and that all the powers, rights, duties, capacities, liabilities, and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act so far as they or any of them related to such purposes were transferred to and became attached to the urban sanitary authority therein referred to.

13. By the Public Health Act 1875, ss. 5 & 6, further provision is made for the constitution of urban sanitary districts and urban sanitary authorities to execute the powers of the Sanitary Acts within such districts.

14. By sect. 10 of the Public Health Act 1875, it is provided that

When any local Act other than an Act for the conservation of any river is in force within the district of an urban authority conferring on any commissioners, trustees, or other persons, powers for purposes the same, as or similar to those of this Act (but not for their own pecuniary benefit) all the powers, right, duties, capacities, liabilities, and obligations of such commissioners, trustees, or person in relation to such purposes shall be transferred and attach to the said urban authority.

By the 20th section of that Act it is enacted as follows :

All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions (namely) : That if in any district the expenses incurred by an urban authority being the council of a borough in the execution of the Sanitary Acts were, at the time of the passing of this Act, payable out of the borough fund or borough rate then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of the borough fund or borough rate, and that if in any district the expenses incurred by an urban authority being improvement commissioners in the execution of the Sanitary Acts were at the time of the passing of this Act payable out of any rate in the nature of a general district rate leviable by them, as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate, and for the purposes of this section the council of the borough of Folkestone, shall be deemed to be improvement commissioners, and that where at the time of the passing of this Act the expense incurred by an urban authority in the execution of certain purposes of the Sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewerage, or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act, shall respectively be charged on and defrayed out of the borough fund or borough rate and of the rate or rates leviable as aforesaid.

15. By the 21th section of that Act it is provided with respect to the assessment, and levying of general district rates under that Act as follows :

The owner of any tithes or any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

16. At a meeting of the town council of the borough of Walsall held on the 9th Nov. 1875, an estimate was presented of the expense to be incurred during the ensuing six months in carrying into effect the powers of the Local Improvement Act and other Sanitary Acts as well as for the purposes to which the borough fund it applicable under 5 & 6 Will. 4, c. 76 and the amending Acts, and it was resolved that a borough rate of 2s. 3d. in the pound should be made and assessed upon all rateable property within the borough to meet those expenses, and that the sum of 7267l. 10s. should be levied in that part of the foreign of Walsall which is situate within the borough as the proportion of the said borough rate assessable on that part.

17. It was also resolved that the mayor should issue his warrant to the parish officers of the foreign of Walsall, commanding them to pay the said sum of 7267l. 10s. so rated and assessed on the part of the foreign of Walsall within the borough.

18. The overseers of the foreign of Walsall upon receiving the mayor's warrant in pursuance of the before-mentioned resolutions made a rate upon the rateable property in the part of the township with the borough by which they assessed certain land and buildings of the appellants, including the land

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used as a railway at 2202l. 10s., its full rateable value taking as their basis the valuation list then in force made by the union assessment committee.

19. The appellants gave all necessary notices of appeal, but they had not when the said valuation list was published made any objection thereto before the assessment committee, or sought relief from them, having no objection to make to such list, and the assessment committee having no power to give any relief in respect of the matters now in dispute.

20. It is necessary to set out at length the appellants' grounds of appeal, the ground of objection to the said rate or assessment being that they are thereby rated on the full value of their railway to the expenses of carrying into execution the improvement and sanitary Acts; whereas they contend that they ought only to be rated to such expenses in respect of their said railway on one-fourth part of the full value thereof.

21. It was agreed, for the purposes of this case, that one-half of the amount leviable by the said rate is to meet expenses under the sanitary Acts and expenses for which under the local improvement Acts, rates would have been levied to which the said railway was only rateable at a fourth part of its value.

22. It is further agreed, for the purposes of this case, that the annual rateable value of the land used as railway is one half of the said sum of 2202l. 10s.

The questions for the opinion of the court are: First, Was it a condition precedent of the appellants' right of appeal that they should have objected to the valuation list before the assessment committee; and, secondly, Were the appellants liable to be assessed upon the full value of their railway towards all the expenses for which the said rate is made? If the court shall be of opinion in the affirmative on either of these questions, the rate is to be confirmed. If the court shall be of opinion in the negative on both questions, the order of the court of quarter sessions is to be quashed, and the rate is to be remitted to the said court to be amended.

Anetie and Jelf, for the respondents, submitted, first, that the appeal could not be heard, as no notice had been given to the assessment committee, under 27 & 28 Vict. c. 39, s. 1, which makes notice to the assessment committee a condition precedent to the right to appeal to the quarter sessions. [LUSH, J.—But by 25 & 26 Vict. c. 103, s. 36, no person not aggrieved can appeal to the assessment committee, and here the railway company were not aggrieved by any act of the committee.] On the main point, they submitted that sect. 4 of the Public Health Act of 1872 made the respondents the sanitary authority within the borough, and that they only had power to levy a borough rate to meet the sanitary expenses, and that the local Acts were now impliedly repealed by the Public Health Acts of 1872 and 1875.

Bosanquet and Neville, for the appellants, argued that although the respondents were constituted the urban sanitary authority, they were only so constituted to carry out the powers of the commissioners under the local Acts, and that the incidence of the rating remained unaltered. That if not, this would be an imposition of a new liability upon the appellants by the Legislature, and that clear words are necessary to impose a new burthen,

and that an exemption from rating cannot be abolished by implication. They cited

Commissioners of Walton v. Walford, L. Rep. 10 Q.B. 180.

The COURT (Mellor and Lush, JJ.) were of opinion that the exemption contained in the local Acts is not affected by the Public Health Acts. Sect. 23 of the Public Health Act of 1872 clearly contemplates the continuance of the local Acts, unless certain steps are taken which have not been taken in this case. Sect. 43 also assumes their validity. That being so, the respondents must levy their rates in the same manner as the commissioners under the local Acts, and subject to the same exemption.

Rules absolute to quash the order of sessions.

Solicitor for the appellants, *Roberts*.

Solicitors for the respondents, *Pearse and Son*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Nov. 18, 19 and 22.

DENNY v. THWAITES (a).

Construction of private culvert on highway—Removal of culvert as nuisance by surveyor—Protection of surveyor for malicious injury to property—"Reasonable supposition of right"—How far court bound by finding of justices—5 & 6 Will. 4, c. 50, sects. 67, 68—24 & 25 Vict. c. 97, sect. 52—20 & 21 Vict. c. 43.

The appellant as surveyor of highways had put down a pipe under the access from the highway to the dwelling house of the respondent. In order to improve the access to the house, the respondent took up the pipe and substituted a culvert of larger dimensions, thereby raising the level of the access and making the highway less commodious. The appellant removed, and in removing damaged the culvert, whereupon the respondent summoned him before justices for a malicious injury to property. The justices convicted the appellant.

Held, upon a case stated under 20 & 21 Vict. c. 43, in which the justices found (inter alia) that the appellant had not acted under a reasonable supposition of right, that the conviction was wrong.

This was a case stated by four justices for the county of Norfolk under 20 & 21 Vict. c. 43, and the following are the material portions of such case.

1. At a Petty Sessions held at the 'Crown Inn, in Mundford, for the Division of Grimshoe, in Norfolk, on the 4th Jan. 1876, an information was preferred by the Rev. W. Thwaites, vicar of Whittington, in the parish of Northwold, hereinafter called the respondent, against Mr. George James Denny, one of the surveyors of the highways for the said parish, hereinafter called the appellant, charging the appellant and one Robert Jarred under 24 & 25 Vict. c. 97, s. 52, with aiding and abetting certain persons in wilfully committing damage, injury, and spoil to and upon certain real property of a private nature, being the property of the respondent, to wit certain drain pipes and a pathway, by removing the pipes, breaking one of them, and digging up the pathway where the said pipes were, and thereby doing damage and injury to an amount not exceeding 5l.

The appellant was convicted and adjudged to pay

(a) Reported by J. M. LALY, Esq., Barrister-at-Law.

a penalty of 1s. to be applied according to law, and also to pay to the respondent the sum of 2l., being a reasonable compensation for the damage and injury so committed, and the sum of 4l. 1s. 6d. for costs, and in default to be committed to Norwich Castle for one day. [The case here set out the evidence at great length.] As two of the justices had viewed the site of the dispute and taken measurements of various parts of the premises, it was agreed to be taken as a fact that the damaged pipes were within 15ft. from the centre of the highway.

It was contended for the respondent that the appellant was not justified in law in procuring the digging up of the pipes referred to, and that the appellant did not act under a fair and reasonable supposition that he had a right to do the act complained of, and that mere *bona fides* was not sufficient, as by sect. 69 of 5 & 6 Will. 4, c. 50, a remedy is provided for the removal of any encroachment upon the highway upon the conviction of the party offending or that the obstruction might have been indicted as a nuisance, and that sects. 67 and 68(a) of the same statute had no application.

It was contended for the appellant that the justices had no jurisdiction on the ground that the appellant acted under a *bona fide* belief that he had a right to do the act complained of; that sects. 67 and 68 of 5 & 6 Will. 4, c. 50, authorised the appellant to do what he did; that the respondent had no property in the road, and that the appellant believed the property therein to be in the surveyor.

(a) The following sections of this Act are material. Sect. 67. The said surveyor, district surveyor, or assistant surveyor shall have power to make, scour, cleanse and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plates, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid.

68. If any owner, occupier, or other person, shall alter, obstruct, or in any manner interfere with any such ditches, gutters, drains, or watercourses, trunks, tunnels, plates, or bridges, after they shall have been made by or taken under the charge of such surveyor or district surveyor, and without his authority and consent, such owner, occupier, or other person, shall be liable to reimburse all charges and expenses, which may be occasioned by reinstating and making good the work so altered, obstructed, or interfered with, and shall also forfeit any sum not exceeding three times the amount of such charges and expenses.

69. If any person shall encroach by making or causing to be made any building, hedge, ditch, or other fence, on any carriage way or cart way, within the distance of fifteen feet from the centre thereof, every person so offending shall forfeit on conviction for every such offence any sum not exceeding forty shillings, and the surveyor who hath the care of any such carriage way or cart way shall and he is hereby required to cause such building, hedge, ditch, or fence, to be taken down or filled up at the expense of the person to whom the same shall belong, and it shall and may be lawful for the justices at a special sessions for the highways upon proof to them made upon oath, to levy as well the expenses of taking down such building, hedge, or fence, or filling up such ditch as aforesaid as the several and respective penalties hereby imposed by distress and sale of the offenders' goods and chattels, in such manner as distresses and sales and forfeitures are authorised and directed to be levied by virtue of this Act.

The justices found that for many years there had been a drain or gutter by the side of the highway in question, and that the same had formerly been under the control and management of the trustees of the turnpike trust, and afterwards of the surveyors of Northwold, that parts of the brickwork, grating, and pipes forming the tunnel under the gateway leading from the public road to the respondent's residence, not being in some places fifteen feet from the centre of the said road, were encroachments upon the highway, and as such were obstructions and dangerous to the free use and passage thereof; that the appellant unlawfully and wilfully caused the digging up, breakage, and removal of the brickwork, gratings, and pipes, that the jurisdiction of the justices was not ousted by the mere *bona fide* belief of the appellant that he had a right to do the act complained of; that the appellant in order to have obtained the removal of the encroachment or obstruction complained had a legal remedy by taking proceedings under 5 & 6 Will. 4, c. 50, s. 69) or by indictment, and that the property in the brickwork, grating, and pipes and in the road next the respondent's residence, was sufficiently in the respondent to support the charge, and "determined adjudged and found" that the appellant did not do the acts complained of under a fair and reasonable supposition that he had a right to do them.

The case concluded as follows: The questions of law arising on the above statement for the opinion of this court, therefore, are:—Whether the appellant was justified by the provisions of the 5 & 6 Will. 4, c. 50, ss. 67 and 68, or had he any other authority to cause the digging up, breaking, and removal of the said brickwork, grating, and pipes. Whether the mere fact that the appellant acted under a *bona fide* belief that he had a right to do the act complained of was sufficient to oust our jurisdiction. Whether the property in the brickwork, grating, and pipes or in the said road, was sufficiently in the respondent to support the charge against the appellant or not. If the court should be of opinion with reference to the points raised in the foregoing questions that the appellant was properly and legally convicted then the said conviction is to remain in full force and effect, but if the said court should be of a contrary opinion then the said information and complaint is to be dismissed with costs to the appellants.

Merewether for the appellant, drew attention to the form in which the questions had been left to the court, and argued that the court might look at the case as a whole, and was not bound by the particular finding that "the appellant did not act under a reasonable supposition of right." If the court should be of opinion that the appellant was not legally and properly convicted—upon the whole facts stated in the case—the court may and should give judgment for the appellant. [The COURT appeared to incline to the opinion that the finding of the justices was conclusive, but after some discussion on this point, directed the argument on the main points of the case to be gone into.] The appellant is justified on three grounds: he is justified as surveyor under the Highway Act, he is justified as an individual under the terms of the 52nd section of the Malicious Injury to Property Act, and he is justified as an individual, inasmuch as he was dealing with his own property. He referred to

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White v. Feast, L. Rep. 7 Q. B. 353; 41 L. J. 18, M. C.; 26 L. T. Rep. N. S. 611.

A. L. Smith for the respondent, argued that as the justices had found that the appellant had not acted under a reasonable supposition of right, the court was bound to give judgment for the respondent; that the 69th section of the Highway Act ought to have been put in force before the appellant could have authority to act; and that *White v. Feast* (*ubi sup.*) was an authority in favour of the respondent (a). He also referred to

Bagshaw v. Buxton Local Board, 45 L. J. 260, Ch.;
Keane v. Reynolds, 2 E. & B. 748;

the effect of which cases is stated in the written judgment of the Court.

Merevether, in reply, referred to

Mill v. Hawker, L. Rep. 9 Ex. 309; 43 L. J. 129, Ex.;
30 L. T. Rep. N. S. 894; affirmed in Ex. Ch. 33
L. T. Rep. N. S. 177;
Poultum v. Thirst, L. Rep. 2 C. P. 449;
20 & 21 Vict. c. 43.

Nov. 22.—The written judgment of the court (Mellor and Grove, JJ. and Cleasby, B.) was delivered as follows by

CLEASBY, B.—This case raises a question of liability to prosecution under the 52nd section of 24 & 25 Vict. c. 97 (Malicious Injury to Property). The facts are stated and evidence set out at great length in the case. It is sufficient to say that the appellant was the surveyor of highways for a certain district; that he or his predecessor had put down a pipe of certain dimensions under the access from the highway to a dwelling-house; that certain persons for improving the access to the house had taken up this pipe and constructed a brick culvert of larger dimensions, thereby raising the level of the access, and that the effect of this was to raise the highway opposite to such an extent as to interfere with the convenient use of the highway by the public, and so occasion a nuisance. The appellant gave notice to the respondent, who was the owner and occupier of the dwelling-house, to abate the nuisance, which could not be done without removing the culvert, and upon this notice not being complied with caused the ground to be broken up, and the culvert to be taken up, and the culvert in doing this was broken and much damaged. The respondent, therefore, took proceedings under the 52nd section, treating this as a wilful or malicious injury to his property, and the magistrates convicted the appellant. Under this conviction the magistrates might have committed the appellant to prison with hard labour for two months, or have fined him 5*l.*, besides awarding compensation not exceeding 5*l.* If the damage had been above 5*l.* the offence would have been a misdemeanor, and the punishment might have been two years' imprisonment with hard labour. The magistrates have found as a fact that the appellant did not act under a fair and reasonable supposition that he had a right to do the act complained of in the terms of the 52nd section and the questions put to the court. First, whether the appellant was justified in doing the act complained of; secondly, whether the mere fact of his acting *bonâ fide* was a sufficient answer to the complaint; and thirdly, whether the property in the brickwork, grating, and pipes was sufficiently in the respondent to support the charge. Upon the first question, viz., whether the appel-

lant was justified, it was urged on behalf of the respondent that surveyors had no right to abate the nuisance until it had been found to be a nuisance to a highway by a competent authority, and the case of *Keane v. Reynolds* (2 E. & B. 748) was referred to. On the other hand, it was contended that the surveyor who represented the public stood in a different position from a private individual, and that several authorities, if they did not show that he had such a right, showed at all events that it was a doubtful matter. The judgment in *Keane v. Reynolds*, in which it was said that a person acts at his peril (which means according as it turns out to be a highway or not) abates a nuisance without a conviction was referred to, as also was a passage in Mr. Justice Blackburn's judgment in *Mill v. Hawker* [see 33 L. T. Rep. N. S. 177], in which he treats the matter as doubtful, and declines to express an opinion upon it. And chief reliance was placed upon the judgment of the Master of the Rolls in *Bagshaw v. Buxton Local Board* (45 L. J. 263, Ch.), in which that learned judge expresses a clear opinion that a surveyor who represents the public has a right to remove such an obstruction. Without in any way dissenting from the opinion of the Master of the Rolls, we think it sufficient for the decision of this case that this is not an ordinary case of removing an obstruction, but it is the case of removing one of the drains placed on the side of the highway instead of the ordinary gutter which was so constructed as to interfere with the use of the road by the public. By the 67th section of the highway (5 & 6 Will. 4, c. 56), the surveyor is empowered to make and cleanse all drains and to make and lay such tunnels as he may think it necessary, and by the 68th section if any person alters or interferes with such drains, tunnels, &c., he is liable to the cost of restitution and a penalty. The surveyor has, in general the sole control over the drains, &c. by the side of the highway, and if the drain or tunnel is constructed so as to affect the use of the highway he would be authorised to alter it. There might be special circumstances under which a private owner might have an exclusive right to a particular drain, but such circumstances do not exist in the present case. A drain of proper size had been laid by the surveyor, and afterwards this had been taken up by an adjoining owner, and a larger drain inserted, which caused the nuisance. It was certainly open to the surveyor *bonâ fide* to remove this nuisance, and restore the original culvert without coming within the peril of a conviction for a wilful or malicious damage, injury, or spoil to property. This decision does not, in any way, conflict with the case of *White v. Feast* (L. Rep. 7 Q. B. 353) where it was held that in the case of a private person doing wilful damage to property mere *bonâ fide* is not of itself a protection from the penalty of the statute. The decision follows from the words of the 52nd section. The ground of our decision is that the appellant is not a private individual, but the surveyor of the highways having a control over and an interest in the drains laid for carrying off the water, and that in dealing *bonâ fide* with the drains he was not guilty of wilful or malicious damage. We only add as regards the third question that the owner of the adjoining land only had a qualified property in the drains, &c., subject to the exercise by surveyor of his control over them. We think it right to add

(a) See also *Newington Vestry v. Jacobs*, L. Rep. 7 Q. B.; 41 L. J. 72, M. C.

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that though the magistrates have found that the appellant did not act under a fair and reasonable supposition that he was justified, we think it so clear that, if he acted *bonâ fide*, he did act under such fair and reasonable supposition, that if it had been necessary to decide the case on that ground, we should certainly have remitted the case to the magistrates for further consideration. The finding referred to appears, from a statement made before us and not contradicted, to have been inserted in an unusual manner, and it is not surprising that the magistrates were not unanimous as to the findings. According to the terms of the reference to us, the information and complaint are dismissed with costs. My brothers Mellor and Grove agree in this conclusion.

Judgment for the appellant.

Solicitors for the appellant, T. M. Wilkin.

Solicitor for the respondent, C. O. Humphreys.

EXCHEQUER DIVISION.

Friday, Nov. 10.

WALLEY v. HOLT. (a)

Infant—Action against—Tort independent of contract—Plea of infancy—When not available as a defence.

In an action to recover damages for injuries to a mare of the plaintiff, whilst let on hire to the defendant, the statement of claim alleged that the defendant hired from the plaintiff a mare and dogcart, to go from M. to C. and back, on the express conditions that only one other person besides the defendant should be carried on any part of the journey in the dogcart, and that the mare should be driven from M. to C. and back, and nowhere else; that in violation of the conditions the defendant carried on his return journey three other persons besides himself in the dogcart, and also drove the mare a greater distance than from M. to C. and back, viz., to B., four miles beyond C., and back to M.; and the defendant also, instead of using due care and diligence in driving the mare at a reasonable pace, as it was his duty to do, drove her furiously, carelessly, and negligently, and beat and otherwise ill-treated her, that the mare on her return was found to be badly cut, bruised, and injured, and was suffering greatly, owing to having been overdriven, and that her injuries, by reason of the negligence, misuser, and improper conduct of the defendant were so great, that the plaintiff was obliged to have her destroyed.

In his statement of defence the defendant did not admit the plaintiff's statement of claim, or his claim or any part of it, and he denied the want of due care, &c., in driving, or that he drove furiously, &c., or beat or otherwise ill-treated the mare, or that any injury was done to her by reason of any negligence on his part; and he said that at the time of the supposed contract and letting to hire he was, and still is, an infant under twenty-one years; and it was contended on the part of the defendant that, being an infant, he was not liable in the present action.

The facts as set forth in the statement of claim were proved at the trial, and a verdict was found for the plaintiff for 25l., and on a rule to set that

verdict aside, and for a new trial, on the ground that the evidence did not establish the defendant's liability, it was

Held (by Kelly, O.B. and Huddleston, B.), discharging the rule, that it was clear from the statement of claim, the whole of which must be looked at in order to see whether the case was substantially in contract or in tort, that the plaintiff claimed damages for a tort; and that in addition to breaking the contract, the defendant, by driving the mare at an excessive speed, and unduly flogging, and otherwise ill-treating, and negligently, and carelessly using her, committed a separate and independent wrong beyond and apart from the contract, and was liable for that wrong in the present action, to which, being in tort, the plea of infancy afforded no defence. *Jennings v. Randall* (8 T. Rep. 335) and *Burnard v. Haggis* (8 L. T. Rep. N. S. 320; 14 C. B., N. S., 45; 32 L. J. 189, C. P.) discussed, and the latter followed.

THIS was an action brought by the plaintiff, a shop-keeper and cab proprietor, at Macclesfield, to recover damages from the defendant, in respect of injuries done by the defendant to a mare and dogcart belonging to the plaintiff whilst the same were on hire to the defendant, under the circumstances detailed in the statement of claim:—

First, that on the 19th Sept. 1875, the defendant, who resides at Macclesfield, in the county of Chester, hired from the plaintiff, who is a cab proprietor at Macclesfield and licensed to let horses and vehicles for hire, a mare and dogcart, for the purpose of carrying himself and one other person only from Macclesfield to Congleton and back, and nowhere else. Secondly, that the plaintiff let the mare and dogcart to the defendant, and on the express condition that only the defendant and one other person should be carried on any part of the journey in the dogcart, and that the mare should be driven from Macclesfield to Congleton and back, and nowhere else. Thirdly, that the defendant, in violation of the aforesaid conditions, carried, on the return journey, three other persons besides himself in the dogcart, and also drove the mare a greater distance than from Macclesfield to Congleton and back, namely, to Buxton, which is four miles beyond Congleton, and back to Macclesfield. The defendant, also, instead of using due care and diligence in driving the said mare at a reasonable pace, as it was his duty to do, drove her furiously, carelessly, and negligently, and beat her and otherwise ill-treated her, and likewise caused great damage to be done to the dogcart. Fourthly, that the defendant brought the mare and dogcart back to the plaintiff about half-past nine on the evening of the said 19th Sept., when the plaintiff discovered that the mare was badly cut, bruised, and injured in various places, and was suffering greatly from fatigue and exhaustion, owing to her having been overdriven, and was otherwise injured both externally and internally; and the plaintiff likewise found that the dogcart was broken and greatly damaged. Fifthly, that the injuries to the mare and dogcart, by reason of the negligence, misuser, and improper conduct of the defendant, on the said 19th Sept., was so great that the plaintiff was obliged to have the mare destroyed on the 18th Oct. 1875, and incurred great expense in and about repairing the dogcart. The plaintiff claimed 300l.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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WALLEY v. HOLT.

[Ex. Div.]

The statement of defence denied all the statements in the statement of claim, and said that at the time of the said supposed contract, and of the said supposed letting to hire, and of the said supposed breach of contract, the defendant was, and still is, an infant under the age of twenty-one years. He was born on the 30th May 1856.

The plaintiff, in reply, joined issue with the defendant upon his statement of defence, and the defendant, being an infant, his father was admitted to defend by order of the court.

At the trial of the action the verdict was for the plaintiff, for 25*l.*, and the defendant's counsel having raised the point that the defendant, being an infant under twenty-one years of age, was not liable for damage accruing to the horse he had hired during the time it was so on hire, the learned judge, after consideration, stayed execution, in order to enable the defendant to move.

Motteram accordingly moved for and obtained a rule.

Jelf (with whom was *Powell*, Q.C.), for the plaintiff, was stopped by the court.

Nasmyth, in support of the rule.—This was not an action of tort, nor a case in which any duty was cast on the defendant, the violation of which would be a tort. It was simply and purely a question of breach of contract, and not at all of tort: (*Jennings v. Rundall* 8 T. R. 335.) In that case, the facts of which are almost identical with the present one, it was held that a plaintiff cannot convert an action founded on contract into a tort so as to charge an infant defendant, and therefore, where the plaintiff declared that, at the defendant's request, he had delivered a mare to the defendant to be moderately ridden, and that the defendant had, maliciously intending, &c., wrongfully and injuriously ridden the said mare so that she was damaged, &c., the defendant was allowed to plead his infancy in bar, the action being founded on a contract. The only distinction between the two cases is that here the defendant drove the mare from Congleton to Buxton; but there was clearly no duty upon him with regard to that, though there was, it may be, an obligation. The plaintiff will probably rely upon the more modern case of *Burnard v. Haggis*, in the Common Pleas (8 L. T. Rep. N. S. 320; 14 C. B., N. S., 45; 32 L. J. 189, C. P.), as being in his favour; but there is a distinction between that case and the present. There the plaintiff's mare was let on hire to the defendant for an ordinary ride, and leaping or jumping with her was expressly forbidden by the contract, and it was held that, using her in a manner forbidden by the contract—viz., forcing her to leap a fence, in doing which she was injured, was a mere trespass and independent tort, for which the defendant, although he was an infant, was liable. It was, as Erle, C.J., said, "an absolute wrong on the part of the defendant, for which he was unquestionably liable, quite independently of contract." And Willes, J., based his judgment in the case on the fact that "the riding the mare into the place where she received her death wound was as much a trespass as if, without any hiring at all, the defendant had taken the mare from a field and hunted her and killed her," and that it was "a bare trespass not within the object and purport of the hiring, and was not even an excess." There is no such element as that in the present case, nor

was there in *Jennings v. Rundall* both which cases are different in that respect from *Burnard v. Haggis*. To convert the present case, which arises out of a contract, into a tort, would be to strain the law, and, as Lord Kenyon said in *Jennings v. Rundall*, "there would be an end of that protection which the law affords to infants." Had the plaintiff sold the mare, or driven her against the plaintiff and injured him, either would have been a distinct tort, not involved in the contract. The question is, Was this an abuse of the contract, or an actionable wrong independent of and beyond any contract?

KELLY, C.B.—The question in this case is, not whether upon the evidence we may think that the contract entered into between the plaintiff and the defendant has been broken by the latter but, whether or not it appears that something in the nature of a wrong has been done by the defendant, independently of and beyond the contract, for which an action on the case will lie. Now, I am of opinion that the plaintiff's action is well founded. There is no doubt that the defendant broke the contract, and as to that infancy is a defence; but where, in addition to that, something has been done beyond the contract which amounts to a tort, then infancy is no defence. The question has recently been very well treated by Mr. Pollock, in his excellent work, "Principles of Contract," where, at pp. 52-3, in discussing the liability of infancy in such cases, and commenting on the authorities, he says that "the rule, that an infant cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract, is decidedly laid down in *Jennings v. Rundall* where it was sought to recover damages from an infant for overriding a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of the contract, and such that but for the contract there would have been no opportunity of committing it, is, nevertheless, independent of the contract in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable. The distinction is established, and well marked by a modern case in the Common Pleas"; and the learned author then refers to the case, which has been cited by Mr. Nasmyth, of *Burnard v. Haggis* as establishing the distinction. In that case the horse was used in a manner positively forbidden by the contract, and it was held to be a trespass and an independent tort, for which the infant defendant was liable; and so in the present case the over-driving and flogging, and all that was done by the defendant, by which the plaintiff's mare was injured, was *ultra* the contract altogether, and constituted a separate and independent tort on his part, to which his defence is in substance the old plea of "Not guilty," and on that he is liable, and the plea of infancy is no defence. The plaintiff's verdict, therefore must not be disturbed, and this rule must be discharged.

HUDDLESTON, B.—I am of the same opinion. Under the old form of pleading the question would have been whether the damage arose in tort or in contract. An action on the case would lie under the old system, and the question is whether it will do so under the new, when both matters are joined together. If an infant be

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sued for a breach of contract, his infancy is a good defence to the action, but there are cases in which circumstances are shown amounting to a trespass, and in such a case infancy would be no defence. Under the new system a plaintiff is now permitted to state the facts of his case and his complaint in a narrative form, and the court must look at the whole statement to see whether the real and substantial complaint of the case is in contract or in tort. Now here the plaintiff, in his statement of claim sets forth the contract between himself and the defendant with regard to the hiring of the mare and dog-cart, and he states his ground of complaint to be that the defendant violated the conditions of the contract by carrying, on the return journey, four persons instead of two, and also by driving the mare a greater distance, and over a different road than that agreed upon by the conditions; and he also goes on to allege, that, "instead of using due care and diligence in driving the mare reasonably, as it was his duty to do, the defendant drove furiously, carelessly, and negligently, and beat, and otherwise ill-treated her," and that the mare was returned to the plaintiff "badly out, bruised, and injured in various places, and suffering greatly from fatigue and exhaustion owing to her having been overdriven, and was otherwise injured, both externally and internally," and that the injuries to the mare "by reason of the negligence, misuser, and improper conduct of the defendant on the occasion were so great that the plaintiff was obliged to have the mare destroyed." The plaintiff here plainly and clearly alleges his ground of complaint against the defendant, and his claim for damages to be the "negligence, misuser, and improper conduct of the defendant," in other words, his claim for damages is for a tort, to which infancy is no defence. The plaintiff consequently is entitled to retain his verdict, and the defendant's rule must be discharged. *Rule discharged.*

Solicitor for the plaintiff, *H. Tyrrell*, agent for *B. and A. Tennant*, Hanley.

Solicitors for the defendant, *Lewis and Sons*, agents for *Barclay and Henstock*, Macclesfield

Wednesday, Nov. 15.

(Before *CLEASBY*, B.)

BULLOCK v. DUNLAP. (a)

Detinue and trover—Property found on a person suspected of having stolen it—Trial and acquittal of suspected party—Property detained by constable—Application by constable to magistrate for order, under 2 & 3 Vict. c. 71, s. 29, as to disposal of property—Adjournment by magistrate to a day not yet expired—Action by acquitted party against constable—Demurrer.

The plaintiff being found by a police constable wearing a diamond pin and diamond ring, was taken into custody and charged by him with stealing them, and being committed by a police magistrate for trial on such charge, was afterwards indicted and tried thereon and acquitted. The defendant, a superintendent of police into whose possession the pin and ring had lawfully come in the course of the proceedings, did not deliver them up to the plaintiff upon the latter's acquittal,

but, before action and within a reasonable time after such acquittal, applied to a magistrate for an order under sect. 29 of the 2 & 3 Vict. c. 71, "for the delivery of the said goods to the party who should appear to the magistrate to be the rightful owner thereof, or such other order as to the magistrate should seem meet." The magistrate entertained the application, and, after hearing evidence in support of it, and the evidence of the plaintiff in support of his claim to the goods, adjourned the hearing to a day which has not expired, and no order has yet been made.

In an action by the plaintiff against the defendant for the detention and conversion of the said pin and ring, in answer to which the defendant stated the facts as above set forth, and alleged that he detained the goods as a constable in the performance of his duty, it was

Held by the Exchequer Division (Cleasby, B.), overruling a demurrer to the statement of defence, that the action was not maintainable, and that the defendant having within a reasonable time applied to the magistrate for an order under sect. 29 of the statute, and done all that the Act of Parliament called upon him to do to render up possession of the goods in question, and the matter being still in the hands of the magistrate, the defendant was not responsible because he was not able before action to relieve himself of the possession of the goods.

The statement of claim in this case was as follows:

The plaintiff is a dealer in jewellery, in Church-street, Soho, and the defendant is a superintendent of the metropolitan police.

1. The plaintiff, in the month of Oct. 1875, was in possession, as his own property, of a certain diamond pin, which he was then wearing in his cravat scarf, as well as of a certain diamond ring, which was also in his possession as his own property.

2. One Charles Butcher, a metropolitan detective police constable, on seeing the plaintiff and observing the said diamond pin being so worn by him as aforesaid, charged him with stealing the same, as well as the diamond ring, and took him into custody upon such charge, and then took from him both the said pin and the ring.

3, 4. The plaintiff was, thereupon, subsequently taken before Mr. Newton, a metropolitan police magistrate, who, after various repeated remands, committed him for trial on such charge, upon which he was subsequently indicted and tried, and acquitted.

5. The said Charles Butcher delivered the said pin and ring to the defendant, as his superior officer.

6. The defendant detains from the plaintiff the use and possession of the plaintiff's goods and property, that is to say, the diamond pin and ring, and has also converted to his own use and wrongfully deprived the plaintiff of the use and possession of his said goods and property.

The plaintiff claims a return of the said goods or their value, and 20*l.* for their detention, and in respect of the conversion of the said goods, the plaintiff claims 100*l.*

The statement of defence:—

1. That the said goods and property were not the plaintiff's, as alleged.

2. As to the alleged conversion of the said goods

(a) Reported by *HENRY LEIGH*, Esq., Barrister-at-Law.

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and property, the defendant denies the statement in paragraph 6 of the plaintiff's statement of claim.

3. As to the alleged detention of the said goods and property, and depriving the plaintiff of the use and possession thereof, the defendant says that, after the plaintiff had been charged with stealing the said goods and property, and had been tried and acquitted (as alleged), the said goods and property were in the lawful possession of the defendant, as and being a constable, within the meaning of the 2 & 3 Vict. c. 71, s. 29; and the defendant, as such constable, being ignorant as to who was the rightful owner thereof, before the commencement of this suit, and within a reasonable time after he became possessed thereof, duly made an application to a magistrate then having jurisdiction in that behalf, under the said section of the said statute, to make an order for the delivery of the said goods to the party who should appear to be the rightful owner thereof, or such other order as to such magistrate should seem meet.

4. That the said magistrate entertained the said application, and heard evidence in support thereof, and the plaintiff appeared before the said magistrate in the matter of the said application, and gave evidence in support of his claim to the said goods and property.

5. That the said magistrate afterwards adjourned the hearing of the said application to a day which has not yet expired.

6. That the said application is still pending before the said magistrate, and no order has yet been made therein by the said magistrate, under the said section of the said statute.

7. That the defendant, as such constable as aforesaid, and in the performance of his duty in that behalf, and not otherwise, detained, and still detains, the said goods and property, and the possession thereof from the plaintiff, until an order has been made under the said section of the said statute, as he lawfully might for the cause aforesaid.

Demurrer to the 3rd, 4th, 5th, 6th, and 7th paragraphs of the statement of defence as bad in law, on the ground that the matters therein contained do not disclose any legal defence.

Sect. 29 of the 2 & 3 Vict. c. 71, referred to in the above statement of defence, enacts "That if any goods or money charged to be stolen or fraudulently obtained, shall be in the custody of any constable, by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanour in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid, shall not be found, or shall have been summarily convicted or discharged, or shall have been tried and acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any such indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof, or, in case the owner cannot be ascertained, then to make such order with respect to such goods or money as to such magistrate shall seem meet. Provided always, that no such order shall be any bar to the right of any person or persons to sue the party to whom such goods or money shall be

delivered, and to recover such goods or money from him by action at law, so that such action shall be commenced within six calendar months next after such order shall be made."

The plaintiff's points for argument. — First, that the paragraphs demurred to disclose no facts which in law disentitle the plaintiff to maintain and continue this action; secondly, that the plaintiff being no party to the said proceedings before the magistrate, the said statute does not take away his right to maintain and continue an action in a court of law; thirdly, that the statute referred to, although enabling a magistrate under certain circumstances to make an order as to the property, does not interfere with the liability of the constable; fourthly, that even if an order by a magistrate within the meaning of the said statute would prevent an action being brought against the constable, yet nothing less than an order (and not the pending of the proceedings) would have that effect; fifthly, that the statute could only have reference to a case in which the application to the magistrate was made before action commenced; sixthly, that the facts disclosed in the statement of defence admit that the adjournment has taken place for the purpose of the continuance of the action, and therefore the magistrate in his discretion must be taken to have declined to adjudicate while the said action is pending.

The defendant's points: First, the defendant, on the argument of the demurrer, will contend (amongst other things) that the statements in the paragraphs demurred to, show that the goods were in the lawful possession of the defendant as a constable, and that such lawful possession was not determined at or before the commencement of the action; secondly, that if the magistrate were now to order the goods to be given up to another person than the plaintiff, the defendant would be obliged to comply with such order; thirdly, that the plaintiff, by submitting to the jurisdiction of the magistrate, and giving evidence in support of his claim, authorised the detention of the goods by the defendant as such constable as aforesaid, until the ownership was determined; fourthly, that it appears from the statement of defence that the defendant only performed his duty as a constable, and is not liable to be sued for the detention of the goods from the plaintiff.

Talfourd Salter, Q.C. (with whom was L. Glyn), for the plaintiff, supported the demurrer, and submitted that even if an order had been made by the magistrate under the 29th section of the statute for the delivery of these articles, or that they should remain in the custody of the constable, it would have been no answer to the present action, nor have afforded any protection against a person claiming the goods from the person having possession of them. The decision of the magistrate as to the ownership under sect. 29 could in no way affect the plaintiff's title or his right to bring that action, nor could the proceeding under that section determine the right of property. The object and intention of the statute was to relieve and protect persons in the position of police officers encumbered with the custody of property under such circumstances by providing a place of deposit for the property, but not thereby in any way to affect the title to it. The question is not whether a reasonable time elapsed before the application to the magistrate, but whether a

reasonable time had elapsed before the commencement of the action. All that the defendant could want a reasonable time for was to find out the title and obtain the magistrate's order, but that did not affect the plaintiff's right. It is possible that the magistrate delays making any order until this action has been decided, and should the court now give judgment against the plaintiff a deadlock may occur, and the constable be placed in peril from which the statute was intended to protect him. The plaintiff's action and the proceedings before the magistrate are for two different purposes, the former is to try the right of property, the other is to ascertain and define a place of deposit for it. He cited and referred to

Pillott v. Wilkinson, 8 L. T. Rep. N. S. 361; 3 H. & C. 347; 34 L. J. 23, Ex; and

Dover v. Child, 34 L. T. Rep. N. S. 737; L. Rep. 1 Ex. Div. 172; 45 L. J. 462, Q. B., C. P., and Ex.

The *Solicitor-General* (Sir H. S. Giffard, Q.C.), with him were *F. M. White* and *Paine*, for the defendant *contra*.—It is not disputed by the other side that the defendant is a police constable, and that the plaintiff had been charged and indicted for stealing the goods in question which are therefore clearly within sect. 29. That section assumes such goods to be in *custodia legis*, and the constable is not to be disturbed or vexed in his possession by an action like the present. He was bound to take possession of the goods and not to allow them to be put under the control or in the possession of the accused, nor to part with them except under the order of the magistrate. The fact that the plaintiff was acquitted at his trial for stealing the goods makes no difference. The section does not direct the goods to be delivered to the acquitted party, but expressly enables the magistrate to exercise his discretion with respect to an order for their disposition notwithstanding such acquittal. The order of the magistrate is only an adjudication on the right to present possession; it cannot affect the ultimate right or bind the title to the goods, or estop the plaintiff from asserting his right to them hereafter; but, until an order is made, the constable's possession is lawful. The matter is still *sub judice*, and should the plaintiff succeed in this action the defendant would be thereby prevented from obeying an order of the magistrate to deliver the goods to some other person than the plaintiff. The plaintiff must show both a right to the present possession and an ultimate right to the property, and that he has not done. He cited

Vaughan v. Watt, 6 M. & W. 492; 9 L. J. N. S. 272, Ex.

Talfourd Salter, Q.C. in reply submitted that the keeping of the goods by the constable after the plaintiff's acquittal was totally unlawful. A reasonable time was of course allowed to a constable under such circumstances to ascertain the facts, but he was bound to exercise his judgment upon them in a reasonable time, and not to withhold property from the owners of it.

OLESBY, B.—It appears to me that the statement of defence in this case is a good defence to the action, and that, therefore, the defendant is entitled to the judgment of the court upon this demurrer. The case turns entirely upon the 29th section of the Act of Parliament that has been referred to, viz., the 2 & 3 Vict. c. 71. Now, what was the object of that section? It was to protect a person who is placed by virtue of his office in

possession of the property of some other person, to which he himself has no title. That is always a dangerous position for a person to be in, because although he may take time to make up his mind what to do, he is eventually bound by what he does do, and renders himself responsible if he does not deliver the property to the right person. The object of this section obviously was to protect a constable from that difficulty, and to enable him to go to the magistrate and say, "Tell me what I am to do with these goods, which do not belong to me; let me know who is the person to whom I am to deliver them." The Act says that it shall be lawful for the magistrate to make the order; and the person who obeys that order will be protected in obeying it, without any reference to the title of the person claiming the goods. That being so under the circumstances of this case, which comes within the Act of Parliament, the defendant applied to the magistrate to know what he was to do with these goods. The application was not disposed of by the magistrate at the time, but was adjourned by him for further and future consideration. He may possibly entertain a doubt in his own mind whether the plaintiff, the person who has been tried and acquitted on the charge of stealing the goods, is or not the person to whom he ought to order them to be delivered. It is hardly contended that had an order been made at once the plaintiff could have maintained this action. Indeed, it seems to be almost admitted that under that state of things it would be impossible for him to do so. That being so, and the matter being in the hands of the magistrate, what difference can it possibly make that he takes some time in order to enable him to make up his mind what his decision ought to be before he gives it? Is it possible, in construing a clause of an Act of Parliament which is made for the protection of an officer, to hold that the officer becomes responsible for the way in which the magistrate, the judge to whom by law the officer is to apply, deals with the case, the matter being within the magistrate's jurisdiction? The magistrate may say, "I cannot dispose of this case now, it requires further consideration, and I desire to have the proper persons to attend me upon it again." I do not suppose otherwise than that a judge or magistrate in dealing with a case is influenced by proper motives, and that he will deal with the case properly, so long as it is pending before him. That being so, it appears to me that the defendant here has done all that the Act of Parliament calls upon him to do to render up possession of the goods in question, and that therefore he cannot be responsible to the plaintiff, because he was not able, before the commencement of this Act, to relieve himself of the possession of them. I think, therefore, that the judgment of the court must be for the defendant with costs.

Judgment for the defendant, overruling the demurrer, with costs.

Solicitors for the plaintiff, *J. C. Fisher and Co.*
Solicitors for the defendant, *Ellis and Ellis.*

RAIL. COM.]

ROBERTSON v. THE MIDLAND GREAT WESTERN COMPANY OF IRELAND.

[RAIL. COM.]

COURT OF THE RAILWAY COMMISSIONERS.

Saturday Aug. 5.

ROBERTSON v. THE MIDLAND GREAT WESTERN
COMPANY OF IRELAND.(a)*Parcel rates—Stamped and unstamped parcels—
Undue preference—Injunction—Costs.*

The M. G. W. R. Co. adopted two scales of charges for carriage of parcels by their line. One of the scales varied in amount according to the weight of the parcel carried and according to the distance; the other scale, though it varied according to the weight, made no reference to the distance. The parcels to be carried by latter scale were not to exceed particular dimensions and a certain value. They were required to be prepaid by having adhesive stamps affixed to them.

The parcels were carried from the receiving offices of the company at Dublin to the terminus, then by the Messrs. W., the company's agents, who are paid in common with all the other carriers employed in Dublin by the company, 1d. per parcel for cartage of stamped parcels. This arrangement was due to an agreement by which Messrs. W. undertook to carry all stamped parcels gratuitously in consideration of receiving 1d. for every unstamped parcel; for other towns stamped parcels were charged 2d. for collection or delivery.

Held, that under the circumstances the company were not guilty of undue preference, although the applicant had the same trouble in collecting or delivering parcels whether they were stamped or unstamped.

THE applicant in this case carried on business as a general carrier and railway carrier (under the name of Messrs. Fishbourne and Company), in the City of Dublin. The application was for an order enjoining the defendants, firstly, to distinguish, in the books kept at the terminal station, out of the general parcel rate, between the amount charged for the conveyance of parcels over their lines of railway, and that charged for the collection and delivery of such parcels in Dublin; secondly, to allow the applicant an adequate sum for his services, which sum should not be less than the sum shown by the company's books as attributable to the same services when performed by themselves, or by carriers other than the applicants; and thirdly, to desist from giving any undue preference either to themselves, or to the carriers to the detriment of the applicant.

A somewhat similar application was made by the applicant against the same defendants in July of last year, when a charge of undue preference was made against the company in regard of their agents, Messrs. Wallis and Company. That application was successful, and, according to an order, then made by the court, the defendants have since that time made both to the applicant and to Wallis and Company the same allowance—namely, 1d. on all unstamped parcels, and nothing on stamped parcels. Since the first day of this year, however, the defendants have opened a railway parcels office of their own in Dublin, in St. Andrew's-lane, and, a short while previously, issued a printed notice acquainting the carriers

and the public [generally of their intention, and also of the rates at which all parcels, both stamped and unstamped, would be carried, and that the rate for the former included delivery to the Broadstone Terminus. Frequent application has been made since the time of the order by Fishbourne and Company to the defendants for an adequate remuneration for their services in connection with stamped parcels—the difference between stamped and unstamped parcels being in point of fact the material point at issue between the parties, a difference which, according to the applicant's counsel, ought not to exist—and also for some knowledge of the apportionment of the general rate charged by them between the charge for conveyance over the railway and for cartage and collection. Both these applications have, however, been persistently refused, and the applicant's contention is that unless he be paid more adequately than he at present is, and unless the preference which he alleges the defendants show to themselves as carriers over him be disallowed, he will be altogether driven from his business. The defendants admit most of the allegations contained in the application, but deny that they exhibit any preference to themselves, or to anybody else, over the applicant. They also maintain that they do adequately remunerate the applicant for the services performed—that is, on the same scale as since the order they have remunerated Mr. Wallis. They are willing to distinguish, as required, between the amount charged for railway carriage and that charged for the carriers' work, should the court enjoin that they should do so; but in the matter of stamped parcels they could not well do so, inasmuch as no allowance is made for cartage and delivery of such parcels.

H. G. Saunders and Macnamara for the applicant.

Rodwell, Q.C. and Kays for the defendants.

The following judgment was delivered by the CHIEF COMMISSIONER. — The Midland Great Western Railway Company who are the defendants in this case, have two scales of charges for the carriage of parcels by their line. One of these scales varies in amount according to the weight of the parcel carried, and according to the distance for which it is carried; and the other scale varies also according to weight, but is irrespective of distance. This latter scale is much lower in amount than the first, but it can be used only under particular circumstances and under particular conditions. The parcels to be carried by this scale must not exceed particular dimensions, nor be more than a certain value, and they must be prepaid by having adhesive stamps affixed to them. Both these parcel rates are stated in the company's printed notice to include delivery at the Broadstone Terminus. It appears that since the commencement of this year the railway company have opened an office of their own in Dublin, where they receive parcels, and from which the parcels are carried to their terminus in Dublin. The parcels are carried by their agents, Messrs. Wallis, who have similar receiving offices of their own; and whether the parcels are carried by Messrs. Wallis from their own or from the company's offices, the rate charged to the public covers the cost of collection between the receiving houses and the railway terminus. But here a distinction is made by the company between stamped and unstamped parcels; for the

(a) Reported by W. EVANS, Esq., Barrister-at-Law.

RAIL. COM.] RADLEY AND ANOTHER v. LONDON AND NORTH-WESTERN RAILWAY COMPANY. [H. OF L.]

letter they pay to Messrs. Wallis for cartage 1d. per parcel; for the former they pay them nothing at all; and they make the same allowance to all other carriers and private persons. The question is, whether the railway company are justified in drawing this distinction between the stamped and unstamped parcels. At first sight it is not clear why, if it is reasonable to make a rebate or an allowance of 1d. on every unstamped parcel that is carried to their railway terminus, they should not do the same with regard to parcels that are stamped. It seems that these latter, when collected or delivered in other towns than Dublin, are, according to the company's notice, charged an extra sum of 2d. for collection or delivery, and Mr. Robertson says that it makes no difference to him as far as the trouble and expense caused to him are concerned, whether the parcels are stamped or unstamped. There is, however, this difference between the two, that while the latter may be of any weight up to lowt., and yet go at the unstamped parcels rate, the former get the benefit of the reduced or stamped parcels rate only up to 21lb. There is that difference as far as the trouble and expense to the carrier is concerned, between the two sets of parcels. The explanation which the company give is this—they say that the stamped parcels rate includes nothing for collection in Dublin, and that they pay also nothing to their carting agent for carrying such parcels between their and his receiving offices and their railway terminus. But they can make this arrangement with Wallis, because, in consideration of their paying him 1d. for every unstamped parcel, he will carry stamped parcels gratis; and the chairman of the company and Mr. Wallis have both given evidence to the effect that neither directly nor indirectly, does the latter receive anything more than this penny. We could hardly go so far as to say that an explanation of that sort could not, under certain circumstances, cause a prejudice, and, perhaps, an undue preference in the case of other persons, because in the case of stamped parcels they probably would be unduly prejudiced by an arrangement of this sort, but this is an improbable supposition. Upon the whole, we think that the explanation of the company is not an unreasonable one, and that it is not so shown by this, that they have given, by this arrangement, no undue preference either to themselves or to the person they employ as their carting agent, and we must decline to grant the injunction. With regard to the application made under sect. 14 that we should require the company to distinguish in their book of rates how much of this rate is for the conveyance of parcels on the line and how much for other expenses, we have already stated that there is nothing, in fact, included in the rate for anything except the carriage on the railway, and under these circumstances we do not think it necessary to make an order to that effect. As the point raised was one not without difficulty, we do not feel inclined to give costs.

House of Lords.

Nov. 21 and Dec. 1, 1876.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, BLACKBURN, and GORDON.)

RADLEY AND ANOTHER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Contributory negligence—Evidence—Misdirection.

The appellants were colliery owners, and had a siding adjoining the respondents' line, on to which the respondents were in the habit of bringing the appellants' empty trucks from their line, which the appellants removed as they thought fit. The respondents brought such trucks at any time without notice to the appellants. On a Saturday, after working hours at the appellants' colliery, they brought on to the siding a truck loaded to such a height that it would not pass under a bridge which crossed the siding. On the following Monday, before daylight and before work was resumed, they pushed on to the siding other trucks, which pushed the loaded truck against the bridge and damaged it. In an action for the damage so done,

Held (affirming the judgment of the court below) that there was evidence on which a jury might find the appellants guilty of contributory negligence, but, reversing the judgment of the court below, that the judge had misdirected the jury in not telling them that if the respondents could have avoided the accident by reasonable care and diligence they were still liable, notwithstanding the negligence of the appellants.

THIS was an appeal upon a case stated under circumstances which appear fully in the judgment. The action was tried before Brett, J. at the Liverpool Summer Assizes 1873, when the jury found a verdict for the defendants (the respondents). A rule for a new trial was obtained on the ground of misdirection, which was made absolute by the Court of Exchequer (Bramwell and Amplett, BB.) as reported in L. Rep. 9 Ex. 71, but this decision was reversed by the Exchequer Chamber (Blackburn, Mellor, Lush, Brett, Grove, and Archibald, JJ., Denman, J. dissenting) as reported in L. Rep. 10 Ex. 100; 33 L. T. Rep. N.S. 209.

This appeal was then brought to the House of Lords.

Herschell, Q.C. and Baylis, Q.C., appeared for the appellants.

Aspinall, Q.C. and McConnell for the respondents.

Dec. 1.—Their Lordships gave judgment as follows:

LORD PENZANCE.—My Lords, the action charges the defendants with negligence in so managing the shunting of some empty coal waggons as to knock down a bridge and some staging and colliery headgearing which stood upon it and belonged to the plaintiffs. The first question raised by the present appeal is whether the Court of Exchequer Chamber was right in holding that there was any evidence proper to be submitted to the jury tending to the conclusion that

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained. The plaintiffs were colliery owners who had sidings out of and on one of the defendants' lines. Over their sidings was a bridge belonging to the plaintiffs with a headway of eight feet. It had been the course of business between the plaintiffs and the defendants for the defendants to take from these sidings the plaintiffs' waggons loaded with coals and deliver or leave them at their destination, also to collect the plaintiffs' waggons when empty and bring them to the sidings, and there leave them. When the waggons were so left on the sidings the plaintiffs dealt with them as they thought fit—that is to say, they took them to the pit to be loaded in such order and at such time as they pleased, or took them to their workshop if they needed repair. On a certain Saturday, after working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday by some special engagement of workmen, the defendants brought and left on one of the plaintiffs' sidings some empty waggons of the plaintiffs, among which was a waggon on which was placed a broken waggon belonging to the plaintiffs. The waggon so loaded was too high to pass under the bridge over the plaintiffs' siding, and it remained on the siding until the Sunday night, when the defendants brought in a very long train of the plaintiffs' empty waggons and pushed it on to the siding where the waggon laden with the disabled waggon was standing. The train came in contact with the waggon in question, which it pushed before it until it came in contact with the bridge, which offered an obstruction to the further progress of the train. The defendants' engine driver, without endeavouring to ascertain the cause of the stoppage, backed his engine, and then gave it such momentum forward as caused the loaded waggon to knock the bridge down. For this alleged negligence the action was brought. It is needless to say that there was evidence of negligence on the part of the defendants; but the learned judge left it to the jury to say whether, and the jury did say that there was contributory negligence on the part of the plaintiffs, and found their verdict for the defendants on that ground. The plaintiffs contended, first, that there was no evidence of contributory negligence. The way the defendants shaped their argument was this—they said the plaintiffs knew, or ought to have known, that the loaded waggon had been brought and left at the place where it was so left; they knew that it would not pass under the bridge; they knew that the defendants would, or might bring, empty waggons on the Sunday, and to make room for what they brought would, or might, push forward whatever they found on the siding, as they had done before that, and, therefore, the plaintiffs ought to have moved the loaded waggon or taken out the broken one, or have warned the defendants that it was there. The plaintiffs said, in answer to this, that, assuming they knew the waggon was there with the load, so did the defendants; that the defendants knew also the height of the bridge, and that the waggon with its load would not pass under it; that the defendants knew that working hours were practically over when they brought it, and that practically the plaintiffs could not move or unload it

until the Monday; and they said they had a right to suppose that the defendants would not be so negligent, under these circumstances, as to drive this loaded waggon at the bridge under which it could not pass, and would knock it down if pushed against it with sufficient force; that, in truth, the alleged negligence of the plaintiffs was not foreseeing and guarding against the negligence of the defendants; that even if they themselves had placed the loaded waggon there, they had no right to anticipate that the defendants would be so negligent as to put any waggon on the siding without seeing what was there, and to push with such force as they did when they found an obstruction. These points the learned judge at the trial properly submitted to the jury, and the decision of the Court of Exchequer Chamber to that effect must be upheld. The remaining question is whether the learned judge properly directed the jury in point of law. The law in these cases of negligence is perfectly settled and is beyond dispute. The first proposition is a general one, to this effect—that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care, which contributed to the cause of the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that although the plaintiff might have been guilty of negligence, and although that negligence might, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence would not excuse him. That proposition of law was decided in the case of *Davies v. Mann* (27 L. J. 322, C. P.), and was supported in that of *Tuff v. Warman* (10 M. & W. 546), and other cases, and has been universally applied in cases of this character without question. The learned judge at the trial, however, told the jury that if there was any contributory negligence on the part of the plaintiffs they could not recover, and failed to qualify that general proposition by telling them that if the defendants could have avoided the accident by reasonable care and diligence they were still liable, notwithstanding that there was contributory negligence on the part of the plaintiffs. In that respect, therefore, the learned judge misdirected the jury, and, therefore, the judgment of the Court of Exchequer Chamber must be reversed, and that of the Court of Exchequer restored; the rule for a new trial must be made absolute, with costs to the appellants in the Court of Appeal.

The LORD CHANCELLOR, and Lords BLACKBURN and GORDON concurred.

Judgment of the Court of Exchequer Chamber reversed.

Solicitors for the appellants, *Sharpe, Parber, and Co.*

Solicitor for the respondents, *R. F. Roberts.*

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WILSON AND ANOTHER v. WADDELL.

[H. of L.]

Nov. 23 and Dec. 1, 1876.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, BLACKBURN, and GORDON.)

WILSON AND ANOTHER v. WADDELL. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Mines—Adjacent owners—Natural user—Water.

The appellants and the respondents were lessees under the same landlord of the minerals under two adjacent parts of the same estate. The soil over the mines was in its natural condition impervious to water. The respondent so worked his mine that the surface of the ground cracked and sank, and the rainfall and surface water flowed through the fissures, and found its way into the appellants' mine, which was at a lower level than the respondent's.

Held (affirming the judgment of the court below), that the respondent was not liable for the damage so done in the natural course of user of his own land.

This was an appeal from a decision of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk (Lord Moncrieff), Lord Ormisdale, and Lord Gifford, affirming a decision of the Lord Ordinary (Lord Curriehill).

The appellants had brought an action against the respondent, claiming damages for the flooding of their coal mine, at Coltness, in Lanarkshire, through the improper working of the adjacent mine, of which the respondent was lessee. They also asked that he should be compelled to construct the necessary works for preventing the water which accumulated above his mine from flowing into their workings.

The respondent alleged that the appellants had improperly reduced the thickness of the barrier which should have divided the two workings, and the court below decided in his favour.

The facts appear fully in the judgment of Lord Blackburn.

Cotton, Q.C. and Lee (of the Scotch Bar) appeared for the appellants.

Benjamin, Q.C. and Balfour (of the Scotch Bar), for the respondent.

Dec. 1.—Their Lordships gave judgment as follows :

LORD BLACKBURN.—My Lords, in this case the appellants maintained, first, that the conduct of the respondent was such as to make him liable to the pursuers for the damage; and, secondly, that the ground on which the court below based their judgment could not be supported, as the pursuers had done nothing to preclude their claim to reparation. The pursuers and the defender were both lessees under the same landlord of the minerals under two adjacent portions of the same estate. The seam of coal cropped out of the surface in the defender's holding. It lay at a high inclination, dipping towards the pursuers' holding, and where it entered it was at a depth of many fathoms below the surface, so that any water which fell on or percolated through the defender's holding would by force of gravitation descend to the pursuers' holding, unless stopped by the mine or soil from doing so. The soil above the coal was stiff and impervious to water; so that while it was undisturbed the greater part of the

rainfall flowed away over the surface, very little of it filtering down to the seam, which was in consequence a very dry seam, the impervious strata above while undisturbed forming what might be called a roof practically watertight over the coal. But the defender altered this state of things by so working the coal that the surface sank over a space of five acres, and cracked into open fissures, through which the rainfall flowed freely down into the defender's working, and thence into the pursuers' mine, and put them to an additional expense in pumping. The question seems to be whether this was *damnum absque injuriâ* from which the pursuers must protect themselves in such a way as they could, or whether the defender when working the upper part of the mine was under any obligation to the pursuers as owners of the mine on the dip to preserve or restore the impervious roof which, while it existed, prevented a great part of the rainfall from entering the mines. The question seems to be whether there is any servitude on the owners of the upper mines for the benefit of the owners of the mines on the dip to preserve either the surface or the subjacent minerals as watertight as the undisturbed state of the strata. No authority has been cited either in a Scotch or an English court in favour of the doctrine that there is such a servitude. The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract, and as a branch of that law the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and a servitude to prevent such user must be founded on something more than mere neighbourhood. In *Rylands v. Fletcher* (L. Rep. 3 H. of L. 330; 19 L. T. Rep. N. S. 220), in this House, the Lord Chancellor said that the occupiers of a close might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if in the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by another, that other could not complain that this result had happened, because if he had desired to guard himself against it, it would have lain upon him to have done so by leaving or interposing some barrier between the two closes to have prevented that operation of the law of nature. I can see no distinction between rain-water falling on the surface and that which filtered down into the coal seams. I therefore think the decision of the court below was right and ought to be affirmed.

The LORD CHANCELLOR, Lord PENZANCE, and Lord GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, W. Robertson.

Solicitors for the respondent, F. & Co.

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THÉBERGE v. LAYDRY.

[PRIV. CO.]

Judicial Committee of the Privy Council.*Tuesday, Nov. 7, 1876.*

(Present: The Right Hons. The LORD CHANCELLOR (CAIRNS), Sir BARNES PEACOCK, Sir R. COLLIER, and Sir HENRY KEATING.)

THÉBERGE v. LAYDRY. (a)

PETITION FOR LEAVE TO APPEAL FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC, CANADA.

*Law of Lower Canada—Quebec Controverted Elections Act—Right of Appeal—Prerogative of Crown.**By a Colonial Act of Parliament the decision of controverted elections was transferred from the legislative assembly of the colony to the Superior Court. The Act enacted "such judgment shall not be susceptible of appeal."**On petition for leave to appeal from a decision under the Act to the Crown in Council,**Held that, although the prerogative of the Crown cannot be taken away, except by express words, yet that, having regard to the peculiar nature of the Act, as affecting the rights and privileges of the Legislative Assembly independent of the Crown, it could not be taken to have created a tribunal with the ordinary incident of an appeal to the Crown under its prerogative attaching to it.*

THIS was a petition for special leave to appeal from a decision of the Superior Court of the Province of Quebec, Canada, under circumstances which appear fully in the judgment of their lordships.

Benjamin, Q.C. and Bompas appeared for the petitioner, and referred to *Boston v. Lelièvre* (L. Rep. 3 P. C. 157; 22 L. T. Rep. N. S. 735), and *Re Marois* (15 Moo. P. C. 189.)

Their Lordships' judgment was delivered by

The LORD CHANCELLOR (CAIRNS).—The petitioner in this case states that he was a candidate at an election held in July 1875, in the Province of Quebec, for the office of member to represent the electoral district of Montmanier in the Legislative Assembly of the Province, and that he was declared duly elected; but that after the election a petition was presented by certain electors against the return of the petitioner, alleging that he had been guilty of corrupt practices by himself and his agents, and praying that the seat might be declared vacant, and the petitioner declared disqualified, in accordance with the provisions of the "Quebec Controverted Elections Act." He then states that the petition was tried according to the Act before the court, and that the court pronounced a sentence against the petitioner declaring the election null and void, and declaring him guilty of corrupt practices, both personally and by his agents. The petition states certain objections which the petitioner makes to the decision of the court, and prays that Her Majesty in council will be graciously pleased to order that the petitioner shall have special leave to appeal from the judgment of the Superior Court for the Province of Quebec of the 29th May 1876, that is to say, from the judgment declaring the election of the petitioner to be null and void. The Act of Parliament in question is the "Quebec Controverted Elections Act" of the year 1875. That

(a) Reported by C. M. MALDEN, Esq., Barrister-at-Law.

Act repealed an Act of the Quebec Legislature of the 36th year of Her Majesty's reign, that is, in 1872, which was entitled "An Act to provide for the Decision of Controverted Elections by the Judges, and to make better provision for the Prevention of Corrupt Practices at Elections." That Act of 1872 appears to have been the Act which, in Quebec, transferred to the court the decision of controverted elections, which before that time was vested in or was retained in its own hands by the legislative assembly of the Province. By the force of the two Acts of 1872 and 1875, in Quebec, as in this country, the decision of questions of that kind has now become vested in the Superior Court. The 89th section of the later of these two Acts, the Act of 1875, provides that the Superior Court sitting in review shall determine,—first, whether the member whose election or return is complained of has been duly elected or declared elected; second, whether any other person, and who, has been duly elected; third, whether the election was void; and fourth, all other matters arising out of the petition or requiring its determination. Then the 90th section enacts, "Such judgment shall not be susceptible of appeal." Now, upon that 90th section it is contended on behalf of the petitioner that it does not take away any prerogative right of the Crown: that the Crown and the prerogative of the Crown is not specially or particularly mentioned; and that the general rule is, that the prerogative of the Crown cannot be taken away except by a specific enactment. It is said that this section may be satisfied by holding that the intention of the Legislature was that there should be no appeal from a Superior Court to the Court of Queen's Bench in the colony, which was the kind of appeal that existed in civil cases in the Colony, and that the prerogative of the Crown is not in any way affected. Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as has often been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known. Accordingly we find, on looking at the Act of Parliament, that, after providing by the 89th section as to the

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matters which the Superior Court is authorised to determine, the 91st section declares that a certified copy of the judgment shall be transmitted without delay to the speaker, and another to the prothonotary in the district in which the petition was presented, and then the 118th section provides: "The speaker shall, at the earliest practicable moment after having received the judgments and reports, adopt all the proceedings necessary for confirming or altering the return of the returning officer, or for the issuing of a new writ for a new election within thirty days, or for otherwise carrying the final judgment into execution, as circumstances may require. He may, for the issuing of such writ of election, address his warrant under hand and seal to the clerk of the Crown in Chancery." Then the 119th section is: "The speaker shall without delay communicate to the Legislative Assembly the judgments and the reports received, and his own proceedings thereon." And the 120th section is: "When a special report has been received, the Legislative Assembly may make such order in respect of such special report as it may deem proper." The whole scheme, therefore, of the Act of Parliament is that, once the action of the Superior Court takes place, and the decision of the Superior Court arrived at, the machinery is to go on just as it had formerly gone on inside the Legislative Assembly; writs are to be issued, seats are to be taken, other proceedings are to be had, as would have been the case before the court was called into operation, and when the Legislative Assembly decided these matters by its own authority. Stopping there, it would be very difficult to do otherwise than conclude, from the character of these enactments, that the object which the Legislature had in view was to have a decision of the Superior Court, which, once arrived at, should be for all purposes conclusive. But there is a further consideration which arises upon this Act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council. Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that court which the Legislative Assembly had substituted in its place. These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that

the prerogative of the Crown, once established, cannot be taken away, except by express words; but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their Lordships, advertent to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the Legislature under this Act, an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party, to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. In the opinion, therefore, of their Lordships, there is not in this case, advertent to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused. It is, of course, in this view of the case unnecessary to consider whether, if there had been a right to admit an appeal, it would have been a case in which, in the discretion of this tribunal, an appeal should be admitted. On that point their Lordships have never entertained any shadow of doubt. They clearly are of opinion that, even if there was the power of admitting an appeal, this is not a case in which an appeal ought to be admitted; but, in their opinion, it is not a case in which it was ever contemplated or intended that there should be a power to admit an appeal on the part of the Legislature. Their Lordships were in one part of Mr. Benjamin's argument pressed with another matter, that even if an appeal should not be here admitted generally, yet that there was in the finding of the judge a subordinate part, which ought to be brought by way of review before this tribunal. Mr. Benjamin said that the judge had found that the petitioner was personally guilty of corrupt practices; and then he said that the Quebec Election Act, by a particular section, the 267th, provided that if it is proved before the court that corrupt practices have been committed by or with the actual knowledge or consent of any candidate, not only the election shall be void, but the candidate shall, during the seven years next after the date of such decision, be incapable of being elected to and of sitting in the Legislative Assembly, of voting at any election of a member of the House, or holding an office in the nomination of the Council of the Lieutenant Governor of the Province. Mr. Benjamin contended that the Act of Parliament, so far as it engrafted on the decision of the judge this declaration of incapacity, was *ultra vires* the power of the Legislature of the Province. Upon that point their Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was in this respect, as contended, *ultra vires* the Provincial Legislature, the only result will be that the consequence declared by this section of the Act of Parliament will not enure against and will not affect the petitioner;

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but it is not a subject which should lead to any different determination with regard to that part of the case. Upon the whole, their Lordships will humbly advise Her Majesty that this petition be dismissed. *Petition dismissed.*

Solicitors for the petitioner, *Bischoff and Co.*

Nov. 23 and Dec. 6, 1876.

(Present the Right Hons. Sir JAMES COLVILLE, Sir BARNES PEACOCK, and Sir ROBERT COLLIER.)

THE REGISTRAR OF TITLES v. PATERSON. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Law of Victoria—Transfer of Lands Statute—Writ of fi. fa.—Alias writ—Registration.

The Transfer of Lands Statute of Victoria, by sect. 106 enacts that every writ of fi. fa. shall cease to bind, charge, or affect lands unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day in which the copy of the writ was served on the Registrar of Titles.

A copy of a writ of fi. fa. had been served under the Act, and transfers to B. of the lands affected by it were presented for registration before the lapse of three months. At the expiration of that period no transfer upon a sale under the writ having been left for entry, the registrar registered the transfer to B. The respondent afterwards lodged for registration transfers to himself under an alias writ of fi. fa., affecting the same lands, a copy of which had been served before the expiration of the period under the original writ.

Held (reversing the judgment of the court below), that the registrar was justified in refusing to register such transfer, and in completing B.'s title.

THIS was an appeal from certain rules and orders of the Supreme Court of Victoria relative to the registration of transfers of land.

Cotton, Q.C., Fitzjames Stephen, Q.C., and J. D. Wood appeared for the appellant.

The respondent did not appear, and the appeal was consequently heard *ex parte*.

The facts of the case, and the clauses of the Act of Parliament upon which the question turned, appear in the judgment of their Lordships.

Dec. 6.—Their Lordships' judgment was delivered by Sir JAMES COLVILLE.—This is an appeal by the Registrar of Titles in the Colony of Victoria against three orders of the Supreme Court of that colony, dated respectively the 2nd Sept. 1872; the 3rd April, 1873; and the 19th Sept. 1874. The determination of it turns chiefly upon the construction to be put upon certain clauses of an Act passed by the Colonial Legislature in June 1866, and known as the "Transfer of Lands Statute." The circumstances under which the orders in question have been made are the following:—In Oct. 1871, John Mulholland was the registered proprietor of certain lands. On the 20th of that month a copy of a writ of *fi. facias*, which had been issued in an action against him in the Supreme Court, at the suit of William Mainfold Aitken, was served on the Registrar of Titles, in conformity with the 106th section of the "Transfer of Lands Statute," specifying those lands as "the lands sought to be affected thereby." The usual entry was thereupon made

in the register book. On the 2nd Jan. 1872, Mulholland presented for registration transfers of the same lands from himself to one William Baylis, in consideration of 632*l.* paid to him by Baylis. On the 5th of that month a copy of an *alias fieri facias* in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Registrar of Titles. On the 21st of that month, and therefore after the expiration of three months from the date at which the copy of the first writ was served on the Registrar of Titles, that officer registered the transfers from Mulholland to Baylis, and issued to the latter the usual certificates of title. On the 2nd and 28th March 1872, transfers of the same lands from the district sheriff to the respondent under the *alias* writ were lodged for registration with the registrar; but he refused to register them, or to issue certificates of title to the respondent as the proprietor. The consideration for these transfers is said to have been only 8*l.* The respondent, therefore, if really a purchaser, and not a mere agent of the judgment creditor, seems to have known that he was buying a very questionable title. Upon this the respondent, proceeding under the 135th section of the statute, required the registrar to set forth in writing the grounds of his refusal; and afterwards took out a summons in the Supreme Court, calling upon him to substantiate and uphold those grounds. The matter of this application was determined by Chief Justice Stawell on the 2nd Sept. 1872, when the first of the orders under appeal was made. By that order the registrar was directed forthwith to enter in the register a copy of this *alias* writ of *fi. facias*, unless the same had already been entered; and also forthwith to register the transfers to the respondent, in accordance with the 106th section of the statute. This order having been made upon him, the registrar tendered to the respondent certificates of title, qualified by a note in these terms:—"This certificate is issued to Mr. Robert Paterson, the transferee, from the district sheriff, under the circumstances appearing in *Re Robert Brand Paterson*, reported 3 Australian Jurist, pp. 52 and 54; and in pursuance of the decision of the Supreme Court in that case." The respondent refused to accept certificates of title in that form; and required the registrar to proceed against Baylis under the 132nd section, in order to compel him to deliver up, for the purpose of being cancelled, the certificates of title issued to him; and on the registrar's refusal to do so, took out another summons in the Supreme Court against him, calling upon him to appear and substantiate and uphold the grounds of such refusal. That summons was disposed of on the 3rd April 1873, by the second of the orders under appeal, which directed the Registrar of Titles forthwith to call in the certificates of title to Baylis, and to issue to the respondent clear certificates of title to the same land. In obedience to this order, the registrar took out a summons in the Supreme Court, under the 132nd section of the statute, against Baylis, and one Smith, who had acquired from Baylis a charge upon the lands and was in possession of the certificates issued to Baylis, calling upon them to show cause why those certificates should not be delivered up for the purpose of being cancelled. This summons was ultimately dismissed by the court on the grounds that Smith had a valid

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

charge on the land, and that so long as that subsisted the court had no power to comply with the summons. It may be observed that the 145th section of the statute contains a strong provision in favour of purchasers for value, and apparently governed the decision of the court on this occasion. The parties being thus at a dead-lock, one order requiring the registrar to do that which the court, on dismissing the last-mentioned summons, had in substance declared he was at present incompetent to do, the respondent took out a third summons calling upon the Registrar of Titles to substantiate and uphold the grounds on which he had refused to register the respondent as proprietor of the land, and to issue to him clean certificates of title in respect of it. The court, on the 19th Sept. 1874, made an order upon this summons directing the registrar to do what he had refused to do; and this is the third of the orders under appeal. It is, however, to be observed that the learned judges who made this last order did so only because they felt themselves bound by the former orders against which there had been no appeal. Neither of them seems to have been satisfied that those orders were correct; and Mr. Justice Fellows expressed an opinion that the court had been wrong throughout. An appeal to Her Majesty in Council against the last order was allowed in the colony; the appellant subsequently obtained here special leave to appeal against the first two orders, and thus the whole matter is now open on appeal before their Lordships. The first question to be determined is obviously the correctness of the order of the 2nd Sept. 1872. The general object and intention of the "Transfer of Lands Statute" are to simplify titles to land by making them depend wholly upon registration, and the certificate of title issued in conformity with the register book. Its provisions deal with transfers of land, whether by the voluntary act of the proprietor, or under an execution sued against him. The material provisions relating to this first class of transfer are the 37th, 42nd, and the 47th sections. The last of these makes the certificate conclusive evidence that the person to whom it is issued is the proprietor of the land; and the second provides that the land shall not pass from one proprietor to another by virtue of an unregistered contract, but only upon registration; and the first provides that every instrument presented for registration shall be registered in the order of, and as from the time at which the same is produced for that purpose. The time, therefore, at which an instrument is presented for registration is very material. It is the duty of the registrar to register it as from that time. On such registration the land passes; and the purchaser is entitled to the certificate which is to be the conclusive evidence of his title. The second class of transfer is dealt with by the 106th section. This provides that no mere registration of an execution shall bind or charge the land; but that the registrar, on being served with a copy of the writ of *feri facias*, accompanied by a statement specifying the land sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book; and after the sale of the land under such writ, shall, on receiving a transfer thereof, enter such transfer in the register book; whereupon the purchaser shall become the transferee, and be deemed the proprietor of the land. It further

provides that until such service as aforesaid no sale or transfer under the writ shall be valid as against a purchaser for value notwithstanding the writ was actually lodged for execution at the time of the purchase, and the purchaser had actual or constructive notice of the lodgment of such writ. And then, after dealing with the case in which the writ may have been satisfied, it expressly provides that every such writ shall cease to bind, charge, or affect the land "unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy was served." The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby. Again, there is nothing in the statute, or in this particular section of it, to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the sheriff. Such a contract, no doubt, can only be perfected by registration, and must, therefore, remain defeasible until the writ is withdrawn, or satisfied, or the term of three months from the day on which the copy was served has expired. In the present case, therefore, the title of Baylis to the lands was clear, unless it can be shown to have been overriden by that of the respondent claiming as transferee not under the original, but under the *alias* writ of *feri facias*. The Chief Justice in giving judgment on the first summons said: "The registrar reads the words 'any writ' as meaning the original writ. There is nothing to justify such a conclusion. 'Any writ,' for obvious reasons, unless limited by the context, refers to an *alias* or *puries* writ, just as much as to the original writ." It is not necessary to the appellant's case to contest this general proposition. Let it be assumed that an *alias* writ is duly issued in order to affect land not previously affected by the execution; such writ would, of course, have the same operation as an original writ would have had. But it would have no more. It would affect the land for three months from the date of the service of a copy of it upon the registrar; but a transferee under it would take subject to rights acquired before such service. Nor, though it would have this operation, could it, in their Lordships' opinion, have the further effect of enlarging, contrary to the plain policy of the statute, the operation of the original writ. In the present case it is not shown, nor is it easy to see, how the *alias* writ came to be issued. The Common Law Procedure Act for the Colony (28 Vict., No. 274) seems to contain no special provisions touching the issue of *alias* writs of execution. It may, therefore, be presumed that an *alias* writ of *feri facias* could only be regularly issued in the colony under the circumstances in which it might be issued in this country; or at all events when such a proceeding might be necessary in order to reach property which had not been reached, and could not be reached by the original writ. In the

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present case the land in question had been reached by the original writ; nor is there any reason to suppose that when the *alias* writ issued the original writ was not still in force. The 292nd section of the Common Law Procedure Act provides that every writ of *fiert facias* may be in the form contained in the 26th schedule to the Act; and according to that form the writ would be returnable "immediately after the execution thereof." The section indeed goes on to say that all writs of execution may be made returnable on a day certain, or may be returnable after the execution thereof. But there is nothing here to show that in this case the original writ had expired before the 5th Jan. 1872; and the act of the registrar in delaying the registration of the transfers to Baylis until the 21st affords a strong inference that the original writ was in force up to that date. Therefore, whether the *alias* writ was or was not properly issued (a question upon which their lordships offer no opinion) it seems clear that the service upon the registrar of a copy of it in order to affect lands already affected by the original writ, can be accounted for only by supposing that the object of the party making the service was the unwarrantable one of attempting to enlarge the statutable term of three months, within which, in order to enforce his execution against the lands, he was bound to procure the sale of them. Again, their lordships are of opinion that upon the true construction of those provisions of the statute (which have already been referred to and considered) Baylis had, on the 5th Jan. 1872, acquired a title to the lands which could only be defeated by a sheriff's transfer of them in pursuance of the original writ. The transfers to the respondent were, *ex concessis*, in pursuance of the *alias* writ, and were made at a time when, according to the statute, no valid transfer could have been made in execution of the original writ. If this be so the registrar was right in completing Baylis's title by registration on the 21st January, and in issuing the certificates to him, and was also justified in refusing to register the subsequent transfers to the respondent. It follows that the first order is erroneous and ought to be reversed. This being so, it becomes unnecessary for their lordships to consider particularly the correctness of the two other orders. They are founded upon the first, and, if that cannot stand, must fall with it. The case has been heard *ex parte*, and their lordships are therefore the more desirous to abstain from expressing any opinion upon the construction of the statute, and upon the reasons given by the learned judges of the Supreme Court for their various orders, which is not essential to the determination of the present appeal. They will humbly advise Her Majesty that all the three orders under appeal be reversed, and in lieu thereof that orders be made dismissing the summons of the 29th June 1872 with costs, and the summonses of the 12th March 1873 and the 29th August 1874 without costs. Considering that the subsequent litigation would have been avoided if the Registrar of Titles had appealed against the first order at the proper time, their lordships have come to the conclusion that the orders of dismissal of the two last summonses should be without costs. They think, however, that the registrar is entitled to the costs of this appeal.

Orders appealed from reversed and appeal allowed.
Solicitors for the appellants, *Freshfields and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, Nov. 30, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRETT, JJ.A.)

Ex parte DIXON; *Re* HENLEY. (a)

Principal and agent—Factor—Set-off against principal of debt due from agent—Proof in bankruptcy.

The fact that an agent for the sale of goods was directed by his principal not to sell the goods in his own name, but to disclose his agency, will not deprive a buyer of the right of setting off against the principal's claim for the goods a debt due to him from the agent, if the limitation of the agent's authority was not disclosed to the buyer.

Semenza v. Brinsley (18 C. B. N. S. 467; 12 L. T. Rep. N. S. 265), followed and explained.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

In 1872, William M'Arthur, who carried on business as an iron merchant in London under the firm of M'Arthur and Co., was appointed sole agent in London for the sale of Calder and Govan pig iron, manufactured by Messrs. William Dixon (Limited), of Glasgow, who forwarded large quantities of iron to him for sale. One of the terms of his appointment was that in case of payment by bills, the agency for Messrs. William Dixon should be disclosed on the bills. During the year 1874, M'Arthur made several sales of their iron to W. T. Henley, who carried on business as a telegraph engineer and contractor at Woolwich.

Henley's orders were sent to M'Arthur as if he had been principal, and the invoices for the goods were made out in M'Arthur's own name (or rather in the name of M'Arthur and Co.), as if he had been principal. But in the bills of exchange which he drew upon Henley for the price, M'Arthur and Co.'s signature was accompanied by the words "Agents for W. Dixon (Limited), Calder and Govan Iron Works, Glasgow," which words were stamped upon the bills in pale blue printed letters by means of a stamping machine, but so faintly as to be hardly legible, the more so as the signature of M'Arthur and Co. was written over the words.

On the 25th Jan. 1875, Henley sent an order to M'Arthur for thirty tons of No. 1 Calder pig iron at 5l. per ton, and thirty tons No. 3 Calder pig iron at 4l. 9s. 6d. per ton.

On the 28th Jan. M'Arthur forwarded the goods and sent an invoice of them headed "W. T. Henley, Esq., in account with Wm. M'Arthur and Co." The price amounted to 286l. 5s. 6d., and at the foot of the invoice were the words "Payment by cash on 10th Feb., less 2½ per cent."

On the 10th Feb. 1875, M'Arthur sent to Henley for his acceptance a four months' bill for 286l. 5s. 6d., with the words "Agents for W. Dixon (Limited), Calder, &c., Works, Glasgow," very faintly stamped upon it, and the signature "Wm. M'Arthur and Co., per J. Mackenzie," written over the stamped words.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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Henley refused to accept this bill, claiming to set-off against the price a larger debt which was due to him from M'Arthur on a private account.

In March 1875, Henley filed a petition for liquidation of his affairs by arrangement, and in the following month M'Arthur filed a similar petition.

Messrs. W. Dixon claimed to prove against Henley's estate for 286*l.* 5*s.* 6*d.*, the price of the iron purchased by him in Jan. 1875. The trustee rejected the proof on the ground that Henley had dealt with M'Arthur as principal, and that there was a right of set-off against the larger debt due from M'Arthur to Henley.

In support of the claim of Messrs. W. Dixon, M'Arthur and his cashier deposed that Henley had no authority from M'Arthur to place the purchase money for the iron to M'Arthur's credit in the private account between him and Henley, that he must have known from the words stamped on the bills sent him for acceptance that M'Arthur acted in the sale as agent for Messrs. W. Dixon, whose property the iron was, and that it was well known in the trade that M'Arthur was the sole agent for Messrs. W. Dixon's Calder and Govan iron. And Messrs. W. Dixon's manager deposed that M'Arthur never had any authority from Messrs. W. Dixon to sell the Calder iron as a principal, and that every pig was branded with the word "Calder," and that it was well known in the trade that iron so branded was made solely by Messrs. W. Dixon.

On the other hand, Henley deposed that he always believed he was dealing with M'Arthur as a principal, and that he never heard anything to the contrary till the 22nd Feb. 1875, and he was not cross-examined on this statement.

Henley's manager deposed that certain Calder pig iron which was ordered in Feb. 1875, and supplied, but afterwards returned, was only ordered with a view of reducing the unsecured balance owing from M'Arthur to Henley on their general account.

The registrar held that the trustee of Henley's estate was entitled to the set-off, and rejected Messrs. W. Dixon's proof.

From this decision Messrs. W. Dixon appealed.

De Gex, Q.C. and Bagley, for the appellants.—The conditions laid down by Willes, J., in *Semenza v. Brinsley* (18 C. B., N. S., 467-77; 12 L. T. Rep. N. S. 265-6), as necessary in order to make a valid defence to such a claim as this, namely, "that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undecieved in that respect the set-off accrued," have not been fulfilled here; indeed, all those conditions are unfulfilled here. It is not proved—indeed the contrary is distinctly proved—that M'Arthur sold this iron as his own goods in his own name as principal with the authority of the appellants. M'Arthur was not a factor intrusted with goods from abroad, and therefore he had no implied authority to sell the goods in his own name. Henley cannot have believed that he was dealing with M'Arthur as principal, for the words stamped upon the bills which he accepted in respect of iron on several occasions showed him that

M'Arthur sold as agent for the appellants. He had thus the means of knowing that he was dealing with an agent, and under such circumstances the case does not come within the rule laid down in *George v. Clagett* (7 T. Rep. 359; 2 Smith's Lead. Cas. 5th edit. 359), that, if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. M'Arthur, in selling the goods in his own name without disclosing his principal, clearly acted beyond the scope of his authority: (*Baring v. Corrie*, 2 B. & Ald. 137.) Henley had such means of knowing that he was dealing with an agent that the necessary inference is that he did know: (*Borries v. The Imperial Ottoman Bank*, 29 L. T. Rep. N. S. 689; L. Rep. 9 C. P. 38.)

Hemming, Q.C. and Jeune, for the respondent, the trustee in Henley's liquidation, were not called upon.

JAMES, L.J.—I am of opinion that the registrar's order in this case ought to be affirmed. It seems to me that every one of the requisites mentioned by Willes, J., in *Semenza v. Brinsley*, has been proved. That is to say, according to the ordinary mode of dealing of factors, M'Arthur sold the goods in his own name and as his own goods. Henley swears and Henley's agent swears (and they have never been cross-examined) that he dealt with M'Arthur as principal, and in the belief that he was the principal, and never had any doubt upon the subject until the 22nd Feb. The only evidence adduced against that is—first, a private communication between the principals and the agent. That, of course, cannot limit the authority of the agent, who is authorised to hold himself out to the world as principal. Secondly, the forms of certain bills of exchange are relied upon. But when I come to look at them they amount to nothing whatever, because although there is something printed on them as to agency, that printed matter is so carefully written over with ink as to prevent anybody from seeing it at first sight—so carefully written over that I had some difficulty myself in seeing what the meaning of the printed words was. Then the bills themselves are endorsed by M'Arthur as principal, he thereby making himself liable upon them to anyone into whose hands they might come as indorsees. Upon that first point I am satisfied that the requisites mentioned in that judgment of Willes, J., have been fully complied with. Then as to the set-off, the registrar has found as a fact upon the evidence before him, which he believed, that there was nothing sufficient to displace the positive affidavit that there was an actual debt due from M'Arthur and Henley before the 22nd Feb., when the notice reached him that the goods really belonged to some one else. In my opinion the appeal ought to be dismissed with costs.

BAGGALLAY, J.A.—I am of the same opinion.

BRETT, J.A.—I am of the same opinion. The first point in this case arises upon the assumption that there is a debt due from Henley, the agent, to Dixon and Co., the alleged creditors. It is contended that even assuming that to be so, the rule laid down by Willes, J., in *Semenza v. Brinsley* is not fulfilled, on two grounds. First of all, it was said that the agent was not a factor and a limitation of the definition of a factor was suggested which, I confess, I have never before

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heard of. The true definition of a factor was, as I have always thought, that which is laid down in Smith's Mercantile Law (8th edit., p. 106), where it is said: "There are two extensive classes of mercantile agents, viz., factors who are entrusted with the possession as well as the disposal of property, and brokers who are employed to contract about it without being put into possession." As for limiting that definition by a supposition that factors are only entrusted with goods sent from abroad, that is a limitation which I never before heard of, and which I think must be rejected. Then McArthur was a factor, that is to say, he was a person entrusted with the possession as well as the disposal of the property. He was a factor. Willes, J., who had the greatest experience in mercantile law that any man in the world could have, says in *Semenza v. Brinsley*, that it is usual for factors (that is to say persons who are so entrusted with goods) to sell the goods in their own name. Another rule of law is this, that the question of the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very fact of entrusting your goods to a man as a factor with a right to sell them, is *prima facie* an authority from you to him to sell them in his own name. Therefore, there being no limitation of that authority as shown here to the person who was dealing with the agent, that is sufficient evidence of an authority to the agent to sell the goods in his own name as principal with the consent of the person who had entrusted him with the goods. That point, therefore, is made out. It is true that Willes, J., in *Semenza v. Brinsley* mentioned as one of the necessary things to enable the debtor to set off the agent's debt against the principal, that the sale of the goods by the agent as his own must have been with the authority of the principal, but that was because he was dealing with a demurrer, and at the end of the judgment he himself said it was a great pity that the parties did not go on and try the facts. And if the facts had been tried, the moment Mr. Justice Willes had found that the agent was entrusted with the goods as a factor he would have held that that was of itself an authority given to him by the principal to sell in his own name, so far as concerned anybody to whom no limitation of that authority was disclosed. Therefore that point is made out that the sale in the agent's own name was with the authority of the principal. Then it is said that the person dealing with the agent must be shown to have believed that he was the principal in the transaction. Now in the present case he swears that he did believe that. But it is suggested, to the contrary, that the bills of exchange in the former transactions must, upon their face, have shown him that the agent was dealing merely as an agent. If the bills had in fact shown that he was dealing as an agent, I should have thought then that the point was a good one. But fortunately we have looked at the original documents, and the moment the original documents are shown we see that the decision of the registrar ought to be supported, because, although it is alleged that the bills on their face do show that the drawer was an agent, yet when you look at them you see that the words which are relied upon are in such a form, they are printed so faintly, and are so written over, that to say the purchaser must have had knowledge

of the fact of agency from seeing the bills, would be wrong. At all events we cannot say the Registrar was wrong in finding that Henley's oath is true; there is nothing on the face of the bills to show us that his oath is untrue. Therefore, so far as the law is concerned, the case is brought within the rule laid down by Willes, J. That, however, would be nothing, if there was practically no set-off. But there, again, the Registrar has found on the evidence that there was a set-off, and there is nothing now brought before the court to show that the decision of the Registrar was wrong in that respect.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitors for the appellants, *Cobbold and Woolley*.

Solicitors for the respondent, *Gedge, Kirby, and Millett*.

Thursday, Dec. 7, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRETT, J.J.A.)

Ex parte TERRELL; Re TERRELL (a).

Composition—Sham resolution—Motives of kindness to debtor—Dissentient creditor—Bankruptcy Act 1869 s. 126.

Where the creditors of a liquidating debtor whose statement of affairs showed a large amount of debts and virtually no assets, passed a resolution to accept a composition of 1s. in the pound, to be paid within one month from the date of the registration of the resolution, no security being given for such payment, it was held that the facts led necessarily to the inference that the resolution had been passed, not *bona fide* for the benefit of the creditors, but from mere motives of kindness to the debtor, and that, therefore, the Registrar was right in refusing at the instance of a dissentient creditor to register the resolution.

Ex parte Page (34 L. T. Rep. N.S. 638; L. Rep. 2 Ch. D. 323), explained.

THIS was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The facts of the case were shortly as follows:

On the 9th June 1876, Mr. Hull Terrell, a retired solicitor, against whom proceedings in bankruptcy had been previously commenced by the Sheffield and Rotherham Joint Stock Banking Company, filed a petition for liquidation of his affairs by arrangement.

The first meeting of the creditors under the liquidation petition was held on the 24th June. The statement produced by the debtor showed that his debts amounted to £1,358*l.*, of which 127*l.* was due to the preferential creditors, namely, for house rent, rates and taxes, and that his assets amounted to 75*l.*

The meeting was adjourned to the 5th July, when the creditors by the due statutory majority passed a resolution to accept a composition of 1*s.* in the pound, payable within one month of the date of the registration of the resolution.

This resolution was confirmed at a second meeting of the creditors held on the 18th July.

The registration of the resolution was opposed by the Sheffield and Rotherham Joint Stock Bank-

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ing Company, and the registrar, being of opinion that the resolution was not *bonâ fide* for the benefit of the creditors, refused to register it, but gave the debtor leave to summon a fresh first meeting of the creditors for the purpose of offering a composition to be secured to their satisfaction. From the former part of this decision the debtor appealed.

There was some evidence that the debtor's son was to find the money to pay the composition, but he had not bound himself in any way to do so.

Marten, Q.C. and J. G. Laing for the appellant.—

The preferential creditors swallow up all the assets, and therefore the creditors could have got nothing in a bankruptcy, and were entitled to accept such a composition as they could get. As the resolution provides that the composition shall be paid in a month, the creditors retain a complete hold over the debtor, for if it is not paid on the appointed day, the full amount of the debts would at once become recoverable. [JAMES, L.J.—How can you distinguish this case from *Ex parte Page* (34 L. T. Rep. N. S. 638; L. Rep. 2 Ch. Div. 323), where we affirmed a refusal to register a resolution of this kind on the ground that the power given to the majority of the creditors, by the 126th section of the Bankruptcy Act 1869, must be exercised *bonâ fide* for the benefit of the creditors, and not from mere motives of kindness to the debtor?] There the creditors resolved to accept a composition of 1s. in the pound, though the debtor's own estimate showed enough to pay 5s. in the pound, so that the facts led necessarily to the inference that the creditors were actuated by motives of kindness to the debtor. While here the creditors get more by the resolution than they would in a bankruptcy, and there is nothing to show that the resolution was passed otherwise than *bonâ fide* in the interest of the creditors. They also cited

Ex parte Sir William Russell, 32 L. T. Rep. N. S. 4; L. Rep. 10 Ch. 255;

Ex parte Linsley, re Harper, 29 L. T. Rep. N. S. 587; L. Rep. 9 Ch. 290;

Ex parte Elworthy, 32 L. T. Rep. N. S. 629; L. Rep. 20 Eq. 742.

R. T. Reid, for the respondents, the Sheffield and Rotherham Joint Stock Banking Company, was not called upon.

JAMES, L.J.—The cases of *Ex parte Page* and *Ex parte Sir William Russell* are now binding upon the court. The court there put a judicial construction upon the Act with regard to these compositions, and we then came to the conclusion expressed in those cases that the creditors must act *bonâ fide* in the same way as it was held under the old Act and in analogous cases by the then Court of Appeal. This court has laid it down that the resolutions must be passed *bonâ fide* in the interests of the creditors, and that they must not be mere sham resolutions. The facts show here that the resolutions were not passed *bonâ fide*. In this case a respite from proceedings in bankruptcy is given for a month, the debtor having no assets that he could recover; he had no assets by which he could do anything, and there is nobody who offers any security; the creditors merely hope that the debtor's sons will in the course of a month find the money; that is not a sort of arrangement for which the Act appears to me to have provided. I think, therefore, that the Registrar was right in what he did.

BAGGALLAY, J.A.—I am of the same opinion. I

assent to the general principle that there is no duty imposed upon the Registrar to ascertain whether the resolutions are such as it would be prudent for the creditors generally to adopt. The duty imposed upon him is to see whether the meeting was properly convened, and whether the resolutions were passed by the proper statutory majority, there having been laid before the meeting the statements which the Act requires, in other words, and in accordance with the language used in *Ex parte Page*, in the course of the judgment, whether the resolutions were such that the majority of the creditors could reasonably bind the minority. It was held in that case that they were not such as could reasonably and properly be binding upon the minority, and I am clearly of opinion that such is the case here. In this case there are no assets at all, and there is no security given. Consequently this is a case of passing resolutions which practically release the debtor from his obligations without any advantage to the creditors.

BRETT, J.A.—In order to obey the authority of any case it is not sufficient to look merely at the facts of the former cases, because the facts in no two cases ever agree; and it is not sufficient to look at the mere words used in one part of the judgment, but it is necessary to discover what is the principle upon which the court decided the former case, and that principle is binding and ought to be applied to future cases. I take it that in all the cases which have been decided with regard to the duty of the registrar, it has been held that so long as it can be shown that the creditors have acted within the statute, then all the registrar has to do is to register the resolutions; he has no authority to determine as to the wisdom of the resolutions; he cannot reject the resolutions passed on account of their foolishness, but he may determine whether the creditors have acted unfairly in the interests of the debtor, because if they have acted unfairly in the interests of the debtor, it cannot properly be said that they have passed resolutions according to the statute at all. Now in the case of *Ex parte Page*, the first part of the judgment no doubt says that two registrars in succession have come to the conclusion that these resolutions were not such as to justify the binding of the minority by the majority. That is perfectly correct, but I apprehend that the reason why that proposition is laid down is because the next proposition laid down in the judgment was substantiated. The judgment then goes on to say that the Legislature has given power to the majority, but it must be exercised *bonâ fide* in the interests of the creditors, and not from motives of kindness to the debtor; that there must be a *bonâ fide* resolution of the creditors. That is the foundation of the judgment, and that is the reason why the resolutions in that case were not such that the majority of the creditors could reasonably bind the minority. The only question, therefore, which the Registrar can properly try, besides the formal matters of whether the requisites of the statute have been fulfilled, is whether the resolution was a *bonâ fide* one, and he has a right to come to the conclusion that it was not so if the creditors were acting not *bonâ fide* in the interests of the creditors, but from motives of kindness to the debtor, and the question here, therefore, is whether the Registrar is justified in coming to the conclusion that the resolutions in this case

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were passed, not *bonâ fide* by the creditors as creditors, but out of motives of kindness. It is true that there is an affidavit which states the belief of the person who made the affidavit that the resolutions were passed out of motives of kindness to the debtor, and I dare say there is an affidavit saying that that is not so, but we must look at the facts before the Registrar, and see whether he was not justified in coming to the conclusion he did upon the facts. The case here is that the debtor had not means of paying 1s. in the pound himself, and it is said that he had no prospect of being able to pay 1s. in the pound, and then a resolution is passed that 1s. in the pound is to be paid in one month, and no security to be given for its payment. For whose benefit can such a resolution be? If we assume that he had no prospect of being able to pay the shilling, of what advantage to any creditors could that resolution be? It could not be of any advantage to them. The only person who could benefit was the debtor, and it might benefit him by giving him one month before he could be made bankrupt on an adverse petition. Then, when the registrar found that the only person who could benefit was the debtor, when he found there was an affidavit to the effect that an appeal had been made to the creditors on account of the debtor's large family and on account of a young firm of attorneys, and when he found that the resolution was of no benefit to the creditors, but only to the debtor, it seems to me that it was a sensible conclusion that the creditors, in passing such a resolution, could only be actuated by kindness to the debtor and not by the belief that they were doing anything for the benefit of the creditors. Therefore, the registrar came to the only sensible conclusion which is within the law, and said that this resolution was not passed *bonâ fide* for the creditors as creditors. JAMES, L.J.—The appeal must be dismissed with costs.

Solicitors for the appellant, *Terrell and Honey*.
Solicitors for the respondents, *Dobinson, Geare, and Co.*

Thursday, Dec. 7, 1876.

(Before JAMES, L.J. and BAGGALLAY and
BRETT, J.J.A.)

Ex parte THE SHEFFIELD AND ROTHERHAM JOINT STOCK BANKING COMPANY; *Re* TERRELL.(a)

*Bankruptcy—Liquidation—Meeting of creditors—
Power to summon fresh first meeting,*

Where the majority of the creditors of a liquidating debtor resolved to accept a trifling composition without any security, and manifestly from motives of kindness to the debtor, and not bonâ fide for the benefit of the creditors, the court, on refusing to register the resolution, gave the debtor leave to summon a fresh first meeting of the creditors for the purpose of offering a composition to be secured to their satisfaction.

Ex parte Gibbs, *re* Webb (29 L. T. Rep. N. S. 123; L. Rep. 10 Ch. 382), explained and extended.

This was a cross appeal by the above banking company from that part of the decision of Mr. Registrar Hazlitt (see *Ex parte* Terrell, *ante* 646), whereby he gave the debtor leave to summon a

fresh first meeting of the creditors for the purpose of offering a composition to be secured to their satisfaction.

R. T. Reid for the appellants.—In *Ex parte Cobb, re* Sedley (29 L. T. Rep. N. S. 123; L. Rep. 8 Ch. 727-9) James, L.J. expressed a doubt whether a fresh first meeting could have any validity, except where the first meeting was invalid for want of proper advertisements or something of that kind. In *Ex parte Gibbs, re* Webb (32 L. T. Rep. N.S. 292-3; L. Rep. 10 Ch. 382-4) Mellish, L.J. stated the circumstances under which a fresh first meeting may be held, namely, "if from some accident or some mistake on the part of the debtor no valid resolution has or could have been passed." Those circumstances do not exist here; there has been no mistake on the part of the debtor, and the resolution is not invalid in form. The creditors came to a final determination, and their resolution failed only because they acted unfairly towards the minority of the creditors. He also cited

Ex parte Cockayne, 28 L. T. Rep. N. S. 678; L. Rep. 16 Eq. 219.

Marten, Q.C. and J. G. Laing, for the respondent, the debtor, were not called upon.

JAMES, L.J.—I am of opinion that the registrar had a right in the exercise of his judicial discretion to allow the creditors to be summoned together again to consider, not whether it was for the interest of the debtor, but whether it was for the benefit of the creditors that these resolutions should be registered. Therefore the only thing to be now considered is whether it is for the benefit of the creditors. The creditors having come to a resolution which we have held to be void as not being a proper resolution, what is to be done under the circumstances? I think that the court—and that includes the registrars as well as the judges—had power to allow another first meeting to be called. Where, through any accident, neglect, or mistake, no valid resolution has been come to, or no valid determination has been come to either one way or the other, then the court is entitled to exercise that power, and that seems to me to be the state of things in the present case—which seems to me to come clearly within the meaning, if not within the very words of my judgment in *Ex parte Cobb*. The principle of that case seems to be the same as in this case—that is to say, that the circumstances having prevented any valid resolution or determination being come to, it was in the power of the registrar to order a fresh meeting to be summoned.

BAGGALLAY, J.A.—I am of the same opinion. In *Ex parte Cobb* James, L.J., held that if the opinion of the creditors had been taken at a meeting, and the creditors refused to pass a resolution, then the registrar has no power to order a fresh first meeting to be held. Mellish, L.J., also deals with a similar case in *Ex parte Gibbs, re* Webb (*ubi. sup.*). That was a case of a valid resolution not having been passed at the meeting on account of some accident or mistake on the part of the debtor, and what we have to consider in the present case is a mistake on the part of the creditors, and not the debtor. I must confess that the observations of the Lord Justice in that case seem to me to be equally applicable to an accident or mistake on the part of the creditors. He used the expression "some accident on the part of the debtor," because

(a) Reported by H. PAUL, Esq., Barrister-at-Law.

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in that case the debtor had mixed up his joint and separate debts and assets. It seems to me that the same reason as the Lord Justice gave there for considering that another first meeting should be held where there had been an accident or a mistake on the part of the debtor equally applies to this case, where there is a mistake on the part of the creditors.

BRETT, J.A.—Unless there is some authority to the contrary, I can see nothing that is not reasonable in allowing a fresh meeting to be called; but if the matter is concluded by authority we are bound by it. The case of *Ex parte Gibbs, re Webb*, decided the matter, and there does not seem to be any authority to the contrary. If there has been, in fact, a first meeting, and the creditors have come to a valid determination, that determination being that they would pass no resolution, or if they have come to a valid determination to pass a particular resolution, then no fresh meeting can be ordered for the purpose of seeing whether they or other creditors have changed their minds; but if no valid determination has been come to at the first meeting, if, by some accident which has happened, a valid determination has not been come to, if by some mistake on the part of the debtor no valid resolution has been passed, then it appears that a fresh first meeting may be called. There being no authority against that proposition, and it appearing to be perfectly reasonable, I do not see why the registrar should not have the power to order another meeting, and I think he has properly exercised that power.

JAMES, L.J.—The registrar is not to do this as a matter of course: he must exercise his discretion. The appeal must be dismissed with costs. The costs of the cross appeal to be set-off one against the other.

Solicitors for the appellants, *Dobinson, Gears, and Co.*

Solicitors for the respondent, *Terrell and Honey.*

Thursday, Aug. 3, 1876.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

Ex parte LANCASTER; re LANCASTER (a).

Bankruptcy—Practice—Debtor's summons—Service—Solicitor's clerk—Country agent—Bankruptcy Rules 1870, r. 61.

Service of a debtor's summons by a clerk of the creditor's solicitor, or by the clerk of his country agent (where the creditor's solicitor is a London solicitor), is good service under rule 61 of the Bankruptcy Rules, 1870, which provides that a debtor's summons shall be served upon the debtor by (inter alios) "the creditor or his attorney."

Decision of Bacon, C.J., affirmed.

This was an appeal from a decision of the Chief Judge in Bankruptcy.

The facts of the case were as follows:

One Lancaster, who resided in Devonshire, being indebted in a sum of over 50*l.* to Matthew Wildsmith, a London tradesman, the latter instructed his solicitor, Mr. William Foster, to take proceedings against him to recover the amount.

Mr. Foster, who carried on business in London, instructed Mr. G. O. Peard, a solicitor at Bide-

ford, to apply to the Barnstaple County Court for a debtor's summons, and to serve it upon Lancaster, and a summons indorsed with the name of William Foster was accordingly taken out, and was served on the 13th March 1876 by a clerk of Peard upon Lancaster personally.

The debt was not paid, and on the 7th April a bankruptcy petition, founded on the non-compliance with the debtor's summons, was presented against Lancaster.

The County Court judge dismissed the petition on the ground that the service of the debtor's summons by Peard's clerk was not good, and that service ought to have been made by the London solicitor himself under rule 61 of the Bankruptcy Rules 1870, which provides that "A debtor's summons or a petition shall be served upon the debtor by an officer or a bailiff of the court, or by the creditor or his attorney."

The Chief Judge reversed this decision on appeal: (See *Ex parte Wildsmith, re Lancaster*, 34 L. T. Rep. N. S. 951.)

The debtor now appealed from the decision of Bacon, C.J.

Winslow Q.C., and Finlay Knight, for the appellant.—The rules must be strictly complied with. The rule says that the summons shall be served by an officer or a bailiff of the court, or by the creditor or his attorney. It might as well be contended that the creditor or any other person mentioned in rule 61, might appoint anyone to effect the service for him, as that his attorney may employ an agent.

E. C. Willis, for the respondent, the petitioning creditor, was not called upon.

JAMES, L.J.—I am of opinion that the decision of the Chief Judge in this case is quite right. We must put a reasonable construction upon this rule. Everyone who is connected with bankruptcy proceedings, or indeed who has anything to do with the administration of the law of this country, knows that attorneys are not in the habit of personally serving any legal process, but that they employ their clerks to do it for them, or if they reside at a distance from the place where the service is to be effected, they employ an agent on the spot. The appeal must be dismissed with costs.

MELLISH, L.J. and BAGGALLAY, J.A. concurred.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Clarke, Woodcock, and Ryland.*

Solicitor for the respondent, *W. Foster.*

Thursday, Nov. 16, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, J.J.A.)

Ex parte COOKE; Re STRACHAN. (a)

Stockbroker and principal—Proceeds of sale of trust fund in hands of stockbroker—Relation of trustee and cestui que trust—Bankruptcy of stockbroker—Following trust money—Earmarking.

A trustee instructed his stockbroker to sell for him a sum of Consols, which he informed the broker he held as a trust fund, and to invest the proceeds of sale in the purchase of certain railway

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stock. The broker sold the Consols for cash, and received in payment a cheque which he paid to the credit of his current account with his bankers, and he bought the railway stock for the next settling day. On the settling day, the railway stock not having been paid for, the broker was declared a defaulter on the Stock Exchange, and soon afterwards he filed a liquidation petition. The principal claimed to have the balance which, at the time of the failure, was standing to the broker's credit at his banker's, appropriated to make good the proceeds of sale of the Consols:

Held, that as the broker had notice of the trust, the proceeds of sale retained the character of trust money in his hands, and could be followed by the principal if they could be traced.

Per Bramwell, J.A., semble that this would have been so, even if the broker had had no notice of the trust.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy.

The facts of the case were shortly as follows:

On the 11th Dec. 1875, the Rev. Charles J. Rashleigh Cooke, the sole surviving trustee and executor of his father, Mr. C. T. Cooke, went to Mr. H. S. Strachan, who carried on business as a stockbroker in Throgmorton-street, in the City of London, and instructed him to sell a trust fund, consisting of 4212*l.* Consols, and to invest the proceeds in London and North-Western Railway Stock. Mr. Cooke informed Strachan that the Consols were a trust fund.

On the 11th Oct. Strachan sold the Consols for cash, and received from the jobber a check drawn in his favour for 3948*l.*, which, with Mr. Cooke's assent, he paid into his general current account at the London and Westminster Bank.

On the same day he bought the London and North-Western Railway Stock, to be paid for on the next settling day, the 15th Oct.

On the settling day, before the purchase of the railway stock was completed, Strachan was declared a defaulter on the Stock Exchange, and he subsequently filed a petition for liquidation of his affairs by arrangement, and a trustee was appointed.

Mr. Cooke applied to the Court of Bankruptcy for a declaration that the 3948*l.* was trust money, and that the sum of 2068*l.* standing to the debtor's credit at his bankers at the date of his failure formed a portion of that fund; and for an order directing the payment of that sum to Mr. Cooke.

Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy, refused that application.

In delivering his judgment the Registrar said: This is an application on the part of Mr. Cooke, the executor and trustee under a certain will, that a certain sum of money, forming part of the banker's balance of the liquidating debtor at the time he suspended payment, may be paid to him (Mr. Cooke), as forming part of an alleged trust fund which found its way into the hands of the stockbroker under the following circumstances. It appears that on the 11th Oct. 1875, Mr. Cooke, in his capacity of trustee and executor, being the proprietor of a certain sum of Consols, directed the broker to sell out the Consols and to invest the proceeds in the purchase of some London and North-Western Railway Stock. The Consols were accordingly sold, and it appears to be accord-

ing to the custom of the Stock Exchange that it is possible to sell and obtain money for Consols on any day whereas other stock can only be purchased and sold for certain days. In consequence of this, the Consols being sold on the 11th Oct. the money was received by Mr. Strachan on that day, but he was unable to reinvest it in the purchase of the London and North-Western Railway Stock until a subsequent day which was the settling day for that stock. Meanwhile the money was paid into his banking account, and mixed up with his ordinary balance there; but before the day came on which the purchase of the London and North-Western Railway Stock was to be completed Mr. Strachan suspended payment, and the money was taken possession of by the trustee in his liquidation. Under these circumstances Mr. Cooke asks to have this money, or so much of it as can be laid hold of, paid over to him in full in preference to the other creditors of Strachan. The ground on which this claim can be sustained, or the steps by which it is to be supported, are two. In the first place, it must be established that the relationship of trustee and *cestui que trust* was established between the stockbroker and his client. Secondly, if that relation is considered to be established, then the trust fund must be shown to be so followed as to render it subject to the rule that a trust fund which can be traced must be returned to the *cestui que trust*. But before we can deal with the second, we must deal with the first question, for if the relation of trustee and *cestui que trust* cannot be established the other question is not reached. Now is there any ground for saying that as between a stockbroker and his client there is the relation of trustee and *cestui que trust*? I should have thought, considering the number of stockbrokers that there are in the city, and the unfortunate number of instances in which they are obliged to suspend payment, that, if that were the settled law, it would have been determined by numbers of recent cases beyond the reach of all argument. But so far from that being the case, I am referred to an old case in the time of Lord Ellenborough (*Taylor v. Plumer*, 3 M. & S. 562), in which it was held that a stockbroker was a trustee for the person who employed him. That case, however, differed essentially from the case before me. In that case the stockbroker went away with actual property in his possession which was the property of his client. Certain American bonds had been purchased with the money of his client; those bonds were found in his possession, and it was held that the client was entitled to take possession of those bonds. If in this instance Mr. Strachan had completed the purchase of the London and North-Western Railway Stock, and that stock had been found in his possession at the time of his bankruptcy, Mr. Cooke would have been entitled to say, "Give it back to me," and it would have been impossible to resist his contention. But the present case is widely different from that. In this case the one stock was sold, the other was not purchased and the money was still in the hands of the broker. I cannot hold, therefore, that the broker was more a trustee for his client than a banker would be. It appears to me that bankers and brokers are all placed in the same position. If I were to hold that a broker was a trustee for his client, I must equally hold that a banker would be so also. I am not able,

therefore, to come to any other conclusion than that no other relation existed between Mr. Cooke and the bankrupt than that of debtor and creditor. As a creditor Mr. Cooke will be entitled to prove for the money he has lost and to receive a dividend, but no preferential payment can be established in his favour. Having taken that view of the matter it is not necessary to go into the question how far the money has been traced. The motion must, therefore, be refused with costs.

From this decision Mr. Cooke appealed.

De Gen, Q. C. and Robertson Griffiths, for the appellant.—The proceeds of the sale of the Consols having been left in hands of the broker for the specific purpose of paying for the railway stock, the broker was really a trustee of it for his principal, and if the proceeds or any part thereof can be traced or earmarked, the principal is entitled to the amount so traced. This is clearly laid down in the old case of *Taylor v. Plumer* (3 M. & S. 562), where a broker, who had been intrusted with a sum of money for the purpose of buying Exchequer bills for his principal, employed the money in buying certain American stock and bullion, and then attempted to abscond, but was stopped before he had left the country, and thereupon surrendered the American stock and bullion to his principal. It was held that the principal was entitled to withhold the proceeds of sale of the stock or bullion from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. From that case it would appear that a principal is entitled to follow moneys in the hands of his broker in every case where the money has been placed in the broker's hands for a specific purpose. In that case Lord Ellenborough, C.J., says (3 M. & S. 575): "The difficulty which arises in such a case is a difficulty of fact and not of law;" the difficulty being to earmark the money. A stockbroker is in the position of a factor. In *Foley v. Hill* (2 H. of L. Cas. 28—35) Lord Cottenham, L.C., says: "Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal." The only difficulty is that of tracing the money. In *Frith v. Cartland* (12 L. T. Rep. N. S. 175; 2 H. & M. 417—20), Wood, V.C., referring to *Pennell v. Duffell* (4 De G. M. & J. 372), says: "But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own. Upon these two principles the case of *Pennell v. Duffell* was decided, and it illustrates very strongly the manner in which the court will follow trust property. The sole question in every case is, whether the property can or cannot be identified." [JAMES, L.J., referred to *Inman v. Clare* (John. 769).]

W. G. Harrison and Horton Smith, for the respondent.—The relation between a stockbroker and his principal is not that of trustee and cestui que trust, but is analogous to that of banker and customer. The proceeds of the Consols were mixed

with the debtor's own money in the bank, and the appellant cannot show that the balance in the bank to the debtor's credit at the date of his failure was wholly derived from the proceeds of sale of the Consols, and therefore there is no reason why the right of the general creditors should be postponed to that of the appellant. He must prove against the estate like the other creditors. This case is quite distinguishable from *Taylor v. Plumer* (*ubi sup.*), which was a case of assignees seeking to recover back what the broker's principal had already got into his hands. They also referred to

Reg. v. Christian, 29 L. T. Rep. N. S. 654; L. Rep. 2 Cr. Cas. Res. 94.

Without calling for a reply,

JAMES, L.J. said.—There is one point in the case which seems to me to be perfectly decisive of the matter, a short one only requiring to be stated. It is this: A. employs an agent to sell trust stock, with notice that it was trust stock, and to reinvest the proceeds for the trust estate. That produce is trust money, and by no bargain between A. and his agent, by no contract, by no rule of the Stock Exchange or of any other body of persons, can trust money become other than trust money. I am bound to say that I have been utterly unable throughout the whole of the argument to find the slightest distinction between this case and the case of *Taylor v. Plumer* (3 M. & S. 562).

BAGGALLAY, J.A.—I do not propose to express any opinion upon the more general question which would have arisen as to the moneys in Strachan's hands if he had not been acquainted with the fact that the Consols were the subject of a trust. Before expressing a decided opinion upon that point I should desire an opportunity of more fully considering the question than I have been able to do during the present argument, though I certainly am at present very much impressed by the decision in *Taylor v. Plumer*. It appears to me to be clear upon the evidence that Mr. Strachan was made acquainted with the fact that the Consols he was about to sell were the subject of a trust. Now, I assume that the trusts of the will of which Mr. Cooke was the executor and trustee authorised the sale of the consols and the reinvestment of the produce in the purchase of North Western Stock and the employment of a broker for this purpose. The employment of Mr. Strachan would therefore be entirely within the trust, and he was bound to deal with the money as trust money. I am not prepared to say that the payment by Mr. Strachan of the produce of the sale into his own private account was necessarily a breach of trust, but whether it was or was not a breach of trust so to deal with the money, I am clear that the money did not cease to be trust money. It may well be that the subsequent dealing with the banking account may render it difficult or impossible to earmark the trust fund at the time Mr. Strachan stopped payment so that it may be recovered for the trust estate, but that is not the question we have to decide now.

BRAMWELL, J. A.—I am of the same opinion. With regard to the point of this being a trust fund, I think I am right in saying that if the *cestuis que trust* (supposing the balance had not been drawn from the bankers) had brought an action against the bankers, joining Mr. Cooke the trustee, and the trustee of Strachan as defendants,

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that action would have been maintainable, because it would have been in respect of trust money traced to the hands of the bankers, and subject to the trust. Upon the other point I confess that it seems to me that this case is absolutely undistinguishable from the case of *Taylor v. Plumer*. The learned Registrar rather deprecated that he had no modern case cited to him, and that he was referred to a case decided by Lord Ellenborough. [His Lordship read part of the Registrar's judgment, and continued:] Now, in *Taylor v. Plumer* the American bonds were not the property of the client except because the money with which they had been purchased was his money, and the reasoning of the court in that case would go to show, and indeed could only be supported upon the ground, that if the absconding broker had been caught not with the American bonds, but with the money in his possession, and that money had been returned to the client, the client would have been held entitled to retain the money just as much as he was held entitled to retain the American bonds. And why? Because it was money given to him in a fiduciary relation, creating a particular duty with respect to that money and not making it a question of debtor and creditor between him and his principal. It was not intended that that relation should subsist between them, but that the money should be applied to a definite purpose. And really, to my mind, the whole difficulty in this case is attributable to this, that instead of managing our matters by handing over gold, when we enter into transactions we do it by drawing cheques on bankers with whom we keep accounts, and crossing them. If the purchaser of the Consols had handed over so many sovereigns to the broker Strachan, and the broker Strachan had kept the sovereigns in a strong box, misappropriating only a certain part of them—if that had been the case, the question would not have admitted of argument at all. But because the payment was made by a crossed cheque, made payable, not to the principal, Mr. Cooke, but to the broker Strachan, this confusion, as it seems to me, has arisen.

[It was then arranged that the case should go back to the Registrar for him to inquire into the accounts and ascertain whether the balance at the bankers could be identified as part of the proceeds of sale of the Consols.]

Solicitors for the appellant, *Dawes and Son*.

Solicitors for the respondent, *Sole and Turner*.

Tuesday, July 18, 1876.

(Before JAMES and MELLISH, L.JJ., and
BAGGALLAY, J.A.)

BARING v. STANTON.(a)

Principal and agent—General agent—Discount on
insurances—Commission.

A shipowner had for several years employed merchants as his general agents at a remuneration, and they had effected insurances on his ships. In their accounts they charged him with the full insurance premiums, although they were allowed by the underwriters to retain out of the premiums 5 per cent. brokerage, and 10 per cent. discount

for ready money, in accordance with the custom of the trade :

Held, that as these allowances were usually made, and as the shipowner had for years assented to them, he could not now object to allow them to retain these allowances on taking the accounts in a suit with regard to a mortgage on certain ships of his.

Decision of Bacon, V.C., affirmed.

Turnbull v. Garden (20 L. T. Rep. N. S. 218), distinguished.

THIS was an appeal from a decision of Bacon, V.C.

The hearing in the court below is reported ante p. 123, where the facts of the case are fully stated.

The shipowner appealed.

Kay, Q.C. and Caldecott, for the appellant.—*The Great Western Insurance Company v. Cunliffe* (30 L. T. Rep. N. S. 661; L. Rep. 9 Ch. 525), on which the Vice-Chancellor based his judgment, does not apply to this case at all. The distinction is that the defendant in that case was employed as an insurance broker and nothing else, while here the plaintiffs are general agents as merchants and not simply insurance brokers. They are general agents on terms of special remuneration, which does not include the right to charge specially as insurance brokers. The five per cent. brokerage is sufficient remuneration, and they have no right to retain the ten per cent. discount. As agents, they should, in their accounts, have disclosed all the allowances made to them, and the defendant was not bound to make any inquiry. They must pay over the discount to their principal:

Turnbull v. Garden, 20 L. T. Rep. N. S. 218; 38 L. J. 331, Ch.;

Queen of Spain v. Parr, 21 L. T. Rep. N. S. 555; 39 L. J. 73, Ch.;

Palmer v. Butcher, 10 B. & C. 329.

Cotton, Q.C. and J. Kaye, for the respondents, were not called upon.

JAMES, L.J.—I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed. The question is, whether this case is governed by the decisions pronounced by me as Vice-Chancellor in the *Queen of Spain v. Parr*, and in *Turnbull v. Garden*, or by the case of the *Great Western Insurance Company v. Cunliffe*. It appears to me that that last case really governs the present case. In that case the Lord Justice Mellish observed (30 L. T. Rep. N. S. 664-5; L. Rep. 9 Ch. 539): "Then it is quite obvious that they must have known, and they do not deny that they did know, that Messrs. Pickersgill were to be remunerated by receiving a certain allowance on discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, whom he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him but by the other persons, which is very common in mercantile business, and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging. That really seems to me to govern this case. It is quite clear that it was known to everybody connected with insurances that the insurance

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offices were in the habit of making allowances, by way of brokerage and otherwise, of 12 per cent. of the profits, or 10 per cent. discount, and also 5 per cent. brokerage, so much so, that some of the documents produced actually contain those terms printed as a common form. It is quite obvious that this is a recognised practice of the insurance offices. That being so, it is very difficult to believe that Mr. Stanton did not know that Messrs. Baring were receiving from the insurance offices such allowances as the offices were in the habit of making. Their dealings go on for years. Mr. Stanton never takes the trouble to make inquiries, but settles all the accounts, and deals with Messrs. Baring on that footing; and it is not unimportant in this case to observe that when he filed a bill—it is true, for another object, namely, to have a declaration that the conveyance of the ships was by way of mortgage only—and asked that, upon the footing of that mortgage, the accounts might be taken, he actually accepted the course of business between the two firms including the very thing which is now the subject of this discussion. After that, as between himself and Messrs. Baring, it seems to me impossible to allow him to re-open an account which has gone on from the year 1861 to the year 1872. I am, therefore, of opinion that the order of the Vice-Chancellor ought to be affirmed, and the appeal dismissed with costs.

MELLISH, L.J.—I am of the same opinion. I think that this case cannot in principle be distinguished from the case of the *Great Western Insurance Company v. Cunliffe*. It appears that there are two ordinary modes in which agents employ underwriters—the cash system and the credit system. According to the credit system the accounts are made out at the end of the year; all the premiums which the particular merchant or agent has brought to the underwriter are put on one side, and all the losses are put on the other side, and then, if there is a profit, the underwriter allows the merchant 12 per cent. on that profit. We held that the merchant or agent who brought the business was entitled to keep that profit. The cash system, which was adopted in the present case, is this: Some underwriters, particularly new insurance companies, object to a long credit system, and prefer a system by which they get their premiums paid at once. They are willing to make a sacrifice for the purpose of obtaining prompt payment, and on payment, instead of the 12 per cent. on the net profits, if the premium is paid within a fixed number of days after the insurance is effected, they make an allowance of 10 per cent., the customers being charged with the premiums just as before. If that is generally known and acquiesced in, I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. Stanton that, being an American, he really did not know the usage in London. But if a person comes and trades in London, he must make himself acquainted with the usages in London, and when he employs the Messrs. Baring he must expect the Messrs. Baring to treat him in the same way as they treat all their other customers; and he cannot be entitled, because, after ten years' business transactions with them, he quarrels with them, to say that they should treat him in a different way from that in which they treat anyone else. According to the evidence of Messrs. Baring's clerk, this is the way in which they invariably charge their

customers, and if Mr. Stanton had inquired before he employed Messrs. Baring what their charges were, they would have told him that these were their charges. But he had confidence in them, and he thought they would charge what was right whether he asked them or not, and he cannot now be allowed to open the accounts. I think we do not at all overrule the case of *Turnbull v. Garden*, because, as I understand it, in that case the party from whom the discount was taken was not in the position of Messrs. Baring, but was an agent for somebody else. The real brokers were willing to allow a discount, and then the question was whether the next agent could keep it in his own pocket, or was bound to give it to the principal, which was an entirely different question. I am of opinion, therefore, that the judgment of the Vice-Chancellor in this case ought to be affirmed.

BAGGALLAY, J.A.—I am of opinion that this case is entirely governed by the decision in the *Great Western Insurance Company v. Cunliffe*, and that there is nothing whatever in that case which was antagonistic to the principle established in the cases of *Turnbull v. Garden* and *Queen of Spain v. Parr*. It appears to me that exactly as in the *Great Western Insurance Company v. Cunliffe* Messrs. Pickersgill were employed, in this case Messrs. Baring were employed, to do a particular business, namely, that of insuring, and they were making certain profits incidental to the carrying on of that business. That certainly appears to have been the view of the case which was taken by Mr. Stanton when he filed his bill against Messrs. Baring, the statements in which bill he verifies by affidavit in a form which implies that that was the ordinary and usual course of business, and that he had been aware of it throughout. *Appeal accordingly dismissed with costs.*

Solicitors for the appellant, *Shum, Crossman, and Crossman*.

Solicitors for the respondents, *Markby, Tarry and Stewart*.

Friday, July 28, 1876.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

Re THE EUROPEAN ASSURANCE SOCIETY (DOWSE'S CASE) (a)

Insurance company—Amalgamation—Transfer of liabilities—Annuitant—Power to transfer business—Notice of provisions of deed of settlement.

An insurance company, which by its deed of settlement had power to transfer its business to another company, granted an annuity by a policy signed and sealed by three of its directors, which declared that the stocks and funds of the company should during the life of the annuitant be liable to pay the annuity. Fifteen years afterwards the company transferred its business to another company, in accordance with the power contained in the deed of settlement. Both companies being in liquidation, the annuitant claimed to prove against the transferring company:

Held, that the omission from the policy of any reference to the deed of settlement did not distinguish the case from Hort's case (33 L. T. Rep. N. S. 766; L. Rep. 1 Ch. Div. 307), and that the

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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annuitant could only prove against the transferee company.

THIS was an appeal from a decision of Mr. Reilly, the arbitrator under the European Assurance Society Arbitration Acts.

The facts of the cases were briefly as follows:

On the 11th April 1850, the Royal Naval and Military Society entered into a contract to grant Miss Frances Dowse an annuity of 10*l.* during her life. The policy, which was signed and sealed by three of the directors, provided that in consideration of the sum of 113*l.* 17*s.* paid by Miss Dowse, the stocks and funds of the society should from time to time during the life of the said Frances Dowse be subject and liable to pay to the said Frances Dowse, or her assignees at the office of the said society for the time being, one annuity or clear yearly sum of 10*l.* by two equal half-yearly instalments, without any deduction or abatement, provided always that the directors executing this policy should not be responsible to any greater extent than the funds and property of the society in their hands or power at the time of any claim being made under this policy should be competent to discharge, and that no proprietor should in any event be liable beyond the amount of the unpaid proportion of his share or shares in the subscribed capital of the society.

In 1866 the business of the Royal Naval and Military Society was transferred to the European Assurance Society in the manner mentioned in *Hort's case* (L. T. Eur. Assur. Arbit. Rep. p. 112), where also the material clause of the deed of settlement of the Royal Naval Society will be found fully set out.

Both societies having been ordered to be wound-up, Miss Dowse claimed to prove against the Royal Naval Society in respect of her annuity policy.

The arbitrator disallowed her claim, and she appealed from his decision.

Hemming, Q.C., Cookson, Q.C. and Grosvenor Woods, for the appellant.—This case is distinguished from *Hort's case* (33 L. T. Rep. N. S. 766; L. Rep. 1 Ch. D. 307), by the fact that our policy does not contain the words "according and subject to the provisions of the deed of settlement of the said society," which words were inserted in the policy in that case. Therefore we did not contract that our policy might be transferred to another society, and we are not bound by the transfer, but retain our right against the old company. [MELLISH, L.J.—The effect of our decision in *Hort's case* was that as soon as the amalgamation has taken place and the affairs of the old society are settled, and the new company has taken up the old contracts, then there ceases to be any capital which can be called up.] Here the society is in liquidation, and the liquidator has capital in his hands, against which we have a right to prove for our claim. [JAMES, L.J.—We are bound by *Hort's case* unless you can show that this contract differs in some substantial respect from the contract in that case. The contract here is by the directors, and it is necessary to look at the deed of settlement to see what contracts they had a right to make.] The directors had implied authority to make contracts of this kind, this being really a common law partnership. [MELLISH, L.J.—They had no authority to enter into any contract except a contract under the deed of settlement.] The decision in *Hort's case* was

founded wholly on the presence of those words referring to the deed of settlement, which words are absent from our policy. [JAMES, L.J.—Is there any difference in point of law between words expressed and words necessarily implied?] Certainly not, but Lord Cairns' judgment in *Hort's case* seems to indicate that there would be no implication in the absence of the words themselves. In *Greenwood's Case* (3 De. G. M. & G. 459) it was held that clauses not referred to could not be treated as incorporated. [MELLISH, L.J.—That was quite a different case. There the contract was by a company incorporated under the Joint Stock Act and not by the directors.] They also referred to

Dowdall v. Hallett, 18 Q.B. 2;

Re Arthur Average Association, 32 L. T. Rep. N.S. 713; L. Rep. 10 Ch. 542.

Higgins, Q.C. and Bomer, for the liquidators, were not called upon.

JAMES, L.J.—We cannot distinguish this case from *Hort's case*. *Hort's case* was very fully considered; all the difficult points were discussed. The legal position of the parties was very fully explained by Lord Justice Mellish, who did not as all differ from the other members of the court in that respect. It was there settled that there could be no claim against assets which under the deed of settlement had been transferred to another company. The question is whether the omission from the policy in this case of the words "subject and according to the provisions of the deed of settlement," which were inserted in the policy in *Hort's case*, can make any difference between that case and this. It is impossible to read this contract, made by three directors, *quâ* directors, on behalf of the society, for payment of any annuity out of the funds of the society, which must be the funds according to the deed of settlement, without seeing that the provisions of the deed must be incorporated. The question is whether the omission of those words makes any difference in this case, and I am of opinion that the omission of those words is wholly immaterial, and that the arbitrator was well warranted in so holding.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—And I am of the same opinion.

JAMES, L.J.—In these cases there is a common order as to costs. The arbitrator is allowed to deal with questions of costs as he thinks fit.

Solicitor for the appellant, *J. V. Musgrave*.

Solicitors for the respondents, *Mercer and Mercer*.

Friday, July 28, 1876.

(Before JAMES and MELLISH, L.J.J. and BAGGALLAY, J.A.)

Re THE EUROPEAN ASSURANCE SOCIETY (RAMSAY'S CASE) (a).

Company—Contributory—Past member—Compulsory registration—Companies Act 1862, s. 38, 209.

The 38th section of the Companies' Act 1862, which makes past members liable to be placed on the list of contributories, applies to companies compulsorily registered under the 209th section of the Act, as well as to companies formed under the Act.

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

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THIS was an appeal from a decision of Mr. Reilly, the arbitrator, under the European Assurance Society Arbitration Acts.

The appellant, Dr. Ramsay, took shares in the European Assurance Society in 1867, and held them till 1871. On the 26th Jan. 1871, he transferred his shares to a purchaser in the regular way, and before twelve months had elapsed from that date, namely, on the 10th June 1871, the winding-up of the society commenced.

The European Assurance Society was originally registered under the 7 & 8 Vict. c. 110, and in 1862 it was registered under the Companies' Act 1862, in compliance with the 209th section of that Act which provides that every insurance company completely registered under the 7 & 8 Vict. c. 110 shall register itself as a company under the Act of 1862.

Dr. Ramsay was placed on the B list of contributories under the 38th section of the Companies' Act 1862, as having been a member within twelve months before the commencement of the winding-up.

The arbitrator having refused to remove his name from that list, he appealed on the ground that the 38th section did not apply to companies compulsorily registered under the 209th section of the Act.

Cookson, Q. C. and Jason Smith, for the appellant.—The 209th section of the Companies' Act 1862 required companies of this kind to register themselves under the Act "in manner and subject to the regulations hereinbefore contained." That section does not say what those regulations are, but they must be those in Part VII. of the Act, which contains certain directory and regulative clauses with reference to the registration of companies. The 179th section contains the "regulations" as to the registration of companies, and sects. 180, 183, and 184 contain further provisions with respect to registration. The 209th section was intended to make the provisions as to registration applicable to companies compulsorily registered; but there is nothing in it to make such companies subject to the 38th section which renders past members in companies formed under the Act liable to contribute to the assets in the event of a winding-up, or subject to any other sections of the Act which are in terms restricted to companies formed under the Act. [MELLISH, L.J.—Has the 7 & 8 Vict. c. 110, a section making past members liable?] Yes. Sect. 66 makes them liable for three years. But that Act has been repealed. [MELLISH, L.J.—The Act of 1862 repeals that Act, and compels you to register under the new Act. Can you contend that you escape the three years' liability under the 7 & 8 Vict. c. 110, and do not incur the new liability for one year under the Act of 1862?] Yes, for the Legislature has not provided for making us liable. "Regulations" point *primâ facie* to administration. Regulative clauses only were intended to be referred to by sect. 209. [JAMES, L.J.—If that argument is well founded no member could have applied under sect. 35 to have his name taken off the register, and none of the provisions protecting shareholders from judgments would apply.] The 38th section is much more limited in its language than the 35th section. The European Assurance Society may be a company "under this Act," which are the words in sect. 35; but it certainly is not a company "formed under this

Act," which are the words in sect. 38. [MELLISH, L.J.—The argument against you is that the words "in manner and subject to the regulations hereinbefore contained" incorporate the whole of part 7, and then part 7 incorporates the whole of the Act, with certain exceptions. According to your argument the provisions as to winding up would not apply, and how could the company be wound up?] Part 4, which contains the winding-up provisions, is not confined to companies formed under the Act. [MELLISH, L.J.—The 196th section unquestionably brings under sect. 38 companies not formed under this Act. The difficulty against you is that the other parts of the 196th section must be intended to apply to you.] Even if that difficulty be insuperable, we are freed from the statutory liability under sect. 38 by the express provisions of the European Assurance Society's deed of settlement. The 103rd clause of the deed provides that when a proprietor parts with his shares, the company shall have no further claim against him, and shall indemnify him against all liability to other persons. It would be idle to make the appellant pay when he would be entitled to full indemnity from the very persons who are asking him to pay. Lord Cairns' decision in *Clark's Executors' Case* (Reilly's Alb. Arb. Cas. 223) is in our favour on this point. [JAMES, L.J.—There was no decision in that case about sect. 38, for it was an unregistered company.] They also cited

Waterhouse v. Jamieson, L. Rep. 2 Sc. App. 29.

Higgins, Q. C. and Romer, for the respondents, were not called upon.

JAMES, L.J.—Having regard to the whole purview of the Act, I think the 38th section of the Companies Act 1862 applies to an insurance company compulsorily registered under the 209th section of the Act. If the effect of the latter section were limited to the mere regulations with respect to registration, it would leave these compulsorily registered companies almost entirely out of the Act. But there is one particular section I may refer to, which seems to me to show clearly that it is impossible to place this limited construction on the 209th section. There is no provision whatever dealing with the proposition of an existing company registering under the Act, or giving such company the powers or rights of an incorporated company in relation to such property except the 193rd section, which provides that "all such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to and be vested in the company at the date of its registration under this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein." This section must, from the very necessity of the case, have been intended to apply to companies compulsorily registered under the 209th section, for otherwise companies so registered could not sue or be sued under the Act in respect of previously acquired property. It is quite clear that we cannot construe the word "regulations" in the restricted way for which the appellant contends. The result is that a company that is compelled to register under the 209th section of the Act is in the same position as a company voluntarily registered. It has all the advantages and all the liabilities of the Act, in-

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cluding section 38. The appellant must, therefore, be placed on the list B of contributories. There will be the usual order as to costs.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—And I am of the same opinion.

Solicitors for the appellant, *Lewty and Co.*

Solicitors for the respondents, *Mercer and Mercer.*

Nov. 29, and Dec. 6, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRETT, JJ. A.)

PLIMPTON v. SPILLER. (a)

Patent—Infringement—Interlocutory injunction—Account of profits—Stopping a trade—Balance of convenience.

In a suit to restrain the infringement of a patent relating to roller skates, the plaintiff moved for an injunction against the defendant until the hearing.

Held (per James, L.J., and Brett, J.A., affirming the order of the Master of the Rolls, Baggallay, J.A., dissenting), that the plaintiff was entitled to an injunction upon giving an undertaking as to damages. Inasmuch as the defendant's trade was only a new one, there would be less hardship in stopping it and requiring the plaintiff to give an undertaking as to damages than in compelling the plaintiff to rely upon the defendant's undertaking to keep an account of his sales and profits.

THIS was an appeal by the defendant from a decision of the Master of the Rolls. The action was brought to restrain an alleged infringement of the plaintiff's patent for improvements in the manufacture of roller skates, the validity of which patent was established in an action of *Plimpton v. Malcolmson* (34 L. T. Rep. N. S. 340). On the 16th March 1876, a motion was made by Mr. Plimpton for an injunction to restrain the defendant until the trial of the action from making, using, or putting in practice the plaintiff's invention or any invention colourably differing therefrom. On that occasion the Master of the Rolls granted the injunction until the hearing, the plaintiff giving an undertaking as to damages. The defendant after this commenced selling a different description of skate known as the "Wilson" skate. The plaintiff alleged that this also was an infringement of his patent, and moved to commit the defendant for breach of the injunction. Before this motion came on to be heard the plaintiff and one of his licensees brought an action of *Thorn v. The Worthing Skating Rink Company*, to restrain that company from using the Wilson skate. Spiller was not a party to that action. A motion in the suit for an injunction was heard by the Master of the Rolls before the motion to commit in *Plimpton v. Spiller*, and an injunction was granted against the Worthing Skating Rink Company until the hearing upon the usual undertaking as to damages, the Master of the Rolls expressing a strong opinion that the Wilson skate was a copy of the Plimpton skate. Upon the subsequent hearing of the motion to commit Spiller, the question of infringement was not again argued, but the Master of the Rolls, instead of committing the defendant, granted an injunction to restrain him from making or selling the Wilson skate until

the hearing of the action of *Thorn v. The Worthing Skating Rink Company*, the plaintiff being required to give an undertaking as to damages. From this order the defendant appealed.

Davey, Q.C., North, Goodve, and Chadwyck Healey for the appellant, contended that Mr. Plimpton's was not a patent for all modes of making the axles of the rollers converge, and that the defendant was entitled to adopt another mode of carrying into effect Mr. Plimpton's principle. Under the circumstances the defendant ought not to be bound to do more than to keep an account of his sales and profits.

H. Matthews, Q.C., T. Aston, Q.C., Waller, Q.C., and W. N. Lawson for the plaintiff, submitted that a *prima facie* case had been made for restraining the defendant until the trial from using the Wilson skate. If the injunction were not granted it would be necessary to bring a number of actions against other persons in order to obtain damages against them.

JAMES, L.J.—I think upon the whole, after the full discussion this case has received, that I see my way to the disposal of it in accordance with the principles and practice of the court. When I come to consider what really was done, it was this: Though it assumed the form of a motion to commit for contempt, the fact of the crime or the contempt at that time was not made out to the satisfaction of the court at the hearing; and what the Master of the Rolls really meant was that he reserved the final decision of the question as to whether contempt had been committed or not until the further hearing, when the case would be fully gone into upon the cross-examination of the witnesses, and the fuller discussion of the principles, and so on, and when further evidence might be brought in; and therefore he said, "I do not determine it—I reserve the question—I do not judge, aye or no, whether any contempt has been committed, because I think that if there was infringement, beyond all question there was contempt. Although the man might say, 'I did not intend to commit a contempt,' yet, if the man was actually infringing when he thought he was not, he was then guilty of contempt, and must be punished in some way or another." The Master of the Rolls appears to me to have in fact adjourned the decision of that question for further and final hearing, exactly the same as upon an interlocutory motion, or an injunction which is reserved. The thing was only interlocutory until a further order. I may add to that that it does not seem to have been really questioned before the Master of the Rolls that he might deal with this motion as a motion for an injunction, which he did. Well then, I think, we have got to deal with it in exactly the same way as if it were a motion for an injunction against a new defendant, the validity of the patent having been established as being an old patent. And then, of course, the court not forming an opinion very strongly, either one way or the other, as to whether it is an infringement or whether it is not an infringement, but, considering it as a fairly open question to be determined at the hearing, and not to be prejudiced by any observation in the first instance, reserves that as a question which it would then have to consider. There will, no doubt, always be the greatest possible difficulty to determine as to what is the best mode of keeping things in *statu quo*, for what the court has to do is to keep things in *statu quo* until the final

(a) Reported by M. S. ROCKE, Esq., Barrister-at-Law.

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decision of the question. And then, of course, the court says, "We will not stop a going trade. We will not do anything in which there would be a very great difficulty in giving compensation on one side or compensation on the other." We have to deal with it as a practical question in the best way we can. On the whole, I am satisfied that what the Master of the Rolls did was right, namely, to put the plaintiff upon an undertaking to abide by an order for damages, if any, if he should ultimately turn out to be wrong; and that it would not be the right order in this case merely to put the defendant upon terms of keeping an account, which I conceive might be a very clumsy and inefficient mode of recompensing the plaintiff, if the plaintiff should turn out to be ultimately right.

BAGGALLAY, J.A.—As the other members of the court are of opinion that the order of the Master of the Rolls should be affirmed, it is immaterial as to the decision in this case what views I may take. But I am desirous of stating very shortly why I have arrived at a different conclusion. The motion was in the form of a motion to commit, and I think it is clear from the facts that have been brought to our attention, and particularly from the circumstance that the defendant in this case accepted the decision in the previously heard case of *Thorn v. The Worthing Bink Company*, that it was treated by the Master of the Rolls as if it were a motion for an injunction before him. Otherwise, the simply accepting the decision in the former case on a motion for injunction would hardly have met the justice of the case. Well, then, treating this as a motion for an injunction to restrain the defendant from continuing to manufacture the articles after the form which has been called Wilson's form, I am bound to say that I think there is a case to be tried on the hearing, and, that being so, of course the only remaining question is what should be done in the meantime. Now it has always occurred to me that the observations of Lord Langdale in the case of *Bridson v. M'Alpine* (8 Beav. 229), indicated what the course was which the court should take in this case, and the observations made by the Lord Justice no doubt apply to that particular case. But what Lord Langdale says is this: "There are cases in which it is not clear either that the patent is legally valid, or that it has been infringed. It depends on the degree of doubt which exists on those questions whether the court will grant the interim injunction. In such cases, it will cautiously consider the degree of convenience or inconvenience to the parties by granting or not granting the injunction." A little further on he says: "According to the doubt which may exist in the mind of the court upon the facts, and according to the degree of inconvenience to the parties, the court not thinking fit to grant the injunction at the time, may take one of several courses. It may either refuse to grant the injunction simply, or it may refuse it upon the terms of the party undertaking to keep an account, or it may direct the motion to stand over." Observations very much to the same effect were made by Lord Cottenham in a case in the House of Lords, where he pointed out that you might cause very much greater mischief to the defendant by granting an injunction, if the injunction, as it should ultimately prove, ought not to have been granted, than by postponing the injunction, which you might grant to

the plaintiff when there was ground for it being granted. Now it appears to me in this case that the granting of the injunction, if the defendant should ultimately prove to be right, would prove of irreparable damage. He is restrained for some length of time from manufacturing these skates; it will be impossible to ascertain to what extent he might have carried on that business of manufacturing or selling skates, and the extent of profits he might have made in the meanwhile if he had not been restrained by the injunction. It may well be—we have been told about a vast number of patents being taken out in the present year—that some new invention will be discovered to make his invention useless in the course of eight or ten months by some others coming into operation. It seems to me that there will be no means of measuring the damage which he will sustain if he should eventually turn out to be right. On the other hand, if we should not grant the injunction, but require the defendant to keep an account of all the skates he has sold, and the profits he has made by them in the interval between the present time and the ultimate hearing of the cause, you will have the means afforded for ascertaining the loss which the plaintiff will have sustained by the continuance or carrying on of that which may prove to have been an improper business. It has been suggested that the undertaking may not be of value. It is said that the defendant may be a man of straw, and eventually not able to repay the royalties or profits which he has received. It has been pointed out on the other side that if the undertaking for damages is given by the plaintiff, inasmuch as he is a foreigner, it would be absolutely impossible to obtain the damages from him. I do not attribute much importance to the argument one way or the other, but it does appear to me that if the damages are to be recovered the amount will be very much larger in the defendant's case than they would be if the plaintiff were seeking to recover. It has been said that if this injunction is not granted at once it will be necessary to bring a number of actions against other persons for the purpose of obtaining damages against them. But, then, as far as regards those actions, if it is thought expedient to take such steps there again the court may not be satisfied that there has been an infringement, and the injunction may not be granted. But, at the same time, I do not think that the court would be justified in refusing what would be a just act towards the particular party, because the doing a particular thing in his favour might be the cause of ulterior proceedings against persons who are not parties to the suit. However, as I have already said, the other members of the court think that the course which has been taken by the Master of the Rolls is one which will best meet the ends of justice. No doubt I have arrived at a wrong conclusion, though I have honestly stated my reasons for it.

BRETT, J.A.—I agree with Lord Justice James that the order of the Master of the Rolls is right. I take it that, without expressing any decided opinion as to what may be the result, sufficient is made out to have entitled the plaintiff to an order either for an injunction or for the defendant to keep an account. I am very glad that no difficulty has ultimately arisen here upon the ground of the form of the original application; but that being

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got rid of, I take it that it is established that one order or the other should be made. Well, now, if you assume that the defendant is in the right there is no doubt that an injunction is a great hardship upon him; but if you assume that the plaintiff may be right, then the mere keeping of an account by the defendant seems to me to be a great hardship on the plaintiff; because if there is to be a mere keeping of an account by the defendant, and the plaintiff is right, then the plaintiff is driven to do that which has been suggested, namely, to go to purchasers and customers, and commence suits against them—obviously a multiplication of suits. Therefore, wherever there is an interlocutory injunction, I apprehend that it is a hardship on one side or the other depending upon the result. Then the question is, on which side does the balance appear to be? Now, if the trade of the defendant were an old and an established trade, I should say that the hardship upon him would be too great, but where the trade of the defendant, the person against whom the order is applied for, is a new trade, and where he is the seller of goods to a vast number of people, it seems to me to be less inconvenient or less likely to produce irreparable damage to stop him from selling than it is to allow him to sell, and merely keep an account, forcing the other side to commence multitudes of suits against the purchasers. Therefore, I agree with the remark which has been made by the Lord Justice, that in such a case as this, as a rule of conduct, it is better, where the trade of the defendant is a new one, and not an old established trade, and where there are likely to be many customers of the new trade, to say that then you will act against the new seller, whereas if he were an old seller you would act in the other way.

Appeal accordingly dismissed with costs.

Solicitors: W. W. Wynne; Ward, Mills, and Co.

SITTINGS AT WESTMINSTER.

(Before MELLISH, L.J. BRETT and AMPHLETT, JJ.A.)

Friday, Dec, 1, 1876.

SANGUINETTI v. THE PACIFIC STEAM NAVIGATION COMPANY. (a)

Charter-party—Days allowed for loading—Stiffening coal—Demurrage—Master's lien—Ceasing of charterer's liability.

Defendants chartered plaintiff's ship to carry a cargo to Callao. By the charter-party the ship was "to be loaded at the average rate of 75 tons per clear working day . . . Stiffening coal, if required, to be supplied at ship's expense at the rate of 40 tons per clear working day after written notice is given to the charterers' agent of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, to be excluded in the computation of the said working days allowed for loading . . . Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3d. per registered ton per day. The master to have a lien on the cargo for all freight and demurrage due under this agreement . . . All liability of the charterers under this agreement shall cease as soon as the cargo is

on board . . . All questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owner. The owner and master to have a lien on the cargo for all freight, dead freight, and demurrage."

Defendants failed to supply stiffening coal, whereby the ship was detained forty-eight days at the port of loading. Plaintiff sued for demurrage.

Held (affirming the judgment of the Queen's Bench Division on demurrer to statement of claim), that putting stiffening coal on board was "loading" within the demurrage clause, and therefore demurrage was payable, but that this was a liability under the charter-party, which ceased when the cargo was on board, and the only remedy was by the master's lien; and therefore plaintiff could not recover on the charter-party.

Action by the plaintiff, owner of the ship Giuseppe, against the defendants, charterers. The statement of claim set out the charter-party, the material parts of which are as follows:

"The said ship, now at Genoa, being tight, staunch, and strong, and in every way fitted for the voyage, shall proceed to Cardiff, with option to take a cargo in Mediterranean for Cardiff for owner's benefit, and there load in any dock ordered by shippers a full and complete cargo of steam coal from the colliery named by the charterers' agent on the vessel's arrival at Cardiff, and being so loaded shall therewith proceed to Callao, or so near thereto as she may safely get, and there deliver the same (all on board to be delivered) into lighters, steamers, depot ships, or at any wharf as ordered by the charterers' agent . . . The ship to be loaded at the average rate of 75 tons per clear working day (as tendered during night or day), commencing when the vessel is in berth (under the tip where tips are used), wholly unballasted and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent. Any time lost by reason of riots, partial or general lock-outs, strikes or cessation from work on the part of the pitmen or other hands engaged in the getting, carriage, or loading of the said coals from whatever cause, or by reason of accidents in mines or to machinery, obstruction on or in any railway, river, canal, or dock used for the carriage of the coal, or in the loading of the ship, or by reason of floods, frosts, storms, or any cause beyond the control of the charterers to be excluded in the computation of the said working days. Stiffening coal if required to be supplied at ship's expense at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board or the ship is detained for the same to be excluded in the computation of the said working days allowed for loading. The vessel to be discharged at the average rate of 40 tons per clear working day, commencing from the day after written notice is given to the charterers' agents of readiness to deliver the cargo. Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3d. per registered ton per day. The master to have a lien on the cargo for all freight and demurrage due under this agreement. . . . All liability of the charterers under this agreement shall cease as

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

soon as the cargo is on board, except as to the aforesaid payment to be made on sailing, and all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owners, the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage."

The statement of claim went on to allege that the ship proceeded to Cardiff, and on 24th Feb. 1875, notice was given that stiffening coal was required.

Clause 5 was as follows: "The whole of the ballast from the vessel could not be taken out of the vessel until the necessary stiffening coal could have been provided, and the use was and is to discharge the greater portion of the ballast and to retain a small quantity of ballast which is kept in the vessel for the purpose of keeping her upright, and this latter small quantity of ballast is discharged simultaneously with the receipt of the stiffening coal, whereof the defendants had notice."

Allegation that the defendants failed to supply any stiffening coal until the 15th April 1875, and that "the defendants detained the ship forty-eight days over and above the period so agreed upon for loading, and thereby became liable to pay to the plaintiff 350l. 13s. for demurrage of the vessel or for damages for the detention of the vessel, yet the defendants have not paid the same, and the same is still wholly due and unpaid."

There were also allegations that the defendants' agent at Callao requested the plaintiff to deliver the cargo without enforcing his lien, and the plaintiff did so; and that the defendants' agent did not settle the questions which arose.

Demurrer "to so much of the plaintiff's statement of claim as alleges liability in respect of what took place in England . . . on the ground that it appears that the cargo was on board, and that all liability of the defendants was by the charter-party to cease thereupon . . . and also on the ground that it does not appear that the said questions had been settled with the said manager or agent of the defendants."

The Queen's Bench Division (Mellor and Quain, JJ.) gave judgment for the defendants, and the plaintiff appealed.

Benjamin, Q.C. (*L. P. Russell* with him) for the plaintiff.—The clause in the charter-party by which all liability of the charterers is to cease as soon as the cargo is on board, does not apply to the claim for detention at the port of loading. It only exempts the charterers from liability for breaches of the charter-party in respect of which a lien is given to the owner:

Kish v. Cory, 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553;

Francisco v. Massey, L. Rep. 8 Ex. 101; 42 L. J. 75, Ex.;

Lockhart v. Falk, 33 L. T. Rep. N. S. 96; L. Rep. 10 Ex. 132.

[*Brett, J.A.* referred to *French v. Gerber* (L. Rep. 1 C. P. D. 737, now pending in the Court of Appeal).] In the present case the parties had two things in contemplation when the charter-party was drawn up—demurrage, and detention as distinguished from demurrage. The lien is only given for "freight, dead freight, and demurrage," and does not extend to the present claim. Therefore the claim is not within the clause exempting the charterers from liability, and the plaintiff is

entitled to recover. The exemption is conditional on the defendants' agent settling according to the charter-party.

Cohen, Q.U. (*Arthur Williams* with him) for the defendants.—The point intended to be raised by the demurrer is that the defendants are subject to no liability, independently of what happened at Callao. This is a claim for demurrage, and as such is within the express words of the clause giving a lien. It follows that it comes within the clause exempting the defendants from liability under the charter-party. The contention on the part of the plaintiff is that by making the charter-party, the defendants contracted an obligation that their agent should settle; if so, that is a liability under the charter-party, and the exemption applies. The court will not vary the meaning of the clause because the plaintiff finds his lien an insufficient security. He also referred to *Bannister v. Breakauer* (16 L. T. Rep. N. S. 418; L. Rep. 2 C. P. 497; 36 L. J. 195, C. P.). [*Brett, J.A.*—That case has been doubted; see *French v. Gerber* (*ubi sup.*)]

L. P. Russell, in reply, referred to

Gray v. Carr, L. Rep. 6, Q. B. 522; 40 L. J. 257, Q. B.; 25 L. T. Rep. N. S. 215.

MELLISH, L.J.—The question in this case is whether, according to the true construction of the charter-party, the defendants are liable to pay demurrage or damages for detention of the plaintiff's ship, which was detained for forty-eight days at the port of loading, Cardiff. The demurrer only raises the question whether the defendants are liable to a claim for demurrage or detention in England. We thought that in order to settle the matter fully, it was desirable to consider the question whether the shipowner can maintain an action on the charter-party if the charterer's agent does not settle the claim at the port of destination. The clause as to demurrage is this: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3d. per registered ton per day." The first question which we have to consider is whether "loading" in this clause is confined to loading the ship at the rate of 75 tons per day after she is wholly unballasted and the stiffening coal has been put in, or whether it includes putting the stiffening coal on board, for which certain days are allowed, and so whether there is an agreement to pay demurrage in respect of that time. The charter-party says: "The ship to be loaded at the average rate of 75 tons per clear working day as tendered during night or day commencing when the vessel is in berth (under the tip where tips are used) wholly unballasted and ready to receive cargo, notice of which is to be given in writing by the master to the charterers' agent." I agree that the working days mentioned in this clause do not begin until after the stiffening coal is put on board, because until then the ballast would not be entirely out. Then there is the clause: "Any time lost by reason of riots, &c., . . . to be excluded in the computation of the said working days." Then comes the following clause: "Stiffening coal if required to be supplied at ship's expense, and at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, to be excluded in the computation of the said working days allowed for

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loading." If we look at the substance of these clauses it is plain that the parties meant that if stiffening coal were required it should be loaded at the rate of 40 tons per working day, and when the ballast was out, and the stiffening coal loaded, the cargo should be put on board at the rate of 75 tons per working day. These stipulations are only separated in the charter-party, because in the one case the rate of loading is to be 40 tons a day and in the other 75. If putting the stiffening coal on board is part of the loading within the meaning of the demurrage clause, demurrage is clearly payable in respect of delay in putting stiffening coal on board, and it is not easy to see why the owner should not be entitled to his 3d. per ton per day if there is delay beyond the days allowed for loading stiffening coal, just as much as if there is delay beyond the days allowed for loading cargo at the rate of 75 tons a day. No number of days is named in the charter-party, but whatever time is occupied beyond the time which it would take to load the stiffening coal at the rate of 40 tons per working day and to load the cargo at the rate of 75 tons per working day, is to be paid for, whether longer or shorter, and I cannot see why this provision should not apply to the time for loading stiffening coal as much as to the time for loading cargo. Then the next clause is: "The master to have a lien on the cargo for all freight and demurrage due under this agreement." We have to decide what the meaning of the word demurrage in that clause is, and I think it applies to demurrage for delay in loading stiffening coal as much as to demurrage for delay in loading cargo. I think this is the true construction, for the two clauses come immediately after each other, and to give any other meaning to demurrage in the latter clause would make them inconsistent with each other. In both I think it extends to detention in loading stiffening coal as well as in loading cargo. Then there is the clause discharging the charterers. "All liability of the charterers under this agreement shall cease as soon as the cargo is on board." It is clear, according to the authorities, that the words in this clause cannot be confined to liability arising from breaches subsequent to the loading, but must extend to all liability under the charter-party of every description. The clause goes on: "And all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination." Now, what is the meaning of the word "settle" in that clause? Is it meant to revive a liability under the charter-party which would have ceased under the previous part of the clause? If it does the charter-party is contradictory. It is shown that the master is to have a lien, and although the consignee and consignor are the same, I think there is no right of action, but the remedy is by lien on the cargo. I do not think the words "short delivery" make any difference; a claim for short delivery would be a claim by the charterers against the owners, and the charter-party means that such a claim is to be settled by the agent and the amount deducted from the freight; there is to be one settlement before the cargo is delivered. I do not think that the use of these words, or the fact that the consignee was the agent of the charterers, can afford any reason for construing the charter-party in a manner contrary to the decided cases. There

may have been reasons why the charterers wanted to make a settlement with their agent at Callao compulsory; the agent might be in the habit of receiving large sums of money for them, and they might wish to compel him to settle claims against them out of the money which he so received. I think the true meaning of the clause is that in a case like the present the charterers are to be subject to no liability. It is true that in the statement of claim it is alleged that the defendants' agent requested that the cargo might be delivered without the plaintiff's lien being enforced. If this be true, it might possibly give rise to some right of action, but it would be *dehors* the charter-party. Mr. Benjamin did not wish for a decision on this, so I offer no opinion as to whether there may be any right of action independently of the charter-party. In my opinion, according to the charter-party, the defendants were freed from liability on the ship's sailing, and their liability did not afterwards revive. I think, therefore, that the judgment ought to be affirmed.

BRETT, J.A.—I am of opinion that on this demurrer we are confined to the charter-party. If the statement of claim on proof being given of something outside the charter-party would give a cause of action, the demurrer is not pointed to that, and the question will still be open. The only question which we have to decide, and which the Queen's Bench Division had to decide, is whether there is a right of action on the charter-party. I have come to the conclusion that there is no such cause of action. In the first place, I agree that the plaintiff's claim comes within the demurrage clause, and I think this is equally so whether stiffening coal is part of the cargo or not. When I asked Mr. Benjamin he admitted at the moment that it was part of the cargo, but I cannot say I am sure it is so, for it is to be provided at the ship's expense. When a ship is chartered to carry goods on a voyage the time of the occupation of that ship depends partly on accident, such as wind and weather, partly on the conduct of the owner, and partly on the conduct of the charterer. It depends to a certain extent on the conduct of the charterer in supplying cargo, and in the same way at the end of the voyage, or whether the consignee is ready to receive the cargo. It is the time at the beginning and end of the voyage which depends on the charterer, and consequently there are provided lay days, during which the shipowner is not allowed to claim anything beyond the freight made payable by the charter-party. These days are fixed at the beginning and end of the voyage in one of two ways. The number of lay days may be stated, or, as was done in this case, the other mode may be adopted, which is by the use of certain phraseology to arrive at the number of lay days. Here the lay days at the commencement of the voyage are fixed by the quantity of stiffening coal and cargo to be put on board day by day. Instead of naming the lay days in the charter-party this method has been adopted. The capacity of the ship and the quantity of stiffening coal required not being known a fixed time cannot be named in the charter-party; but this is found out when the ship arrives, and if the ship can take a certain number of tons of cargo that number divided by 75 will give the number of lay days to be allowed in respect of the cargo, and the number of tons of stiffening coal divided by 40 will give the number of lay days in respect of

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the stiffening coal; the two added together will give the total number of lay days, and the result will be the same as if that number had been written in the charter-party. Then the charter-party goes on to provide that if the ship is detained, which must be understood to mean by the fault of the charterer, demurrage is to be paid; all days beyond the days allowed for loading and discharging are to be paid for, and the effect is to bring the whole case within the demurrage clause. As to the question whether this is demurrage or detention, generally if there is a fixed number of demurrage days named in the charter-party beyond the lay days, and the ship is delayed by the fault of the charterer beyond the demurrage days, this is detention, for which the owner is entitled to compensation in damages; but here the number of demurrage days is not mentioned at all, and therefore all the detention beyond the lay days seems to me to be demurrage. Therefore, whether the stiffening coal is part of the cargo or not all the days beyond the combined number of days to be allowed for loading the ship and for supplying stiffening coal are demurrage days, and are within the demurrage clause. But if they were not strictly demurrage days I should still agree that they would come within the clause which gives a lien, for that clause ought to be enlarged so as to include detention in the nature of demurrage. Therefore the captain could have exercised his right of lien in respect of detention at the port of loading, and there was a lien in respect of the plaintiff's claim. Therefore, whether the decision in *French v. Gerber* (*ubi sup.*) is adopted or not, this is an absolving clause, and, unless this is distinguishable from the other cases, will absolve the defendants from liability. That reduces the judgment to the question whether the latter part of the clause modifies it or not. I think it does not. At the moment I was struck with the suggestion made as to the use of the words "short delivery," because for "short delivery" there would be no lien, but it seems that it would be a claim by the charterer against the owner, which would have to be settled. It seems to me that the question of short delivery would be determined by the agent at Callao. There is another question which the charterers' agent there may be the person most fit to settle, and that is the question of demurrage at the port of discharge. The agent is given power to settle both against the owner and in his favour, and the settlement is binding on the owner. If there were a dispute as to whether fifteen or ten days' demurrage were payable, and the agent said it was ten days, the captain might possibly refuse to deliver the cargo unless he were paid for fifteen; if he did so the owner would be liable, and if the charterer paid for fifteen days he could get back what he had paid for five of them, because the decision of the agent would be binding on the owner. Having regard to the nature of the clause, it seems to have been primarily meant to apply to cases of delay at the port of discharge, but the words are applicable to demurrage for delay at the port of loading. The effect of all the parts of the clause taken together is that the defendants' liability ceases on the charter-party as soon as the cargo is on board, and the only remedy left is the lien. I am, therefore, of opinion that the judgment is right and ought to be affirmed, expressly stating that we do not determine whether, under

the circumstances which took place at Callao, the plaintiff would have any right of action against the defendants or their agents.

AMPHLETT, J.A.—I am of the same opinion. I regret that so much time has been taken up in discussing the pleadings, which are very unsatisfactory. It is admitted that there are two causes of action in the statement of claim, and to one there is a demurrer, that is to as much of the statement of claim as alleges liability in respect of all that took place in England, and if there is any cause of action in consequence of the conduct of the defendants' agent abroad this is inconsistent with an action on the charter-party. If the defendants' agent requested the cargo to be delivered without settling the plaintiff's claim, the question whether there is any right of action is left open. I do not propose to go through the reasons for our decision so clearly given by Mellish, L.J., and Brett, J.A. I quite agree with the reasons given, and I think the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff, *Ingledeu, Ince, and Greening*, for *Ingledeu, Ince, and Vachell*, Cardiff.

Solicitors for defendants, *Field, Roscoe and Co.*, for *Bateson and Co.*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Wednesday, Nov. 8, 1876.

STONES v. TODD. (a)

Patent—Novelty—Prior publication—Description in provisional specification omitted in final specification.

A description of an invention appearing in a provisional specification and omitted in the final specification must be presumed to be abandoned by the inventor, and, unless a full description, will not avoid a subsequent patent on the ground of prior publication.

THIS was a suit to restrain the infringement of a patent for improvements in raising and lowering revolving shutters which had been granted to Thomas Kirby in 1866, and since assigned to the plaintiff. The defendant by his answer raised, among other issues, that of novelty, and relied on an improvement in revolving shutters described in the provisional specification of a patent granted to Clarke in Nov. 1856, but omitted from the final specification, as amounting to prior publication of Kirby's invention.

Aston, Q.C. and *Langley* (Roxburgh, Q.C. with them) for the plaintiff.

Chitty, Q.C. and *Rigby*, for the defendant.—The provisional specification of Clarke's patent completely describes the plaintiff's invention, and, although it is omitted from the final specification, the omitted part is as much protected as that which is retained.

Sir G. JESSEL.—The question is whether an invention disclosed in a provisional specification of one Clarke, left at the patent office in the year 1856, is an anticipation of the patent, for the infringement of which this action is brought. The point is a new one. In order to decide it, I

(a) Reported by G. WELBY KIRK, Esq., Barrister-at-Law.

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must consider the nature of a provisional specification, and the effect on it of the final specification of the same invention. The provisional specification was never intended to be anything more than a mode of protecting the invention until the filing of the final specification. It was not intended to convey a complete description of the invention, but merely to disclose it—fairly of course—in its rough state, leaving the inventor to perfect it in its details. Again, the provisional specification as such is not known to the public. It is never published, unless with the final specification, or until after the expiration of the time within which the final specification ought to be filed in those cases where the inventor does not file a final specification. In short, it is not intended to enable a workman of ordinary skill to make the invention, which is the office of the final specification. Then when we find a provisional specification disclosing two methods of doing a thing, one of which is omitted from the final specification, is not that a notification that the omitted one is useless or will not effect its purpose? Is it not to be regarded as a mere hint which the inventor did not work out and could make nothing of? I do not consider that the publication of a sketch in a provisional specification can give that information to the world which a final specification is expected to give. I exclude from consideration those cases which we sometimes meet with where the description in the provisional specification is as full as the description in the final specification, and confine my remarks to the case of a sketch. I should hold the publication of a sketch such as this in a provisional specification to be not such a publication of the invention as to avoid a subsequent patent for want of novelty. There is scarcely such a thing as an invention that is absolutely novel; and it would be hard if an inventor were to be deprived of the fruit of his ingenuity by a sketch such as this.

Solicitors: *Collette and Collette; Emmett and Son.*

(Before Vice-Chancellor BACON.)

Friday, Nov. 24, 1876.

BARKER v. COX. (a)

Vendor and purchaser—Husband and wife—Joint power of appointment—Contract by husband to sell the fee—Death of husband—Specific performance with compensation.

Property stood limited to such uses as A. and his wife should jointly appoint, and in default of appointment to the wife for life for her separate use without power of anticipation, remainder to A. in fee. A. contracted to sell the property to B. The agreement stated that the property stood limited "to such uses as A. and his wife should jointly appoint," and that A. would "procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." A. died before completion, having devised the property to trustees upon trusts for sale.

Held, that B. was entitled to specific performance, with compensation in respect of the wife's life interest.

By the settlement executed on the marriage of William Sands Cox and Isabella, his wife, and

dated 25th Aug. 1866, his freehold estates were limited and settled to such uses upon such trusts and in such manner as he and his wife by any deed or deeds should at any time or from time to time jointly appoint, and in default of and until and subject to any such appointment to the use of William Hatton and Osborne Reynolds, and their heirs, in trust nevertheless to pay the rents and profits thereof to or permit the same to be received by Isabella Cox for her separate use without power of anticipation, with remainder to the use of William Sands Cox in fee.

*By an agreement dated the 25th Oct. 1875, and made between William Sands Cox of the one part, and William Barker of the other part, William Sands Cox agreed to sell to William Barker his two freehold houses in Paradise-street, Birmingham, subject to a lease for 21 years, at the yearly rent of 180*l.*, the purchase to be completed on the 24th Dec. 1875; the agreement also provided that the purchaser should on or before the 24th Dec. 1875, transfer into or invest in the names of the vendor or into such other names or name as he should direct in the Three per Cent. Consols, such a sum of money as would by the dividends thereof produce the clear annual income of 180*l.*, and stated "the premises are now settled to such uses as the vendor, and Isabella his wife shall jointly appoint, and the vendor will procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." The title was accepted, and a draft conveyance of the premises to the purchaser in fee was prepared by the purchaser's solicitors, such conveyance purporting to be made by the appointment by William Sands Cox, and Isabella his wife, in exercise of the joint power of appointment reserved to them by their marriage settlement in consideration of 6000*l.* Three per cent. Consols, to be purchased by the said William Barker, in the names of William Hatton and Osborne Reynolds, by the direction of William Sands Cox and Isabella his wife. The draft having been approved by the vendor's solicitors, was engrossed, and was on the 23rd Dec. 1875, forwarded to the vendor's solicitors for execution, but early on the same day William Sands Cox died without having executed the conveyance. On the preceding day, the 22nd Dec., William Barker had purchased, in the names of William Hatton and Osborne Reynolds, the sum of 6000*l.* Three per Cent. Consols, which was such a sum as would by the dividends thereof produce the clear annual income of 180*l.*, which sum of Consols was still standing in their names.*

William Sands Cox, by his will dated 3rd Feb. 1857, devised all his real estates to trustees, upon trust for his wife for life, for her separate use, and after her death upon trust for sale, and devised all trust and mortgage estates to the same trustees, and appointed his wife Isabella Cox and five other persons executors of his will. Isabella Cox having refused to concur in a conveyance of the property to William Barker, on the ground that she was not bound to concur therein in respect of her life estate under the marriage settlement, he commenced an action against Mrs. Cox, the trustees of the settlement and the trustees and executors of the will, claiming specific performance of the agreement of the 25th Oct. 1875, subject to the life estate of Isabella Cox therein under the settlement with compensation out of the personal estate of William Sands Cox in respect of such life

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estate, and also claiming a lien on the 6000*l*. Consols for the amount of such compensation.

The action now came on for trial.

Sir H. Jackson, Q.C. and *Chapman Barber*, for William Barker.—This is a contract by the husband alone for the sale of the whole fee simple, and there is nothing to exclude the general rule that if a vendor contracts to sell the whole fee simple, and is only able to convey a less interest, although he cannot compel the purchaser to take the property, yet the purchaser can compel him to convey such interest as he has with compensation; and it is right that he should be compelled to do so where it can be done without any great preponderance of inconvenience: (*Graham v. Oliver*, 3 Beav. 124, 128.) The purchaser completed the contract before the death of the vendor, and it was a mere accident that it was not fully completed. The case must be taken to be in the same position as if the purchaser was coming for specific performance against the husband in his lifetime by reason of the wife's refusal to concur, in which supposition his right to relief is clear:

Sugden's V. & P., 14th edit. p. 305;
Mortlock v. Buller, 10 Ves. 316;
Hill v. Buckley, 17 Ves. 394;
Melthorpe v. Holgate, 1 Coll. 203, 222;
Wilson v. Williams, 3 Jur. N. S. 810;
Thomas v. Dering, 1 Keen, 729;
Barnes v. Wood, L. Rep. 8 Eq. 424; 21 L. T. Rep. N. S. 227;
Dart V. & P. 1087;
Hooper v. Smart, L. Rep. 18 Eq. 683;
Jones v. Evans, 12 Jur. O. S. 664;

The cases the other way are

Whatley v. Slade, 4 Sim. 126;
Mow v. Topham, 19 Beav. 576;

but both of them have been questioned by Lord St. Leonards (*Sugden's V. & P.* 14th edit., pp. 309, 317, 318). The other side rely on *Castle v. Wilkinson* (L. Rep. 5 Ch. App. 534). But there the husband and wife in terms agreed to sell the wife's estate, and the wife afterwards refused to complete. The *ratio decidendi* there was that the purchaser knew the state of the title. That is a case in fact referable to a class of authorities by which *Emery v. Waste* (8 Ves. 850), is one of the earliest examples. Here the husband alone purports to sell and to obtain the concurrence of all necessary parties.

Kay, Q.C. and *Woodroffe*, for the trustee of the will.—The vendor did not represent that he could convey the fee, but the contract gives the purchaser clear notice that it could only be done by the joint exercise of a power, and therefore the purchaser had clear notice that the vendor had not the power of conveying the fee simple, for he said I will procure all necessary parties to concur. There is, therefore, no misrepresentation of fact (*Jordan v. Money*, 5 H. L. Ca. 185), and in all the cases relied on by the other side there was some misrepresentation or misstatement of fact; here there is none. It is well settled that where the concurrence of the wife is necessary, the husband cannot be compelled to coerce his wife if she refuses to concur. The case is in fact on all fours with *Castle v. Wilkinson* (sup.).

Sir H. Jackson, Q.C., in reply.

Russell Roberts, for the executors; and *Rowden*, *A. T. Watson*, and *Bigby*, who appeared for other parties, took no part in the argument.

BACON, V.C.—Upon the main question in this case I cannot say that I entertain the slightest

doubt. I think I must treat this as if the vendor were now alive. Nothing that has happened since this contract was entered into can alter the relations subsisting between the parties. The cases, in my opinion, are all consistent. I am not disposed to think that misrepresentation is a necessary element in those cases in which the court is called on to do justice between the parties. The plain justice of this case does not require one word to be said about it. An owner in fee simple subject to certain trusts in a marriage settlement, which do not affect his interests unless they are put into execution, sells an estate, and sells it for a price which is fixed, the meaning of which is clearly understood. His wife is entitled to a separate estate for her life, and he did not mean to disturb his wife's enjoyment of her life interest, and therefore a sum of money is to be set apart to procure an income equal to what she would receive from the rents, namely, 180*l*. a year, and the 4th clause of the contract which has been particularly adverted to is, "the premises are now settled to such uses as the vendor and Isabella Cox, his wife, shall jointly appoint, and the vendor will procure an assurance of the premises to the purchaser to be executed by all necessary parties." She might die the next day, and then his interest would be absolute. She might concur, and he expected that she would concur. His engagement is that all necessary parties should concur, and he might safely enter into the engagement for as the power was a joint appointment, whether he could procure her concurrence or not, he knew that by withholding his own the incumbrance would never exist on the estate. Then what has happened? He receives the money—the whole money—every shilling of it is paid to him, every interest that he or anybody succeeding to him could claim out of this estate is bought and satisfied, and the object of this suit is that the people who represent him should be compelled to carry the contract into effect in its plain and material terms, or that they should forego that sum of money which has been paid, or make compensation. Cases have been referred to very conveniently, but not, I think, very necessarily, because the rule of the court is plain that if a man enters into a contract to sell something, representing (as I read this contract does) that he has the entire interest, and receives the price of it or becomes entitled to receive the price of it, and does not perform his contract, then the other party to the contract who has parted with his money, or is ready to pay his money, is entitled to be placed in the same position in which he would be in if the contract had been completed, or, if not, by compensation to be placed in the same position in which he would be entitled to stand. I cannot doubt that the claim made in this suit is upon the whole a right claim. Specific performance is asked, but that cannot be decreed in its entirety. Then it is asked that it should be declared that he is entitled to compensation. That seems a matter of course upon the facts admitted, and that he has a lien on the sum of stock in the meantime I think is equally clear.

Solicitors for the plaintiff, *Gamlen and Son*.

Solicitors for the trustees, *Kennedy, Hughes, and Co*.

Solicitors for other parties, *J. J. Brownlow; The Solicitors for the Treasury*.

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RANKEN v. ALFARO.

[CHAN. DIV.]

(Before Vice-Chancellor HALL.)

Monday, Nov. 20, 1876.

RANKEN v. ALFARO. (a)

Bill—Cargo—Specific appropriation—Lien—
Equitable assignment.

Y., a merchant, in Costa Rica, shipped coffee to M. and Co., London, "on the strength of" which he drew bills on M. and Co., requesting them to have the coffee sold for his account, and the proceeds passed to his credit. There was an agreement between Y. and E. and Co., of Panama, to share profits and losses on this transaction. The bills came into possession of the plaintiffs, and were dishonoured by M. and Co. Y. wrote to S., asking him to honour the drafts and obtain the bills of lading of the coffee from M. and Co., by whom they were accordingly handed over to S.

S. wrote to the plaintiffs, saying that he expected soon to get the delivery warrants of the coffee, and that he could dispose of the coffee as instructed by the sender.

M. and Co. were creditors to a large extent of E. and Co., whose agent they affirmed Y. to be, and they caused an attachment to issue out of the Lord Mayor's Court against the coffee.

S. then paid the proceeds of sale into court, and the plaintiffs applied to have their bills paid thereon on the ground that the coffee had been specifically appropriated to the bills, and that S. had made an equitable assignment of a part of the coffee equal in amount to the bills.

Held, following Robey and Co.'s Perseverance Iron Works v. Ollier (27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695) that there was no such appropriation, and that S. had no authority to make such equitable assignment.

Frith v. Forbes (6 L. T. Rep. N. S. 847; 4 De G. F. & J. 409) distinguished on the ground that in that case the bills showed on the face of them that they were appropriated to the cargo.

THE plaintiffs, Peter Ranken, Clement John Andrew Ulloa, and John Francis Chalmers, are merchants, carrying on business under the firm of Chalmers, Guthrie, and Co., and now suing on behalf of themselves and other holders of the bills of exchange hereafter mentioned.

Between the 1st and 17th April 1874, the defendant Yldefonso Alfaro, who is a merchant carrying on business at San José, in the Republic of Costa Rica, shipped and consigned three several parcels amounting in the whole to 808 sacks of coffee, belonging to him, to the defendants, Assur Henry Moses, Moses Henry Moses, Alfred Merton, Arthur Abraham Levy, and Edward Levy, merchants, carrying on business in co-partnership, in Fenchurch-street, in the city of London, under the firm of Moses, Levy, and Co., and drew various bills of exchange thereon.

On or about the 5th April, the said Yldefonso Alfaro wrote to Moses, Levy, and Co., a letter in Spanish, of which the following is a translation:

San José, 5th April 1874.

Messrs. Moses, Levy, and Co., London.

Gentlemen,—I inclose to you a letter of recommendation of Messrs. Eloy, Alfaro, and Co., of Panama, authorising me to draw on you at the rate of 4l. per quintal, of coffee, which I may ship for my account to your consignment.

On the strength of this I have drawn on you the following drafts:

200 No. 112, to the order of Mr. Miguel Cyalos, at 90 days.
600 No. 113, to the order of Mr. Adolfo Bonilla, at 90 days.
500 No. 114, to the same.

£1300

Thirteen hundred pounds sterling, which I hope you will please accept and pay at maturity, to the debit of my account.

My agent, Mr. Nicolas Peña, of Puntarenas, will remit to you a bill of lading of said coffee. Up to to-day I have advice that they have remitted you already 220 sacks coffee with 130lb. each, and by the present another parcel will go forward, of which I cannot know to-day the number of sacks that can be shipped. Said coffee I request you to have sold for my account, and its proceeds passed to my credit.

In this transaction Messrs. Eloy, Alfaro, and Co., of Panama, have a share, being interested for a half of the profit or loss. On the strength of this, I hope you will please follow the instructions which said gentlemen may give you. By the succeeding steamers I shall continue remitting you greater quantities of sacks.

I avail myself of this opportunity to offer you my services in this place, and remain, yours truly,

(Signed) YLDEFONSO ALFARO.

The bills for 600l. and 500l. respectively mentioned in the said letter were two bills of exchange both dated the 31st March 1874, and drawn by the said Yldefonso Alfaro upon Moses, Levy, and Co., in favour of a Signor Adolfo Bonilla, who on the same day sold and indorsed the same to Messrs. Blanco de Triqueros, of San Salvador, in America, who in turn indorsed and forwarded them to the plaintiffs, their correspondents in England. The plaintiffs paid full value for the bills, and now hold them.

On or about the 15th April 1874, the said Yldefonso Alfaro wrote to the said Messrs. Moses, Levy, and Co., a letter in Spanish, of which the following is a translation:

San José, 15th April 1874.

Messrs. Moses, Levy, and Co., London.

Dear Sirs,—Without any of yours, I address the present lines to you, to advise you of the drafts I have drawn on you, on the same terms as heretofore:

£ s.			
500 0	No. 125, of Mr. E. Huard, at 90 days, dated 10th inst.		
100 0	No. 126, do.	do.	
125 0	No. 127, of Mr. Pedro Garcia	do.	
291 14	No. 128, of Mr. Gasto Gomez	do.	
300 0	No. 124, of Messrs. Juan Fernandez & Sons	do.	
700 0	No. 135, of Messrs. B. Fernandez and Co.	do.	
600 0	No. 137, of Mr. Joaquim Cantaglio	do.	

£2216 14

Two thousand two hundred and sixteen pounds, fourteen shillings, which I trust you will accept and pay at maturity, debiting me for their respective amounts, upon the same terms as before.

Coffee.—With a fall of the price there, the quintal has gone down \$2 upon its price. My agent in Puntarenas remits you, by each steamer, bill of lading of shipment of above articles consigned to you, all of which please have sold according to my previous instructions. My opinion is that, given a fall of price there, it will be better to keep it three months longer, after which time I believe it would fetch a better price.—Yours, &c.,

(Signed) YLDEFONSO ALFARO.

The said Yldefonso Alfaro drew several other bills in like manner on Moses, Levy, and Co. The total amount of the bills was 4256l. 14s. Yldefonso Alfaro also through his agent, the said Nicolas Peña, forwarded to Moses, Levy, and Co., and they on the 13th and 16th May 1874, received all the bills of lading, shipping documents and warrants, relating to the said shipments.

On the 14th May, the plaintiffs presented the said bills of 600l. and 500l. respectively, to Messrs. Moses, Levy, and Co. for acceptance.—They were,

however, refused without cause assigned, and on the same day accordingly, the plaintiffs caused them to be protested for non-acceptance, and then held them to await maturity—they being bills at ninety days' sight.

In consequence of this the defendant Yldefonso Alfaro addressed the following letter to the defendant Schwarz:

Costa Rica, San José, 17th June 1874.

Mr. F. M. Schwarz, London.

Dear Sir,—At the suggestion of Messrs. J. Ezatas and Co., of Panama, I take the opportunity of informing you, that having made various consignments of coffee for my risk and account to Messrs. Moses, Levy, and Co., of your city, amounting to 808 sacks (105,030lb.), and drawn upon them for 4256l. 14s. sterling, as per details at foot, said bills have not been accepted; they maintaining that my former letter, in which I gave them instructions, was never received by them.

I therefore beg of you to take charge of this consignment and to realise it, honouring all my drafts, which on account of it I drew upon Messrs. Moses, Levy, and Co., and for which you will kindly ask them for a list of the holders of the said drafts. If the proceeds of the coffee should not be sufficient to cover the drafts, telegraph to Messrs. Eloy, Alfaro, and Co., of Panama, so that they may inform me of the sum wanting, which I will immediately remit.

I will now explain to you how I came to enter into the transactions with these gentlemen.

At the beginning of this year I wrote to Messrs. Eloy, Alfaro, and Co., of Panama, requesting them to send me some letters of recommendation to Europe, and at the same time authorise me to draw upon the house in the which I should commence business at the rate of 4l. per quintal, for coffee sent to it in consignment, for my risk and account. In reply to this, the said Messrs. Eloy, Alfaro, and Co. sent me several letters such as I desired, and further proposed that we should do the business jointly, sharing losses and gains, which proposal I accepted, as the manager of the said house, Messrs. Eloy, Alfaro, and Co., is my brother.

I inclose you copies of my letters to Messrs. Moses, Levy, and Co. for your guidance. I also send you a power of attorney, for you to claim the consignment of those gentlemen, or else its proceeds in case it be sold.

I do not for a moment doubt but that you will attend to this affair as if it were your own, and that you will take all means in your power to prevent my reputation suffering commercially or morally.

I take this opportunity of subscribing myself—Your most obedient servant,
YLDEFONSO ALFARO.

The "former letter" referred to in the first paragraph of this letter was the one dated 5th April 1874, above set out. The "details at foot" above referred to consisted of a list of drafts on Moses, Levy, and Co., among which were the drafts numbered 113 and 114 for 600l. and 500l. respectively.

In the said letter of the 17th June 1874, copies were inclosed of Yldefonso Alfaro's letters of the 5th and 15th April above set out. The plaintiffs contended that the said F. M. Schwarz was thereby constituted special agent of Yldefonso Alfaro with respect to the property and matters which were the subject of the suit.

Accordingly the defendant, F. M. Schwarz, by his clerk communicated to Moses, Levy, and Co., the contents of the letter of the 17th June, and applied to them for a list of the holders of the bills, and also for the bills of lading, shipping documents, and warrants relating to the said coffee.

On or about 14th Aug. 1874, the said F. M. Schwarz received from Moses, Levy, and Co. the following letter:

London, 14th Aug. 1874.

Mr. F. M. Schwarz.

Dear Sir,—At your request we hand you list of bills

drawn on us by Señor Don Yldefonso Alfaro, and also in whose hands they are. We shall take care to refer the holders of such bills, when they become due, to yourself for payment.—We are, dear Sir, yours truly,
(Signed) MOSES, LEVY, AND Co.

(A list of the bills, &c., was appended.)

On the 15th Aug. 1874, the said bills for 600l. and 500l. became due, and were presented for payment to Moses, Levy, and Co., who refused to pay either of them, and the plaintiffs had them accordingly protested for nonpayment. On the same day the plaintiffs received from the defendant, F. M. Schwarz, the following memorandum:

(Memorandum.)

14th Aug. 1874.

From F. M. Schwarz, 10, Basinghall-street,
London, E.C.,

To Messrs. Chalmers, Guthrie, and Co.,
9, Idol-lane, Tower-street.

£800} Drawn by Yldefonso Alfaro, of San José
£500} de Costa Rica, on Moses, Levy, and Co.

Please take note that I expect to receive from Messrs. Moses, Levy, and Co., early next week, delivery of the coffee sent by drawee [a clerical error for "drawer"] against the above, and that I will then again write to you on this subject.

Paragraph 13.—Shortly afterwards—namely, on the 17th Aug. 1874—the said F. M. Schwarz received from Moses, Levy, and Co., the delivery warrants relating to the said 808 sacks of coffee, and on the 17th Aug. wrote and sent to the plaintiffs the following memorandum:

(Memorandum.)

17th Aug. 1874.

From F. M. Schwarz, 10, Basinghall-street,
London, E.C.,

To Messrs. Chalmers, Guthrie, and Co.,
9, Idol-lane, Tower-street.

Referring to my memorandum of the 14th inst., I beg to inform you that Messrs. Moses, Levy have now handed me over the warrants for the coffee sent by Mr Yldefonso Alfaro, and that I shall dispose of same as instructed by sender, and will let you have further particulars in due time.

The said F. M. Schwarz paid in exchange for the said delivery warrants the charges for freight for the said coffee and other expenses, amounting to 464l. 11s.

Paragraph 14.—On the 20th Aug. 1874, the plaintiffs received from the said F. M. Schwarz another memorandum, to the effect that an attachment had been served upon him in reference to the coffee, and that he requested to be informed if they (the plaintiffs) wished to take any steps to protect their interests in this matter.

The attachment had issued on the 17th Aug. 1874 out of the Lord Mayor's Court on behalf of Moses, Levy, and Co. in an action which they had commenced against Eloy, Alfaro, and Co.

On the 20th Aug. 1874 the plaintiffs entered an action against the said Yldefonso Alfaro as holders of the said bills for 600l. and 500l. respectively.

On Aug. 21st F. M. Schwarz sold a portion of the coffee, and the plaintiffs applied to him to pay the said bills out of the proceeds of sale. But Schwarz refused to do so, on the ground of the attachment. The original bill was filed 24th Aug. 1874, and shortly afterwards the defendant, F. M. Schwarz, sold the rest of the coffee, and under an order of the court paid the proceeds of the sale into court, amounting to 3692l. 12s.

The plaintiffs claimed that the coffee was specifically appropriated to meet the said bills of exchange, and that the proceeds of the sale might be paid to them and to the other holders of the

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bills proportionally, and that the defendants, Moses, Levy, and Co., might be restrained from prosecuting their action in the Lord Mayor's Court.

By the answer of Moses, Levy, and Co., it appeared that they had had large dealings with Eloy, Alfaro, and Co., and that the latter firm were very heavily in their debt. A long correspondence between the two firms was set out. It appeared that Eloy, Alfaro, and Co. had promised to send 2000 bags of coffee to Moses, Levy, and Co., in part payment of the balance owing.

In a letter from Eloy, Alfaro, and Co. to Moses, Levy, and Co., dated 4th April 1874, the following passage occurs: "We confirm your last of the 20th March. Mr. Yldefonso Alfaro writes advising us that he has already commenced his shipments of coffee of which we have spoken to you, and that in all the present month he will have sent you the whole of the 2000 bags promised by us.

With the drafts which Mr. Yldefonso Alfaro may draw on you against B/L coffee, we expect that the credit with you will be arranged (or settled) in taking care to make our remittances also in bills, so that they may arrive in time for the due dates by which our banking account with you will be terminated." And on the 15th May 1874, Moses, Levy, and Co. wrote to Yldefonso Alfaro in answer to his letter of the 15th April above set out a letter, in which they said: "We have received some B/L of small lots of coffee per the steamer just arrived, which, as per advice from the friends Eloy, Alfaro, and Co., of Panama, are part of 2000 bags which they promised you would send us for the account of themselves." Their case, therefore, was that the 808 bags of coffee were part of the 2000 bags promised by Eloy, Alfaro, and Co., and that Yldefonso Alfaro was the agent of Yldefonso Alfaro. They denied that the billholders had any lien on the proceeds of the coffee, and that even if the coffee belonged in part to Yldefonso Alfaro, it belonged in part also to Eloy, Alfaro, and Co., who were admitted to be entitled to a share in its proceeds, and they claimed to be entitled to at least an equivalent share in the proceeds of the sale thereof.

Dickinson, Q.C. and *Rawlins* for the plaintiffs.—The real question is this. A fund has been brought into court which the plaintiffs claim as the holders of the bills, to which the goods of which the fund in court is the proceeds was appropriated. Now the coffee was Yldefonso's coffee. He consigned it to Moses, Levy, and Co., for them to take it for him. They were to credit him with the proceeds of the coffee, and they were to debit him with the bills. There was no other transaction between them. Eloy, Alfaro, and Co. had no interest in the cargo. Yldefonso Alfaro cannot be affected by the representations of Eloy, Alfaro, and Co. This was simply a debtor and creditor account between Yldefonso Alfaro and Moses, Levy, and Co. created for the first and only time. The coffee was to cover the bills, and was specifically appropriated to the bills, a balance to be struck. It makes no difference that Eloy, Alfaro, and Co. were to share in that balance. The coffee was the sole property of Yldefonso Alfaro, and Eloy, Alfaro, and Co. had no share in it though they had in the proceeds. But they claim the actual coffee itself. Now, two facts are clear, and the deduction of law from those facts is equally clear. First, the fact, established by undisputed evidence, that the coffee

never was the property of Eloy, Alfaro, and Co.; secondly, that Yldefonso Alfaro was not the agent of Eloy, Alfaro, and Co., and, thirdly, that by law an interest in the profits arising from the sale of goods is not an interest in the goods themselves. This is fully established. The most recent case is *Alfaro v. De la Torre* (34 L. T. Rep. N.S. 122) where it is laid down that where a person ships goods on the "half joint" account as it is called, that is, that another person is to share in half the profits, that interest in the profits gives that other person no property in the goods. We should have been paid in due course, but for the proceedings in the Lord Mayor's Court, but we could only interfere with the proceeds by coming here. Besides, Schwarz had authority to appropriate the goods or to make an equitable assignment of them.

Hastings, Q.C. and *Romer*, for the defendants Yldefonso Alfaro, and Schwarz.

Robinson, Q.C. and *A. Young* for the defendants Moses, Levy, and Co.

The case is completely covered by *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (L. Rep. 6 H. L. 353). To establish the plaintiffs' bill there must be a clear case of appropriation of the goods to meet the bills. If there was such appropriation, it was made by Schwarz, and is stated in the 12th, 13th, and 14th paragraphs of the bill. It cannot be contended that Schwarz's memorandum amounted to a specific appropriation. There is a statement that the coffee was sent against the bills drawn, but that does not constitute specific appropriation. The latest case on this subject is *Hobey and Co.'s Perseverance Iron Works v. Ollier* (L. Rep. 7 Ch. Ap. 695; 27 L. T. Rep. N.S. 362) which was a case of actual bills of lading sent against bills of exchange, and it was held that there was no specific appropriation. The bill in that case was founded upon *Frith v. Forbes* (4 De G. F. & J. 409; 6 L. T. Rep. N.S. 847). Now, there was no authority given to Schwarz to make such an appropriation or an equitable assignment; Yldefonso's letter to Schwarz certainly gives no such authority. See also *Thomson v. Simpson* (L. Rep. 5 Ch. 659); *Everett v. Williams* (14 East, 582). On both grounds the plaintiffs' bill is misconceived. The plaintiffs had no claim either on the ground of specific appropriation or on this afterthought of Schwarz's authority which is not suggested in the bill.

Dickinson in reply.—In *Thomson v. Simpson* the question simply was, did the conversation between the two bank managers amount to an appropriation? In that case there was a mere representation, a truthful statement of what was in fact the ordinary course of business between the Liverpool and the New Orleans Bank. The element was wanting which is present in this case of a direction to apply the money to the particular bill. There was no direction to the person in whose hands the funds were to apply them to meet the particular bills. It was not the case of a direction, with the number, date, and amount of the bills given, to appropriate them to goods equally well ascertained. In *Hobey v. Ollier* it was held that there was no specific appropriation, because it simply amounted to this, "Out of my moneys pay my drafts." There were two circumstances which Lord Justice James said distinguished *Hobey v. Ollier* from *Frith v. Forbes*. In *Frith v. Forbes*

the person who gave the directions was sole owner of the goods; so he was here. In *Robey v. Ollier* he was not. Secondly, in *Frith v. Forbes*, as here, the proceeds were to be applied to specified bills. *Frith v. Forbes* is still good law and completely covers this case.

HALL, V.C.—The argument of Mr. Robinson supplemented by what Mr. Dickinson has said, and the references which have been made to the authorities lead me to the conclusion that the plaintiffs' bill cannot be maintained. This case not being altogether identical with *Frith v. Forbes* must be taken to fall within the principle of *Robey v. Ollier*. In *Frith v. Forbes* there was one feature to which both the Lords Justices adverted, and on which Lord Justice Turner relied, viz., that on the face of the bills (or at least of two of them) it was shown that they were expressly drawn against the proceeds of the cargo. That circumstance does not exist in the present case. In *Robey v. Ollier* the Lord Justice James was not prepared to hold that the mere circumstance of a bill of exchange purporting to be drawn against a particular cargo, makes it carry a lien on that cargo into the hands of every holder of the bill. "In *Frith v. Forbes*" the Lord Justice said, "there were grounds for saying that the intention was to give Frith, Sands and Co. an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of Frith, Sands, and Co. Here the reference is only to bills, which the consignor had drawn to his own order, not mentioning any third parties." Lord Justice Mellish does not even advert to this last circumstance. It seems that in the first letter dated the 15th April 1874, which was a letter of advice to Moses, Levy, and Co., there is mention made of bills drawn on them on the same terms as heretofore, mentioning the names of the bills as in *Frith v. Forbes*, but not mentioning the additional ingredient which was found in that case. Here we have not got the two ingredients which existed in *Frith v. Forbes*. We have not the additional ingredient of a bill on the face of it showing that it is drawn on account of a particular cargo. It seems to me, therefore, having regard to the absence of this feature in this case, that I cannot hold that there was an appropriation of the proceeds of the cargoes in favour of the persons in whose favour the bills were drawn, either in virtue of the bills being drawn in their favour or by the instructions given to the original consignees or by these two circumstances taken together. The case, therefore, as regards appropriation as originally constituted seems to me not to be established. But the case does not remain there. This took place: Moses, Levy, and Co. refused to have anything to do with the transaction. The bills were covered, and Moses, Levy, and Co. did not accept. It was their business, therefore, to give up the cargoes. The consignor instructs fresh parties to act as he had instructed Moses, Levy, and Co. to act, viz., Schwarz, who undertook the same duties as Moses, Levy and Co. had undertaken. They were in the same position, and there was no appropriation of the proceeds any more than there had been in the former case. The bills having been presented, were dishonoured and protested. They were then held by the plaintiffs until they became due, i.e., on the 15th Aug. 1874. Moses, Levy, and Co. furnished Schwarz with a list of the persons in whose favour the bills

were drawn, and the holders of the bills. Schwarz writes, on the 14th Aug. 1874, to the plaintiffs, and gives them particulars of the two bills which the plaintiffs now hold and which are set out in the 12th paragraph of the bill. The memorandum is as follows: [His Lordship read the memorandum set out above.] There is no engagement in this to do anything with the proceeds of the cargo. He says he has not got the warrants from Moses, Levy, and Co., but that he expects to get them in the following week. Then he promises to write again on the subject. He writes again on the 17th Aug., having received the delivery warrants, and the memorandum which he sends is this. [His Lordship read it as above.] The plaintiffs, as holders of the two bills, had no conversation with the defendants as to what the instructions of the consignors were with reference to the proceeds. All that Schwarz says is, that he shall get certain warrants early in the next week, and will then write again; then when the warrants have come he says he shall dispose of the same as instructed by the sender. There is no representation that those proceeds were to be applied to one bill rather than to another, or as to any particular order in favour of one person rather than of another. It seems to me that there is no representation at all; at all events, the proceeds would be applied wholly or partially to taking up the bills. If it has any other meaning it amounts to this. "I am the person representing the owner of the goods, the drawer of the bills. I hand the bills to you. There are certain warrants which I shall receive, and I shall then be in funds." It appears to me to be simply the representation or contract of a man saying: "There are certain bills of mine becoming due. I am going to realise certain things, and then I shall be in funds to meet them." But there is nothing in the nature of an assignment or charge on the bills. It amounts to this: "It is only by realising this property that I shall be in a position to make arrangements. At all events, I shall wait for instructions." Those instructions amount to this—that he is to take up the bills out of the proceeds of the cargo. There is no representation that such original instructions were ever given to Moses and Co. or in like manner to their substitute Schwarz; there is not enough to amount in the original or in the second instructions to an assignment of a rateable share of the proceeds of the coffee to take up the bills. The plaintiffs' case, therefore, fails on these grounds, independently of what was argued by Mr. Robinson—viz. that it does not appear on the plaintiffs' case that the principal debtor, the consignor, gave to Schwarz authority to make an equitable assignment to any particular creditor or bondholder. There is that additional difficulty in the plaintiffs' way. The plaintiffs' bill, therefore, is not sustainable; and as it has been proposed to sustain it by Yldefonso Alfaro, the consignor and owner of the goods, appearing and saying that he does not dispute the plaintiffs' claims, but that there is another question with reference to Moses, Levy, and Co., and that they ought to pay the costs—in these circumstances I say that the plaintiffs, not having made out their case, their bill must be dismissed with costs, with the exception of the costs of Yldefonso Alfaro who has supported the plaintiffs' case.

Solicitors: Kynaston and Gasquet; Murray, Hutchins, and Co.; Hollams, Son, and Coward.

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SILKSTONE AND DODSWORTH COAL AND IRON CO. v. JOINT-STOCK COAL CO.

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EXCHEQUER DIVISION.

(Before KELLY, C.B. and CLEASBY, B.)

Wednesday, Nov. 22, 1876.

THE SILKSTONE AND DODSWORTH COAL AND IRON COMPANY (LIMITED) v. THE JOINT STOCK COAL COMPANY (LIMITED). (a)

Vendor and purchaser—Colliery owner and coal dealer—Contract for sale and purchase of coal at per ton, to be delivered in equal monthly quantities at pit's mouth—Breach of contract by defendants failing to take the coal—Measure of damages—How to be calculated—Plaintiffs not bound to raise and sell the coal not taken by defendants—Allowance for value of coal remaining unraised.

The plaintiff company, colliery owners, contracted to supply, and the defendant company, dealers in coal, in London, contracted to purchase, 3250 tons of old Silkstone coal, at 19s. a ton, to be delivered to and taken by the defendants at the pit's mouth in equal monthly quantities, extending over a period of nine months. During several of the months the defendants failed to send waggons forward to accept the full quantity they were bound to accept, and which the plaintiffs were ready and willing to supply in such months, and the defendants therein made default. The coal of the plaintiffs' colliery is a perishable coal, deteriorating rapidly in quality if stacked or stored above ground, and it is not the ordinary course of business, nor a reasonable course for the colliery owner, to raise such coal, except to supply contracts previously entered into, and it is raised as far as possible from day to day to supply the waggons arriving to receive it, into which it is delivered direct from the pit's mouth. Such coal already raised could be, and frequently is, sold in small quantities in the London Coal Exchange by colliery owners, when a truck of coal has been refused by a customer, or has been sent astray, or when from any other reason coals ready raised are left on their hands, but not otherwise.

An action was brought by the plaintiffs to recover damages from the defendants for breach of contract in failing to take the full monthly quantity of coals.

Held (by Kelly, C.B. and Cleasby, B.), that the amount of damages the plaintiffs were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine (whatever those two heads of calculation may amount to) and the contract price of 19s. a ton, and that such amount could be accurately calculated and ascertained by persons familiar with the subject, without actually raising and selling the coal which, being of a perishable nature, was not readily or profitably to be so disposed of, and that the plaintiffs were not bound to have so raised and sold it.

CASE stated by an arbitrator.

1. The plaintiffs are a Joint Stock Company carrying on business as colliery owners, and they are the proprietors of collieries of Silkstone coal in the county of York.

2. The defendants are a Joint Stock Company carrying on business in London as dealers in coal.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

3. On the 7th June 1873, the plaintiffs' manager wrote and sent the following letter to the defendants:—

795.

Memorandum.

The Silkstone and Dodsworth Coal and Iron Company (Limited).

From Alfred H. New, 3, Adelaide-place, London Bridge, E.C.,

To Messrs. Joint Stock Coal Co., 115, Chancery-lane, W.C., 7th June 1873.

Gentlemen,—I telegraphed to your Mr. Matthews at Chatham on the 6th, that we could supply you with 3250 tons of Real Old Silkstone coal, delivered in equal monthly quantities from this date to 31st March 1874, at the price of 19s. per ton pit, which I now confirm; provided that, in the event of the pits being stopped by accidents or strikes or turn outs of the men, the said contract shall be in abeyance during the said stoppage. Terms: Monthly account payable by end of month following the consignment of the coal.—Yours truly,

ALF. H. NEW.

4. On the 25th June 1873, the defendants' manager wrote and sent in reply the following letter to the plaintiffs' manager:—

796

Joint Stock Coal Company (Limited),

Chief Office, 115, Chancery-lane, London, W.C., 25th June 1873.

All communications must be addressed to the manager at the chief office of the company. My directors at the board yesterday agreed to accept your offer of Stamp 7th June of 3250 tons of Real Old Silkstone 26/6/73 coal, 21 cwt. to the ton, at 19s. per ton to be taken in equal monthly quantities from 1st July 1873 to March 1874.—I am, yours truly,

A. H. NEW, Esq.

F. A. NEW, Manager.

The terms of the last-mentioned letter were accepted by the plaintiffs, and coals were delivered by the plaintiffs and received by the defendants on the terms of the said letter.

5. During several months between the 1st July 1873 and the 31st March 1874, the defendants failed to send waggons for and to accept the full quantity of coals which, under their contract hereinbefore mentioned, they were bound to accept from the plaintiffs in such months respectively and which the plaintiffs were ready and willing to supply, and the defendants therein made default.

6. Silkstone coal, such as that of the plaintiffs' collieries, is a perishable coal which rapidly deteriorates in quality if stacked or otherwise stored above ground. It is not the ordinary course of business, nor would it be a reasonable course on the part of a colliery owner, to raise such coal except to supply contracts previously entered into. It is raised as far as possible from day to day in such quantities as to supply the waggons which arrive to receive it, and is delivered direct from the pit's mouth into the waggons.

7. Such coal already raised could be sold on the London Coal Exchange, and it is frequently so sold in small quantities by colliery owners, when a truck of coal has been refused by a customer or been sent astray or when, for any other reason, coals ready raised are left on their hands, but not otherwise.

8. The court may draw inferences of fact.

9. It was contended, on the part of the plaintiffs, before the arbitrator, that the plaintiffs are entitled to recover as damages the net profits that they would have made on the coals which ought to have been and were not accepted by the defendants, after making allowance for all cost of raising and for the advantage to the plaintiffs of having the coal still unraised in their pits.

10. It was contended on behalf of the defen-

dants, that the plaintiffs ought to have raised the coals which the defendants failed to take, and to have sold them as raised coal, which they did not in fact do, and that the measure of damage was the difference between the prices for which they could so have been sold as raised coal and the contract price.

The question for the opinion of the court is, upon what principle the damages are to be assessed to which the plaintiffs are entitled in respect of the defendants' failure to accept the contract quantity of coal in those months in which such default was made.

Points for argument on behalf of the plaintiffs:

1. The true measure of damages for non-acceptance is such a sum as will place the vendor in such a position as if the vendee had performed his contract.

2. Ordinarily speaking, that amount is the contract price of the goods less the value they bear in the hands of the vendor, which may be nothing, or any amount up to the contract price.

3. If the vendor sells, the damages are then measured and ascertained, and will be the difference between the contract price and the sale price of the goods upon a proper sale; but he is not bound to sell, and then the damages must be ascertained according to the above rule.

4. The only obligation on the vendor is to behave honestly and fairly towards the vendee with a view to reduce and not to inflame the damages, and though that generally involves the sale of the goods contracted for, yet there is no general obligation to sell.

5. In endeavouring to reduce the damages the vendor is not bound in consequence of the vendee's breach of contract to incur risk or loss to himself.

6. Upon the facts stated in this case the plaintiffs behaved reasonably within the above rules, and were not bound to raise and sell the coal as suggested, and to have done so might and probably would have increased the damages, and not reduced them, and would have been unfair to the defendants, as it is found that the fair value of the coal could not be obtained under the circumstances.

7. The measure of damages contended for by the plaintiffs represents their actual loss.

8. The measure of damages contended for by the defendants would impose on the plaintiffs new obligations which might impede their business and cause greater loss than that sustained by the original breach of contract.

C. Russell, Q.C. (with him were W. G. Harrison and Arbuthnot) for the plaintiffs.—It is not disputed on the part of the plaintiffs, that ordinarily the measure of damages, in a breach of contract for sale and delivery of goods, is the amount of the difference between the contract price of the goods and their market price at the time when the breach occurred. But here the coal was not to be purchased or raised until the defendants' waggons were at the pit's mouth ready to receive it, and from its nature, as found by the case, there was no market for it as raised coal, except occasionally in very small quantities, and the defendants' contention that the plaintiffs were bound to have raised the coal and sold it, and that the measure of damages is the difference between the price for which it could so have been sold and the contract price, falls therefore to the ground. A vendor, under such circumstances, is not bound to

sell, and had the plaintiffs done so here the result would have been to have increased rather than to have lessened the damages payable by the defendants. The ordinary rule cannot, it is submitted, apply to an article not *in esse* at the time of the breach. The defendants may say perhaps that the plaintiffs should have made forward contracts, but it may be doubted whether that would have been a reasonable or possible course to adopt, and had they been able to do so, it would have entailed upon them the necessity of raising a double quantity of coal each month in order to be ready to supply their present contract as well as such forward contracts. The defendants being in default have no right to impose such an unreasonable burden on the plaintiffs. The proper damages are those contended for by the plaintiffs in paragraph 9 of the special case.

E. T. Holland (with him was Cohen, Q.C.) for the defendants *contra*.—There is a market price with regard to coal thrown on the plaintiffs' hands, and being bound to do their best for both parties they should have taken what they could into the market. There was a ready market for some part, and a contract market for the rest. "Market price" need not be market price for raised coal, but the contract price which the plaintiffs could and ought to have obtained. The advantage to the plaintiffs of having the coal in the mine means either the price for which the coal could be sold at the time of the breach either in open market or by contract, which is the same principle as the defendants contend for, or it means the benefit accruing from having the coal in the mine with reference to circumstances then affecting the plaintiffs, in which case the advantage is uncertain, depending on special circumstances peculiar to the plaintiffs, as on the nature and extent of their contracts, and on their title to the mine, whether freehold or leasehold, &c. If the plaintiffs seek to draw such special circumstances into the case it must be observed that they were not in the minds or contemplation of the parties when the contract was entered into, and if they are excluded it is difficult to see the difference between the two contentions on the one side and the other. Even if the plaintiffs were not bound to have raised the coal, it is submitted that the measure of damages is as if the coal had been raised. [KELLY, C.B.—The raising the coal would, it rather seems, have been a losing proceeding.] The loss would have fallen on the defendants. The proper measure of damage is the difference between the contract and the market price, wherever there is a market for the article in question, and the damage must be assessed as at the price of the article in the market at the moment of the breach. The rule is laid down in *Barrow v. Arnaud* in the Exchequer Chamber, in error from the Queen's Bench, 8 Q. B. 604, by Tindal, C.J., in delivering the considered judgment of the Exchequer Chamber as follows: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So if a contract to accept and pay for goods is broken the same rule may properly be applied,

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for the seller may take his goods into the market and obtain the current price for them" (8 Q. B. pp. 609, 610). Many other subsequent cases lay down the same rule. (See also *Benjamin on Sales*, 2nd edit., pp. 617, 618).

C. Russell, Q.C. in reply.—The advantage to the plaintiffs is the amount of profit to them at the end of each month. I admit that at the end of each month, when the purchasers made default, the sellers were bound to act reasonably; but what would or not be reasonable conduct must depend on a variety of circumstances. It would, I contend, be quite unreasonable that where a purchaser, as here, had made default at the end of any one month, the seller should be called upon to undertake to raise a double quantity of coal in the following month, especially when it is found in the case that there was no certain or regular market for the sale of it.

KELLY, C.B.—I think that there really is no great difficulty in this case, when the facts of it are carefully considered. The question is, what have the plaintiffs lost by the non-performance on the part of the defendants of the contract which had been entered into between them and the plaintiffs. Now, in order to ascertain what the plaintiffs have so lost, we must first consider what they would have received had the contract been duly performed. Let us take, for example, any single month, at the end of which there has been a breach of the contract, and when the defendants ought to have had their waggons ready at the pits' mouth to receive the coal, and when if the waggons had been there, the coal would have been delivered by the plaintiffs and paid for by the defendants. Now the contract was for the delivery of 361 tons a month at 19s. a ton, so that at the end of the month the plaintiffs ought to, and, but for the defendants' default would, have received from the defendants the sum of 3421. 19s., the contract price of the 361 tons. But then, in order to receive that sum, the plaintiffs must have raised and had the coal at the pit's mouth ready to be delivered, and must have delivered it. Now it is alleged by them that they were ready and willing to deliver. The question then is, supposing they had done all which it is said they were ready and willing to do, namely, that they had had the coal ready and had delivered it, what would have been the net profit which they would have derived from this payment of 3421. 19s.? In order to deliver the coal they must have first incurred certain expenses for labour, and for wear and tear of machinery, and for a number of other matters which I need not enumerate, in raising it. Let us suppose, then, that their expenditure in raising the coal would be altogether 10s. a ton, what more would they have expended, or lost, or parted with? Why they would have taken out of their coal mine 361 tons of coal, and consequently would have been possessed of that quantity of coal less than would have been the case if the coal had remained unraised in the mine. What then is the value of that? In other words, what, in addition to the actual working cost of raising the coal, is the owner or lessee of the mine the worse for the taking away from the mine 361 tons out of the, it may be, two or three millions of tons of coal which he might, perhaps, be able to raise during the period of his lease; or, if it be his own mine in perpetuity, out of whatever may be the entire

capacity of the mine? Now mine owners and persons acquainted with the working of collieries and with the coal trade and the sale of coals at the pit's mouth could, doubtless, without difficulty calculate and ascertain correctly to a fraction what that would be. Such persons would be familiar with and able to specify the figures exactly. I will, however, as a mere speculation, assume that it would be 5s. a ton. Supposing then the plaintiffs' pecuniary expenditure in raising the coal to be 10s. a ton, and the value of the coal in the mine to be 5s. a ton, that would amount to 15s. a ton, by which sum plaintiffs would be the worse upon the supply of the coals; but as they would and ought to have received 19s. a ton on delivery under the contract, 4s. a ton is the amount by which they would be the worse by reason of the defendants' default, and which, therefore, they would be entitled to recover. Now, what is the contention of the defendants? It is contended on their behalf "that the plaintiffs ought to have raised the coals which the defendants failed to take, and to have sold them as raised coals, which they did not in fact do, and that the proper measure of damage is the difference between the price at which they could so have been sold as raised coal and the contract price." But, if the plaintiffs "ought to have raised the coal," then they must also have entered into contracts with other persons to exactly the same effect as the present contract with the defendants. The consequence of which would have been, as pointed out by Mr. Russell, that they must have raised double the quantity of coal every month in order to have had enough ready to supply the defendants under the present contract and the other contracting parties under the other contracts. Supposing, however, this had not been done (as it was not), what other course could have been resorted to? Why this: in the first place they would have to go through the entire calculation to which I have already alluded—namely, what would be the amount of the expenditure incurred in raising the coal, which again I will take to be 10s. a ton; and then, what would be the value of the coal when raised and brought to the pit's mouth, which, as before stated, I will take to be 5s. a ton. Then these two items being agreed to as amounting to 15s. a ton, this further question comes, that is to say, supposing the plaintiffs to have had 361 tons of coal lying at the pit's mouth on a certain day in any given month, how much could they have sold that coal for in the market? That is an inquiry which we have no means of satisfactorily answering or settling. It may be that the coals might have been sold for 19s. a ton, or possibly, but not very probably, even for more than that, but on the other hand it may also be that, owing to a deterioration in its value having taken place, or to other circumstances, the coal might not have realised on a sale more than 9s. or 10s. a ton. All that is a fair matter of speculation. Now it appears most clearly from the case that, if the plaintiffs had raised the coal, and brought it to the pit's mouth and endeavoured to sell it, the result of such a proceeding would have been a deterioration of the coal from day to day until a purchaser could have been found for it; and that even if one had been found it would have been very uncertain whether the price that would have been obtained would have been equal to that which the defendants had contracted to pay. Indeed, everything tends

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rather to show the contrary. That being so I confess I do not see why we are to say that the plaintiffs ought to have adopted that course. The case expressly finds that it is only by entering into a contract, or contracts, such as the present one, that a colliery of this description can be profitably worked. If, therefore, that be so, it would have been far less profitable if the coal had been raised, and the plaintiffs had afterwards had to find a purchaser for it in the ordinary market. Under these circumstances it appears to me to be that we have only to consider what is the amount of profit that the plaintiffs would have gained by the defendants performing their contract. They would undoubtedly have gained the difference between the amount of their expenditure in raising the coal, added to the value of the coal itself, had it remained unraised and unsold in the mine (whatever these two heads of calculation may amount to per ton) and the contract price of 19s. per ton, which they would have received for the coals had the contract been duly performed, and that difference is the sum which the plaintiffs are entitled to recover.

OLMSTEAD, B.—I am of the same opinion. There is, I think, no difficulty in this case except that which may arise from not attending to what is really the nature of the contract between the parties. This is not the ordinary case of a contract between two merchants dealing in coals on the one hand and purchasers on the other, where there is a market into which persons can go and buy coals for the purpose of selling them again. In such a case on a breach of the contract the two important figures to be considered are, the contract price and the market price at the time when the contract is broken which ought to have been performed. The present is a contract between the plaintiff company, who are coal mine owners, and the defendant company, who are coal merchants. The defendants by the contract say to the plaintiffs, "We will give you 19s. a ton for so much coal delivered to us at the pit's mouth," and under and by virtue of that contract the plaintiffs became entitled to the profit which the price of 19s. a ton, for coal so delivered by them to the defendants, represented to them. The plaintiffs carry on their business for the purpose of profit on the raising and delivering their coal at the pit's mouth in this manner, and are entitled to claim the profit to which the present contract gives them a title. But then it is said, on the part of the defendants, that, in order to ascertain what that profit amounts to, certain things must be first done, and it is that proposition of the defendants' to which I cannot at all see my way. If it could be shown that the amount of profit could not be ascertained in any possible manner without doing those things, that would be a different matter; but I confess I do not see why the benefit of this contract, or, in other words, the amount of profit to be derived by the plaintiffs after bringing the coal to the pit's mouth and delivering it there to the defendants at 19s. a ton, cannot be arrived at without actually raising and selling the coal. If it were a case in which the exact value of the coal at the pit's mouth could not be ascertained without going through the process of raising and sending it for sale, it might be very reasonable to adopt that course, and then take the difference between the contract price of 19s. a ton, and the value of the coal as realised by the sale of

it at the time the contract was to be performed. But there is no doubt that minerals of this sort are capable of valuation as they lie unraised in the mine. First, it must be ascertained what the actual expense of raising the coal would be, and next, what is the advantage or benefit accruing to the coal owner by reason of its remaining still unraised in the mine; and these two items being ascertained, the amount of profit to which the plaintiffs became entitled by virtue of this contract, under which they were to receive 19s. a ton for coal delivered at the pit's mouth, can be legitimately and regularly ascertained in the way proposed by my Lord, without the necessity of doing that which would probably be injurious to the plaintiffs and the defendants, namely, bringing to the surface these coals which are of a perishable nature, and obviously not very readily or profitably to be disposed of in large quantities in the ordinary coal markets. When the nature of the contract is attended to, it really seems to me that there is not much, if any, difficulty in seeing what the plaintiffs are entitled to, and how the amount is to be ascertained.

KELLY, C.B.—The judgment will be for the plaintiffs, and that the mode of estimating the damages or the principle upon which they are to be assessed, is to be as contended for by the plaintiffs.

Judgment for the plaintiffs accordingly.

Solicitors for the plaintiffs, *Hewitt and Alexander.*

Solicitors for the defendants, *John Turner and Sons.*

Nov. 28 and 29, 1876.

BAKER AND OTHERS v. OAKES.(a)

Costs—Application made after trial to judge at chambers—Jurisdiction—Judicature Act, Order LV.

Where no application as to costs has been made to the judge at the trial, neither that judge nor any judge at chambers has jurisdiction under Order LV. to make an order as to costs upon application made after the trial, even where fresh facts have come to light since the action was tried.

APPEAL from an order of Huddleston, B. made at chambers three months after the trial of the action that plaintiff do pay his own costs of suit subsequent to the payment into court by the defendant.

The action was brought on the common *indebitatus* counts to recover three sums of 61*l.*, 6*l.*, and 60*l.* The defendants, as to the claim for 61*l.*, paid it into court with interest, and as to the residue they pleaded never indebted. At the trial, before Huddleston, B. and a jury at the Summer Assizes, 1876 the plaintiff failed to prove his claim of 60*l.*, but gained a verdict for 4*l.* 6*s.*, being part of the claim of 6*l.*, this amount consisting of two items, one of 2*l.* 7*s.*, the price of certain seed, the other of 3*s.* for superintending the sowing of seed and manure. The verdict was accordingly entered for the plaintiff for that amount beyond what had been paid into court, but no application was made at the trial as to costs.

Some days after the trial the plaintiffs discovered that the sum of 2*l.* 7*s.* had actually been received by them before action brought, and

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wrote to the defendants, stating that the evidence at the trial on that head was not correct, and acknowledging that the verdict for that amount was wrong. The defendants, therefore, took out a summons to stay execution till the 4th Nov., in order that they might apply for a new trial on the ground of surprise, of mistake, and unintentional misconduct on the part of the plaintiff's witnesses. Huddleston, B., stayed execution accordingly, and in November the application for a new trial was heard, and refused on the ground of the smallness of the amount in dispute. The court, however, at the same time, pointed out that it was substantially a question of costs, and that the remedy seemed rather to be to make an application to vary the incidence of costs under Order LV. of the Judicature Act.

A summons was accordingly taken out at chambers, and referred thence to Huddleston, B., to show cause why the plaintiff should not bear his own costs of suit subsequent to defendant's payment into court.

Huddleston, B., made the order as prayed for, at the same time giving the plaintiff leave to appeal on the question of his jurisdiction to make such order.

Geary, for the plaintiffs, now moved to set aside that order.—The question is whether the judge can, three months after the trial, make an order depriving the successful party of his costs under Order LV. of the Judicature Act. That order says: "Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the court shall otherwise order." It is clear from this that no one has power to make this order except the judge at the trial. [He was stopped by the court.]

Fullarton, in support of the order.—Huddleston, B., had jurisdiction to make this order. The words "upon application made at the trial" are directory only, and intended to conclude the applicants, but not to conclude the court, and the judge had power under Order LVII., rule 6, to enlarge the time for making this application, even though such enlargement was not asked for at the trial. But, again, the words of Order LV. are "unless upon application made at the trial, the judge before whom such action was tried or the court shall otherwise order." The words "at the trial," therefore, cannot apply where the application is made not to the judge who tried the case as such, but to the court. The words "the court" must mean the High Court of Justice acting by such of its members sitting at such place as is provided for the hearing of applications as to costs, who, under the Judicature Act 1873, sect. 39, and Order LIV., rule 2, must be the sitting judge at chambers. Huddleston, B., for this purpose must be taken not to be the judge before whom the cause was tried, but the sitting judge at chambers. As such he came within the words "the court," and so had jurisdiction to make the order. But, again, he had jurisdiction under Order XLII., rule 22, the ground of the application having arisen or come to the defendant's knowledge after the trial of the action.

Kelly, C.B.—This is an application to discharge an order made by Huddleston, B. at chambers, the order being as follows: "That the plaintiff pay his own costs of suit subsequent to the pay-

ment into court by the defendant." The question is whether the learned Baron had jurisdiction to make this order, and that depends entirely on the language of Order LV. of the Judicature Act. That Order begins as follows: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; provided that where any action or issue is tried by a jury, the costs shall follow the event." Now the present case is expressly within this proviso. The action was tried in Feb., and the jury found a verdict for the plaintiff, which verdict has not been set aside and still stands. That being so the plaintiff is within the provisions of Order LV., that "the costs shall follow the event," and within that proviso would be entitled to his costs. But then the provision proceeds to enact, "Unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court shall otherwise order." In this case no application was in fact made at the trial, and, consequently, the judge at the trial made no order depriving the plaintiff of the right which he had by the early part of the section become entitled to. No order having been made at the trial, the question therefore arises whether such an order can under any other circumstances be made by a judge who tried the case, or by any other judge. The Act is clear and precise to the effect that unless such order was made at the trial the plaintiff shall be entitled to his costs; and I am clearly of opinion that under this order no judge at chambers has jurisdiction to make such an order, and that Huddleston, B. had, therefore, no jurisdiction, either as the judge who tried the case or as a judge sitting at chambers.

Cleasby, B.—I am of the same opinion. The first question is whether the judge, three months after the trial, could make this order, and so vary the law that costs shall follow the event. The words are, "the costs shall follow the event, unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court shall otherwise order." Now that order says that the application must be made at the trial. The reason of this is obvious, that the judge who tried the case is well acquainted with the facts, and if the application were not made at the trial it would be extremely inconvenient. That being so the express rule in the Act, founded on obvious reason, must not be departed from. I do not think that Order LVII., r. 6, applies. The counsel for the defendant contended that that rule gives power to a judge to enlarge the time for making the application. But I cannot agree to that. That rule can apply only to a case where the Act has decided that something is to be done within a certain time, and the judge can enlarge the time by giving ten days instead of eight, or any other time; but it was not intended to apply here, where the Act expressly declares that the application must be made at the trial, and "for good cause shown;" that is for good cause existing then. These circumstances arose afterwards, therefore this application could not have been made then. Then the learned counsel relied on this, which is the only ground he could properly take, viz., that in the alternative the application may be made to the court, the words of the order being "the judge before whom such action is tried or the court shall otherwise

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der." There is no doubt that for some good reason the power of the court over costs in every case is reserved, and the counsel argued from that fact therefore it follows that the power can be exercised by a judge at Chambers. I will not stop to say whether the court can act on this order, but in cases must be very exceptional ones. I think it would be absurd to give the construction to this order contended for, that the words "or the court" mean "or any other judge shall otherwise order." That cannot be the meaning. Order LII., r. 22, has no application.

Solicitors for plaintiffs, *Abbott and Co.*Solicitors for defendant, *Hewitt and Alexander.*

ERRATUM.—In the case of *Bullock v. Dunlap* (Ex. Div.), ante 655, col. 2, line 7 from bottom, for "Act" read "action."

COURT OF BANKRUPTCY.

(Before the CHIEF JUDGE.)

Monday, Nov. 20, 1876.

Ex parte NATIONAL PROVINCIAL BANK; *Re* BOUTLER. (a)

Equitable mortgage—Misdescription in schedule—Rectification—Evidence, Admissibility of—Statute of Frauds.

A., by deed, charged "the premises mentioned in the schedule at the foot hereof" as security for advances made to him by his bankers; the schedule to the deed referred to leaseholds held under a lease dated the 25th Sept. 1874, and made between the parties named therein. The reference to the lease was an error, the intention being to charge property held under a lease dated the 31st Dec. 1874, and made between the same persons as were parties to the lease of the 25th Sept. 1874. Upon the bankruptcy of *A.*, his trustee disputed the validity of the charge.

A. held, that parol evidence was admissible to show what property was intended to be included as the subject of the charge.

And prior to 1875, William Henry Boulter, of Bridgend, in the county of Glamorgan, Builder, became engaged in large building transactions, and was entitled to the following property:—

(a) One house in Coity-road, held for a term of ninety-nine years, under lease from Henry Lewis, dated the 25th Sept. 1874, and mortgaged to the Maesteg Benefit Building Society, by deed dated the 3rd Oct. 1874. The equity of redemption was assigned by Boulter to R. Lewis on the 27th Jan. 1875.

(b) Two houses in Meadow-street, held for a term of ninety-nine years, under lease from Henry Lewis, dated the 31st Dec. 1874, and mortgaged to the Maesteg Benefit Building Society, by deed dated the 2nd Jan. 1875.

(c) Two houses in Coity-road, held for a term of ninety-nine years, under lease from Henry Lewis, dated the 31st Dec. 1874, and mortgaged to the Maesteg Benefit Building Society by deed dated the 14th Jan. 1875.

(d) Thirteen houses in Quarella-road, held for a term of ninety-nine years, under lease from Messrs. Williams and others, dated the 1st May 1875, and mortgaged to the Maesteg Benefit Building Society, by deed dated the 15th May 1875.

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

(e) One house in Coity-road, held for a term of ninety-nine years, from Henry Lewis, dated the 13th May 1875, and mortgaged to the Maesteg Benefit Building Society by deed dated the 18th May 1875.

On the 2nd Nov. the debtor executed the following charge in favour of the National Provincial Bank:—

I, the undersigned William Henry Boulter, of Bridgend, in the county of Glamorgan, builder, hereby charge and assign to the National Provincial Bank of England, their successors and assigns, all and every the premises mentioned in the schedule at the foot hereof, and all my right, title, and interest therein as a security for all moneys with interest, commission, and other usual banking charges, which may be now due or may hereafter become due from time to time by me to the said bank in any manner whatsoever subject to a certain indenture of mortgage dated the 2nd Oct. 1874 from me to the Maesteg Permanent Benefit Building Society. And I hereby for myself, my heirs, executors, and administrators, covenant and agree with the said bank their successors and assigns to execute to them when called upon a legal and valid mortgage of the said premises to be prepared at my expense for the better security of the said moneys to the said bank. And it is agreed that this security shall be held by the said bank without prejudice to any other security or securities which they may now or hereafter hold on my account. The schedule above mentioned: Three leasehold dwelling-houses in the parish of Coity, and county of Glamorgan, held by the said William Henry Boulter by a certain indenture of lease, dated the 25th Sept. 1874, and expressed to be made between Henry Lewis of the one part, and the within named William Henry Boulter of the other part.

On the 4th Nov. the Bank gave the Maesteg Benefit Building Society notice of their charge.

On the occasion of and before executing the charge the bank manager was shown and went over the three houses intended to be mortgaged, and it was alleged that these three houses were those numbered (c) and (e), and that the debtor, by mistake, said that they were held under one lease of the 25th Sept. 1874, and one mortgage of the 2nd Oct. 1872, whereas he ought to have said one house held under lease dated 13th May 1875, and mortgaged by deed dated 18th May 1875; and two houses held under lease dated the 31st Dec. 1874, and mortgaged by deed dated the 14th Jan. 1875.

In December, 1875, W. H. Boulter filed a liquidation petition. His creditors resolved upon a liquidation by arrangement, and a trustee was appointed.

The trustee paid off the Benefit Building Society and sold the properties, and the National Provincial Bank claimed the balance of the purchase-money in his hands arising from the sale of the houses marked (c) and (e), in satisfaction of the moneys due to them under their equitable charge.

On the 9th August 1876, the County Court Judge, upon the application of the trustee, made an order declaring that the instrument dated the 2nd Nov. 1875, and executed by the debtor, purporting to be an equitable charge upon three leasehold messuages in the parish of Coity in the county of Glamorgan in favour of the Bank created no charge upon the two messuages and premises comprised in and demised by the indenture of lease dated the 31st Dec. 1874. Upon the hearing of this application the above evidence as to the identity of the property intended to be included in the charge was tendered on behalf of the Bank, but was not admitted.

The Bank appealed.

J. G. Wood appeared for the appellants.—The question was whether the charge was to be thrown

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aside altogether, or the effect intended by the parties and proved by the evidence to be given to it, and the error corrected when the final deed should come to be executed. The memorandum of charge was for a contract by the debtor to execute a mortgage, and was not the mortgage deed itself. It was not a case of parol variation of the terms of a written contract, but the rectification of a misdescription, according to the rule *falsa demonstratio non nocet*, for which purpose parol evidence was admissible to remove the ambiguity.

McMurray v. Spicer, L. Rep. 5 Eq. 527; 18 L. T. Rep. N. S. 116;

Ogilvie v. Poljamba, 3 Mer. 53.

It would be a great hardship upon his clients if this evidence, which showed the real intention of the parties, were to be disregarded. All the authorities as to the admission of evidence in such cases were summed up, and the rule given in *Taylor on Evidence*, ss. 1105-1109. He submitted that the erroneous statement in the schedule should be rejected, and the rejected evidence let in to explain the real subject matter of the agreement.

Little, Q.C. and *Romer*, for the respondents, contended that the deed was an actual charge, and not merely a covenant to give one. The description in the schedule was clear and decisive as being of property comprised in a certain lease. The agreement, therefore, must be read as if in the schedule the parcels in that lease had been copied out. In order to give to the bank a charge upon these two houses, there must be a contract in writing within the Statute of Frauds; but there was no contract in writing charging the two houses referred to, or any other houses than those contained in the lease of the 25th Sept. 1874. It was in truth an attempt to manufacture a contract in despite of the Statute of Frauds by effecting a substitution of parcels; but no substitution of parcels in a deed had ever been admitted by parol evidence. They referred to

Taylor on Evidence, s. 1104.

THE CHIEF JUDGE.—In my opinion the whole of the argument on behalf of the trustees has proceeded upon an entirely erroneous principle. The Statute of Frauds in my judgment has no more to do with this case than *Magna Charta* has. The contract is plainly proved between these people. It is a contract for advancing money, and it is plainly proved that the contract was that there should be a security upon certain property. That property was pointed out and examined, and the parties then resorted to the banking house to prepare a written memorandum in order that the Statute of Frauds should be complied with. Taking the bankrupt's own description of the three houses, and taking it from no other source he promised a mortgage, upon the faith of which the advance was made to him. It is now said that that paper is erroneous in its description. In this Court of Bankruptcy, which is as much a court of equity as any other court of equity, can it be doubted that if this man was not really insolvent he might have had this contract rectified? Upon the evidence before me it is impossible to doubt that he could; for lender, borrower, and agent all agree that these are the facts which I have thus shortly described. Any reference to latent or patent ambiguities is wholly unnecessary. The mortgaged property subject to a prior mortgage to the building society is sold, and all the

proceeds are realised. By an affidavit, which is uncontradicted, it appears that the proceeds are enough to satisfy the first mortgage to the building society and to leave a surplus sufficient to satisfy the debt due to the bank, which also is undisputed. Under these circumstances and in this view of the law, I have no doubt that the appellants here would have been entitled in a court of equity to have the contract rectified, inasmuch as in itself it does comply with the Statute of Frauds, for it does describe the contract between the parties. The intention between the parties is duly executed, and the only failure is that the bankrupt, the borrower, has furnished this erroneous description. There is no error in the description of the three houses. He points out the houses, and they can see them with their eyes and touch them with their fingers. There is no doubt, whatever, that he has a right to have the contract rectified. The appellants are perfectly entitled to the 351*l.*, which it is not disputed was due under this contract, which the proceeds of the estate, after satisfying the building society's charge, are sufficient to pay.

Order accordingly.

Solicitors for the appellants, *J. G. Hepburn and Co.*

Solicitors for the respondent, *Torr and Co.*

Monday, Nov. 20, 1876.

Ex parte LATHAM; Re LATHAM. (a)

Bill of exchange—Action at law—Debtor's summons—Security for costs—Bills of Exchange Act 1855, sect. 2—The Bankruptcy Act 1869, sect. 7.

Where a debtor's summons is issued in respect of a bill of exchange, and further proceedings are stayed to abide the result of an action under the Bills of Exchange Act 1855, the court, in considering whether or not security shall be given, will have regard to any order as to security which may have been made in the action under sect. 2 of the Act by a common law judge.

This was an appeal from the decision of the Judge of the County Court of Kent, holden at Canterbury.

Samuel Latham and William Forster traded as merchants and shipping agents at Dover in co-partnership under the style of "Latham and Co."

In May 1876, William Forster gave a bill of exchange in the name of the partnership for 1000*l.* to one Francis Lovett Cotton, who subsequently indorsed it to Nehemiah Learoyd. The bill was dishonoured. On the 24th Aug. Nehemiah Learoyd commenced an action in the Exchequer Division of the High Court of Justice against the firm of Latham and Co. to recover the amount of the bill.

Contemporaneously with the bringing of the action Nehemiah Learoyd issued out a debtor's summons against the firm, requiring payment of the amount of the bills.

On the 29th Aug. an order was made by Huddleston, B., upon the application of Samuel Latham, giving him leave to appear and defend the action unconditionally and without security, upon the ground that the bill was given without his

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knowledge and authority, and that no consideration for it was ever received by the firm. On the 31st Aug. a summons on behalf of the plaintiff to rescind the last mentioned order was dismissed with costs.

On the 6th Sept. Latham and Forster applied to the county court to dismiss the debtor's summons. The application was heard by the Registrar, sitting under his delegated powers, who made an order that Latham and Co. should, within fourteen days, pay into court the sum of £100l. as security for the payment of such sum as might be recovered against them by Nehemiah Learoyd in the action at law, and that upon such deposit being made all proceedings under the debtor's summons should be stayed until the result of the action was known.

Messrs. Latham and Co. appealed against so much of this order as directed them to give security.

N. Learoyd in his affidavit swore that he gave full and valuable consideration for the bill and without any knowledge of the circumstances deposed to by Samuel Latham.

Wheeler appeared in support of the appeal.—The rule is that where a debtor's summons is ordered to stand over for an action to be brought, and the court is of opinion that the probability of success is as much in favour of the debtor as of the creditor, no security for costs would be required: (*Ex parte Turner*, L. Rep. 10 Ch. App. 175.) The registrar in effect reversed the order of the common law Judge.

De Gea, Q.C. and *J. Beaumont* appeared for Mr. Learoyd.—The argument of the other side is founded upon a total misapprehension of sect. 7 of the Bankruptcy Act 1869, which provides that the court may dismiss the summons if satisfied with the allegations made by the debtor, or it may, upon such security, if any, being given as the court may require for payment to the creditor of the debt alleged to be due, and the cost of establishing such debt, stay all proceedings on the summons, &c. This section provided only an alternative direction, and unless evidence was adduced proving want of consideration, security must be given. They also referred to

18 & 19 Vict. c. 67, s. 2;

Ex parte Lowenthal, re *Lowenthal*, 29 L. T. Rep. N.S. 895; L. Rep. 9 Ch. App. 324;

Ex parte Shorey, 21 W. R. 105.

Wheeler, in reply.

The CHIEF JUDGE.—The simple question before me is whether the registrar was right in the order which he has made. Reference has been made to the Bills of Exchange Act 1855, sect. 2, which provides that a judge of the Common Law Court shall give leave to a defendant to appear and defend the action upon the defendant "paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder of the bill to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit." The learned judge in the Common Law Court has upon that section given leave to the defendant to appear and defend the action. The defendants have pleaded want of consideration. That Act requires that the judge shall in his discretion make such order as to security or otherwise as he may

deem fit. The learned judge has in his discretion thought fit to order that no security for costs shall be given in this case. The proceeding by debtor's summons in bankruptcy is somewhat different, but the question raised upon this summons can be determined on the trial of the action at law. If the debtor should neglect to comply with the summons he commits an act of bankruptcy which will remain available to the creditor. If the creditor succeed in his action he will obtain all that he is entitled to, for there is no suggestion here that the debtors are insolvent or that the rights of the creditor will be prejudiced. Under all the circumstances of the case, and having regard to the decision of the learned judge of the Common Law Court, and the cases cited, I think it is fairer that the trial of this question should proceed at law than that there should be any further proceeding had in this court. I do not think that I ought to disregard the discretion which was exercised by the judge in the Common Law Court, although I am not bound to follow it. The summons, therefore, will be stayed without security being given, and the costs of this appeal will be reserved.

Solicitors for the appellant, *Lawrence, Plews, and Co.*

Solicitors for respondent, *Learoyd and Co.*

(Before the CHIEF JUDGE.)

Monday, Nov. 27, 1876.

Ex parte Threlfall; Re Williamson. (a)

Trader—Stoppage in transitu—Bill of sale—Further advances of goods—Act of bankruptcy.

A. having failed to meet a cheque which he had given in payment of goods purchased by him, the vendor stopped the goods in transitu, and declined to make any further advances without security. A. then paid the amount of the cheque and gave the creditor a bill of sale to secure the debt then due and further advances in goods or in money. The goods which had been stopped were then delivered. Nine days afterwards the creditor seized under his bill of sale, and a few days after A. filed a liquidation petition.

Held, that as the goods had been supplied with the bona fide intention of enabling A. to carry on his business, the bill of sale was good as against the trustee.

THIS was an appeal from a decision of the judge of the County Court of Lancashire, holden at Blackburn.

On the 18th March 1875, George Margerison, the traveller of Messrs. Threlfall, wine and spirit merchants at Preston, called in the ordinary course of business on Robert Williamson, who then kept the Golden Lion Hotel in Blackburn, and obtained an order for goods amounting in the whole to 92l. 11s. At the same time R. Williamson paid to Margerison on account of the debt then due to Messrs. Threlfall 150l., made up of 50l. in cash and a cheque for 100l.

On the 20th March, G. Margerison returned to Preston and delivered to Messrs. Threlfall the cash and cheque paid by Williamson, and directed the goods ordered on the 18th March to be forwarded. Part of these goods, amounting in value to 39l. 13s. 9d., were in bond, and the remainder,

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to the value of 52*l.* 17*s.* 3*d.*, were on the 25th sent by rail addressed to R. Williamson, at Blackburn.

On the 27th, Margerison, having heard that the 100*l.* cheque had been returned dishonoured, telegraphed to Williamson to inform him of the fact. At the same time he telegraphed to the railway company at Blackburn to stop the delivery of the goods. He also went to Blackburn and took with him a bill of sale ready prepared, and explained to Williamson that his principals declined to supply him with any more goods, or to allow the goods at the Blackburn Railway Station to be delivered unless security was given to secure payment of his account. Williamson thereupon paid the 100*l.* and agreed to execute the bill of sale.

The bill of sale was dated the 27th March 1875, and made between Robert Williamson of the one part, and Messrs. Threlfall of the other part, and after reciting that Williamson was indebted to Messrs. Threlfall, and that the latter had agreed to continue to do business with him, Williamson, in consideration thereof, and to secure the repayment of the money then owing, and of any sum or sums of money and interest in which he might become indebted to Messrs. Threlfall for money advanced or paid, goods sold and delivered, or upon any account whatsoever, Williamson assigned to Messrs. Threlfall all his stock in trade, fixtures, furniture, chattels, and effects in or upon the Golden Lion public house, subject to redemption. The deed contained a power of sale, which was exercisable in case of default made in payment on demand of all moneys owing from Williamson to Messrs. Threlfall.

The stoppage *in transitu* upon the goods was withdrawn on the 29th March 1875, and on the following day the goods were delivered to Williamson. The same day the goods in bond were transferred into his name.

On the 6th April 1875, Messrs. Threlfall seized under their bill of sale, and on the 13th Williamson filed a liquidation petition.

The trustees of Williamson's estate disputed the validity of the bill of sale, and by consent the property was sold and paid into a bank to abide the result.

On the 24th Aug. 1876, the County Court Judge, upon the application of the trustees, declared the bill of sale void as an act of bankruptcy, upon the ground that at the time Williamson executed it he was insolvent, and known to Messrs. Threlfall to be so, by reason of the stoppage *in transitu*.

Against this order Messrs. Threlfall appealed.

De Gez, Q.C. and *Finlay Knight*, appeared for the appellants.—The execution of the bill of sale was not an act of bankruptcy. The book debts and good will of the business were not included in the deed, so that it could not be said to have been an assignment of the whole of his property. But even if it were it was settled that if a debtor assigned his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been; but if there were also a further advance it was not a question whether the further advance was great or small, but whether there was a *bona fide* intention of carrying on the business: (per Mellish, L.J., *Ex parte Ellis*, L. Rep. 2 Ch. D. 798.) There was no doubt of the *bona fides*, and it mattered not whether the further advance was in money or

money's worth so long as it was intended to assist the debtor in carrying on his business. They also referred to

Ex parte Winder, re Winstanley, L. Rep. 2 Ch. D. 290, 560; 33 L. T. Rep. N. S. 615; Benjamin on Sales, p. 796.

J. Edwards, Q.C. and *Bidley*, for the trustees, contended that there was no *bona fides* in the transaction, but a simple device to give colour to a security for a pre-existing debt. The appellants stopped the goods *in transitu* and had good reason to doubt the debtor's solvency. No substantial advance was really made, and they seized within a few days after they obtained their security. The bill of sale substantially included all the property of the debtor, They cited

Ex parte King, re King, 34 L. T. Rep. N. S. 466; L. Rep. 2 Ch. D. 256;

Lomaz v. Buxton, 24 L. T. Rep. N. S. 187; L. Rep. 6 C. P. 107;

Allen v. Bennett, 23 L. T. Rep. N. S. 487; L. Rep. 5 Ch. App. 577.

The CHIEF JUDGE.—I have endeavoured to learn what the whole amount of the debtor's property was at the time he executed the bill of sale, and I have not succeeded. If this be an assignment of the whole of his property it is no act of bankruptcy. That is what I have to examine into upon the evidence before me. A man carrying on what is said to be a thriving business, a splendid business according to one witness, orders goods from his wine merchants and pays for them partly by cash and partly by a cheque, and the cheque is not paid when it is presented. Afterwards he orders further goods to the extent of 92*l.* 11*s.*, consisting partly of goods in bond and partly of goods which were sent to the railway company for the purpose of being delivered to the debtor. When the merchants learn that the cheque has been dishonoured they stop the delivery of the goods. The tradesman wants, for the purpose of carrying on his business and for other purposes, that the order which had been given by him should be executed, and he accordingly then, although somewhat late, pays the 100*l.* cheque. The merchants had of course acted upon the notion that they would not trust him any longer since he could not pay the cheque, but when he did pay they trust him further to the extent of that 92*l.* 11*s.*, but they say we will not trust you unless you execute the bill of sale, and he executes it. Thereupon the goods remain at his disposal, some being sent to him direct and some remain in bond. It has been said that that is not an advance. But it is an advance of the very things with which the tradesman could carry on the business, viz., wines and spirits which he dealt in. Whether it was said so or not it is clearly an advance for the purpose of enabling him to carry on his business. The last case which was mentioned, *Ex parte King*, referred to what has often been referred to before, the proportion between the old debt and the present advance, because Mellish, L.J., there said that if the advance was a substantial one it takes away from it the reproach of there being a fraudulent conspiracy between the debtor and creditor. If in this case the publican instead of being short of money had 500*l.* in his pocket, and had said to the wine merchant "you may trust me, I have 500*l.* in my pocket and I will give you that 500*l.* as a pledge, send me 500*l.* worth of goods," would that have been an act of bankruptcy? Is the pledging of the things comprised in the bill of

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sale anything more? He gets a present and full advance, an advance made only for the purpose of enabling him to carry on his business and doing away with the necessity of going elsewhere to buy those commodities. Then it is said that is no advance because it is not in money, and next it is said that it is not for the purpose of enabling him to carry on his business. It is as clear an advance to carry on his business as can be stated. There is in none of the decided cases any principle recognised or any dictum which I can fasten upon to say that such a transaction as this, which is not an extraordinary transaction, but one happening every day of the year and in every county throughout the empire, is an act of bankruptcy. The order of the court below must be discharged with the costs of this appeal and in the court below.

Solicitors for appellants, *Gregory, Rowcliffe, and Co.*

Solicitors for respondent, *Shaw and Tremellen.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Tuesday, July 18, 1876.

(Before JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.)

ROGERS v. INGHAM. (a)

Mistake—Payment of legacy under mistake of law—Assent of other claimant—Repayment.

There being a dispute on the construction of a will as to how a fund should be divided between two legatees, both parties took counsel's advice, and the executor divided the fund in accordance with such advice, the dissatisfied legatee assenting in order to avoid litigation. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee to have the will construed by the court, and the money received by the other legatee repaid.

Held (affirming the decision of Hall, V.C.), that as the fund had been divided by consent with a perfect knowledge of the facts on both sides, and as the mistake, if any, was a mistake of law, the suit could not be maintained.

THIS was an appeal from a decision of Hall, V.C. The facts of the case were as follows:

Mary Rogers, who was entitled under her late father's will to one-fourth part of his residuary estate for life, with remainder to her children, died in 1866, leaving two children her surviving, Martha Rogers and Robert Rogers. She had had another child, Hester, who married one Thomas Wheatley, and died in her mother's lifetime.

The surviving executor of the will for some time divided the income of the one-fourth between Martha Rogers and Robert Rogers equally, thinking that they were entitled to the whole of it as survivors of their sister Hester, and after the death of Robert Rogers he paid the whole of the income to Martha Rogers.

Subsequently the executor took counsel's opinion on the will, and was advised that the share of

Hester Wheatley had become vested in her, and had passed to her husband as her legal representative, and the income of that share had consequently been wrongly paid to Martha Rogers.

Martha Rogers, being dissatisfied with that view of the case, took the opinion of counsel, who confirmed that view.

Thereupon the executor divided the fund in accordance with the opinion of counsel, deducting from the share of Martha Rogers the income paid to her in mistake, and adding the amount so deducted to the share of Hester Wheatley, which was paid to her husband, Thomas Wheatley.

The share of Martha Rogers was sent to her solicitors by cheque on the 2nd July 1873, and the receipt was acknowledged by her solicitors.

On the 14th June 1875, Martha Rogers filed her bill against the executor and Thomas Wheatley, submitting that on the true construction of the will the share of Hester Wheatley had passed to the plaintiff by survivorship, and praying that Thomas Wheatley might be ordered to repay the same with interest.

Hall, V.C., held that the bill could not be maintained. In the course of his judgment the Vice-Chancellor said: It seems to me that the fund was divided as a matter of arrangement between the parties, and that having taken place two years before the bill was filed, I ought not to give the assistance of this court for the purpose of recalling the fund from the defendant, who received it upon the faith and footing of what took place on that occasion. This has been acquiesced in, and the executor has been permitted to distribute the fund accordingly, which fund, for aught I know, Wheatley may have spent and may not be in a position to restore. Under these circumstances it appears to me that the plaintiff's case fails; and as I take that view, it is not necessary for me to determine, nor do I determine, what is the true construction of the will. And the bill was accordingly dismissed with costs.

From this decision the plaintiff appealed.

Dickinson, Q.C. and Eyre Thompson, for the appellants.—This was not a compromise, but a mistake on the part of the executor, and *Bingham v. Bingham* (1 Ves. Sen. 126) shows that the court will rectify such a mistake. If the mistake in this case can be called an error of law, that is not a reason why the court should not grant relief. In *Clifton v. Cockburn* (3 My & K. 76-99) Lord Brougham says that the distinction between payments made in error of law and in error of fact "is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one; and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule, and refuse to relieve against an error of law." They also cited

Naylor v. Winch, 1 S. & S. 555;
Cooper v. Phibbs, L. Rep. 2 E. & I. 149;
Davis v. Morier, 2 Coll. 303;
Stone v. Godfrey, 5 De G. M. & G. 76;
Bullock v. Downes, 9 H. L. Cas. 1;
Re Condon, L. Rep. 9 Ch. 609.

Hastings, Q.C. and Hanson, for the respondent.—This is really an action for money had and received, and no such action can be maintained when

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both parties knew all the facts, and the mistake is purely a mistake of law :

Brisbane v. Dacres, 5 Taunt. 143;
Midland Great Western Railway Company of Ireland v. Johnson, 6 H. L. Cas. 798;
Stewart v. Stewart, 6 Ch. & Fin. 911;
Reg. v. Lords Commissioners of the Treasury, 16 Q.B. 357.

Dickinson in reply.

JAMES, L.J.—I am of opinion that the decision of the Vice-Chancellor ought to be affirmed. In arriving at that conclusion I entirely put aside anything that has been said about any supposed or conditional consideration connected with the matter. The case must really be looked at as between the two persons who alone are now in litigation before us—that is, the plaintiff on the one part, and the defendant Wheatley on the other part; and the greater portion of the argument seems to me to be disposed of by this consideration, that there really is no question of trust, trust estate, or trust money, to be dealt with. When a trustee, by the direction or with the authority of his *cestui que trust*, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the *cestui que trust* had received the money from the trustee, and had herself paid it to that third person. It is simply a case of money paid by the lady, or by her direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money. That being so, the case is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if A. through a third person had paid money to B., thinking that B. was entitled to it, B. thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties. No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course cases of that kind must have frequently occurred, and yet no case has been produced in which a suit of this kind has succeeded. And, even treating it as the common case of money paid to B. under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one court than in the other court, for the action for money had and received proceeded upon equitable considerations. Here the money has got into the hands of one person, who received it honestly, with no mistake on his part, and no mistake on the part of the lady, or of the trustee, the intermediate hand through which the money passed, and by which it was actually paid. No doubt there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity supervening by reason of the conduct of either of

the parties. It is said that there have been two cases of that kind. In *Bingham v. Bingham* (1 Ves. sen. 126), a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money, because he had not the consideration for which he had bargained. The other case is *Davis v. Morier* (2 Coll. 303), where the relation of trustee and *cestui que trust* existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all except 500*l.* a year, and it appeared that the 500*l.* a year was not all that he ought to have paid to the *cestui que trust*; and that being so, the Vice-Chancellor Knight-Bruce directed an inquiry—first, as to whether he had retained more than he ought to have retained, and, secondly, under what circumstances and whether the other *cestui que trust* had in any manner assented to such retainer—that is to say, had acquiesced in it so as to show whether they had given it up. Therefore there was in that case a question between a *cestui que trust* and a trustee, which trustee, no doubt under mistake, had retained trust money in his own possession. That is the nearest case that I have been able to find to the case now before us; but that case is far from establishing the proposition here contended for. If that proposition were true in respect of this case, it must be true in respect of every case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in cases of the distribution of estates, and it would be difficult to say what limit could be placed on this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts and having given a release. The thing has never been done, and it is not a thing which, in my opinion, is to be encouraged. Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be re-opened by one of the parties saying, "You have received your money by mistake; I acquiesced in your receipt of it under that mistake, and therefore I ask you to give it back to me." I am of opinion, therefore, that the decision of the Vice-Chancellor is perfectly correct, and ought to be affirmed.

MELLISH, L.J.—I am entirely of the same opinion. There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the courts of equity did not, in such cases, interfere with the courts of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might years afterwards be recovered, because perhaps some court of justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in

itself an equitable and just rule which is not interfered with by courts of equity; but, on the other hand, I think that, no doubt, as was said by Turner, L.J., in *Stone v. Godfrey* (5 De G. M. & G. 90): "This court has power (as I feel no doubt that it has), to relieve against mistakes in law as well as against mistakes in fact;" that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it. Now, is there any such ground in this case? It appears that there was a trustee in possession of a fund which belonged either to the plaintiff or to the defendant. All the facts were perfectly well known; the trustee was in communication with both parties; both parties were well aware that the question was then to be decided. The plaintiff's attention and the attention of the plaintiff's legal advisers was called to all the facts and circumstances; she took advice upon the point, she and her advisers being all of them aware that, if she had not assented to the view that the trustee took, the natural consequence would be that the money would have been paid into court under the Trustee Relief Act, and that she would have been obliged to have the question then decided. Therefore, having all the facts before her, and before her solicitors, and being advised by them, she thinks it better for her not to contest the matter, but to allow it to be settled in that way; and there is no doubt that she was properly advised. Thereupon the money was divided, and of course would not be paid into court, and the matter would not be litigated. Then the question is whether a person who has acted in this way is now entitled, because she has changed her mind, to litigate this question, which before she had been advised and had determined not to litigate. It seems to me that it would be contrary to the ordinary rule of law so to hold; and that the defendant is entitled to say, "I received this money believing it to be my own; the person by whose direction it was paid was the counter-claimant against me; she knew all the facts, and elected at the time not to litigate the question; and therefore I have received the money just as if the question had been determined in open court." In my opinion, it would be most unsafe to estates in general if we were to hold in a case of this kind that money paid under such circumstances could be recovered. I agree, therefore, with the Lord Justice in thinking that the judgment of the Vice-Chancellor ought to be affirmed.

BAGGALLAY, J.A.—I am of the same opinion, and I merely wish to add that, while I give a general assent to the passage in the judgment of Lord Brougham in *Clifton v. Cockburn* (3 My. & K. 99), which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the court to relieve against an error of law, I do not think that the present is a proper case for the application of such a principle.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitor for the appellant, F. Last, agent for Barrell and Rodway, Liverpool.

Solicitors for the respondent, Paterson, Snow, and Burney, agents for Dibb, Atkinson, and Braithwaite, Leeds.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, J.J.A.)

Nov. 10, 11, 13, 14, 17, 18, and 20, 1876.

BIGSBY v. DICKINSON. (a)

Practice—Appeal—Admission of fresh evidence—Appeal on question of fact—Cost of printing shorthand notes of evidence.

A varnish manufacturer filed a bill against a tar manufacturer to restrain the latter from causing a nuisance to the plaintiff by means of sulphuretted hydrogen emitted from the defendant's works. The defendant adduced scientific evidence that asphaltum, which it was admitted that the plaintiff employed in manufacturing varnish, also emitted sulphuretted hydrogen, and an experiment was made in court showing that such gas was emitted from mineral asphaltum in a heated state. The plaintiff applied for leave to adduce evidence in reply to prove that the only asphaltum used by him was vegetable asphaltum, which did not emit sulphuretted hydrogen:

Held (reversing the decision of Bacon, V.C.), that this evidence ought to have been admitted, on the ground that it was never too late to adduce fresh evidences to show that confusion and error have arisen from two things passing by the same name, and the evidence was accordingly admitted on the appeal.

Observations of the Privy Council in *The Glanibanta* (or *The Transit*) (34 L. T. Rep. N.S. 934; L. Rep. 1 P. & D. 283), as to the circumstances under which the Court of Appeal will reverse the decision of the court below on a question of fact, although the witnesses have been examined before the judge of the court below, approved.

The appellant was allowed the costs of transcribing and printing shorthand notes of the evidence given *viva voce* in the court below, though they had been printed without any previous order of the court, and without any consent on the part of the respondent, on the ground that the appeal could not have been properly heard without the printed evidence; but the court refused to allow the costs of the attendance of the shorthand writer to take the notes.

This was an appeal from a decision of Bacon, V.C., dismissing with costs a bill filed by the plaintiff to restrain a nuisance alleged to have been caused by chemical works belonging to the defendant at Trundley's-lane, Deptford.

The plaintiff was a varnish manufacturer, carrying on his business in premises consisting of several of the railway arches on the London and Greenwich line of railway, near Trundley's-lane, and the defendant's tar and chemical works, which had been taken by him ten years ago, were in close proximity to the premises occupied by the plaintiff.

The case made by the bill was that sulphuretted hydrogen, and other noxious and poisonous gases were emitted from the defendant's works, especially in the manufacture of tar, sulphate of ammonia, and anthracene, the effect of which, the bill alleged, had been to destroy plants, trees and vegetables in the plaintiff's garden, to kill one of his horses, and seriously injure others, to produce nausea and serious illness in himself, his wife and children, and generally to impair health and render life difficult and insupportable.

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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The defendant's case was in effect that the evil, if any, arising from his works had been greatly exaggerated in the plaintiff's evidence; that the injury to the health of the plaintiff and his family might have been caused by other chemical works in the neighbourhood, and were not attributable solely, if at all, to those of the defendant; and lastly, that the plaintiff in his manufacture of varnish was in the habit of using chemicals and materials which emitted large volumes of dense and sickening vapour, including sulphuretted hydrogen, so that he was himself responsible for any nuisance that affected his own premises.

In support of the last part of the defendant's case an experiment was made in court by a scientific witness to prove that mineral asphaltum emitted sulphuretted hydrogen.

It was admitted that the plaintiff used asphaltum in manufacturing varnish. But on the completion of the defendant's evidence he applied for leave to adduce evidence that the only asphaltum used by him was vegetable asphaltum, which did not emit sulphuretted hydrogen.

The Vice-Chancellor refused this application, and, being of opinion on the evidence then before him, that the plaintiff had failed to establish his case against the defendant, and that the defendant had proved that the plaintiff was himself responsible for any nuisance that affected his premises, his Lordship dismissed the bill with costs.

From this decision the plaintiff appealed.

During the hearing of the appeal the plaintiff applied for and obtained liberty to adduce fresh evidence as to the materials used by him in manufacturing varnish, which the Vice-Chancellor had refused to admit.

E. K. Karstake, Q.C. and Sealy for the appellant.

Kay, Q.C. and Daumey for the respondent.

Cur. adv. vult.

Nov. 20.—JAMES, L.J. now delivered the following written judgment.—In this case the appellant's counsel in opening the appeal asked leave to put in further evidence, and we thought right to grant such leave. The application was made and granted in the following circumstances: The suit being a suit to restrain a nuisance by the defendant, it was suggested on his behalf that the nuisance was occasioned, or to a great extent occasioned, by the plaintiff's own manufacture. The plaintiff is a varnish maker. He gave general evidence that his manufacture did not produce any such nuisance. Among the witnesses he called was one Dopson, who, in examination, stated that the plaintiff, among other varnishes, made Brunswick black or Japan black; but in answer to further questions stated that it was made from a soft gum, and that he had never seen any asphaltum on the premises. In the course of the defendant's case, a scientific witness read and verified from technological works a statement that Brunswick black and black Japan are made by mixing any foreign asphaltum, except Egyptian, with other ingredients, and proved that foreign asphaltum gives out sulphuretted hydrogen, which is the material, the principal, subject of the nuisance complained of. He made an experiment with this asphaltum in the presence of the court. No question whatever had been put to the plaintiff, or to any of his witnesses except Dopson, about the Brunswick black or black Japan, or what he made it of, or in what quantities; and nothing was said to lay a founda-

tion for the contradiction of his evidence, to be inferred or deduced from the statement of the scientific witness. On the close of the defendant's evidence the plaintiff and other witnesses were recalled as to another matter, but no question was asked with reference to the manufacture of Brunswick black or Japan black. The counsel for the defendant contended, on the evidence of Dopson and the scientific evidence, that he had made out that the plaintiff's manufacture did give out the noxious vapours, and further that the plaintiff had been guilty of a most dishonest attempt to deceive the court by suppressing the fact that he was making such varnish, the manufacture of which produced such vapours. At the close of his speech the counsel for the plaintiff applied to be allowed to show that the whole of this was upon a mere misapprehension and mistake; that there were two kinds of asphaltum, well known in the market and to all makers and dealers, one a mineral asphaltum which did give out noxious vapours, and one a vegetable asphaltum, which did not, and which would in fact answer Dopson's description of a gum, and which was the one he used. This was undoubtedly a very late period at which to apply to give further evidence. The Vice-Chancellor thought it was absolutely too late, and that he was precluded from admitting it. Considering, however, how this part of the case had been launched by the defendant—that the plaintiff was to be convicted of dishonest suppression of the truth and his evidence discredited on the mere inference that his Brunswick black was made in the same manner and from the same materials as stated in the books, and that no question had been put to him, as ought always to be put to a witness who is intended to be contradicted and discredited; and considering further what the evidence was which he proposed to give, we are of opinion that he ought to have had the opportunity he asked. It was not evidence of something which could have been invented or fabricated during counsel's speech to meet the pinch of the case. The main fact sought to be proved was, if true, known to all the persons in London connected with the trade—viz., that there was such a thing as vegetable asphaltum, and that such asphaltum was used in making the varnish. It was to get rid of a misapprehension arising from two very different things being known by the same name. And at no period of a cause is it too late to show that confusion and error have arisen from two persons or two places, or two things passing by the same name, and more especially to show that through such confusion the court had been deceived by a misleading experiment performed in its own presence. We therefore admitted the evidence, which proved to be absolutely conclusive, and to entirely exonerate the plaintiff from the very serious charge which was thought by the counsel for the defendant and the Vice-Chancellor to have been established against him. And the result showed that if that evidence had been excluded, the case on that point would not have been decided according to the truth of the facts, but according to the mode in which the case had been forensically conducted. It was also very much pressed upon us not to disturb the finding of the Vice-Chancellor on a matter of conflicting evidence. With respect to the great weight that is due to the decision of a judge of first instance, whenever, in a conflict of testi-

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mony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat and adhere to what we said in *The Glannibanta or The Transit* (34 L. T. Rep. N. S. 934; L. Rep. 1 P. & D. 283). Of course, if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But, then, that would be in truth to do away with the right of appeal in all cases of nuisances; for there is never one brought into court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in those cases than in any other. [His Lordship, after briefly going through the facts of the case as established in evidence, held that the plaintiff had completely made out his case to relief, and, reversing the decision of the court below, that he was entitled to a perpetual injunction against the continuance of the nuisance complained of arising from the works of the defendant.]

BAGGALLAY, J.A.—If this appeal were to be disposed of on the same evidence as was before the Vice-Chancellor, I should feel very great hesitation in arriving at a different conclusion from that at which he arrived. I also think that, having regard to the course pursued by the parties at the hearing of the cause—the course pursued as well by the plaintiff as by the defendant—neither of them had any right or title to ask of the court to have a further examination of the plaintiff and other persons upon his side. But it appears to me that it is exactly the case in which it was, I will not say the duty, but the right, of the court to require that a further witness or further witnesses should be called. It appeared that one part of the case, namely, the possibility of the injuries which the plaintiff sustained being caused by operations going on upon his own premises, had not been sufficiently and completely dealt with by either of the parties to the cause. Such further evidence has been admitted by this court, and I think most rightly admitted, and it appears to me, now that we have that further evidence before the court, it is beyond all question that the plaintiff has sustained his case in this court, and that he is entitled to the injunction which he asks.

BRAMWELL, J.A.—I think it right in this case, differing as I do from the conclusion to which the Vice-Chancellor came upon the materials before him, to give my reasons at length for the conclusion to which I have come, although I do not know that I shall add much to what has been said before; but I think it is better to show that one has formed an absolutely independent opinion upon a matter of this description than that one has adopted merely the opinion of one's colleagues. Now, we were warned by Mr. Kay, reasonably enough, that we ought not to treat this as a new matter; that we ought not to reverse the judgment of the Vice-Chancellor unless we were satisfied that he was wrong. In that I entirely agree. We were also warned by Mr. Kay that the burden of proof was upon the plaintiff, and that therefore we had to consider whether he had made out a case, and made out that the Vice-Chancellor was wrong, and in that I agree. We were also reminded by him that the Vice-Chancellor had had the advantage of having the witnesses before him, whereas we only had their evidence upon paper,

without the opportunity of seeing and judging of them and their demeanour. And that is true, and it is a thing that ought to be particularly impressed upon us at this moment, when we know that the Legislature has made a change in the mode of giving evidence in these courts, which may certainly, to a certain extent, be said to have succeeded to the old system of the equity courts, by directing that, as a rule, it shall be given *voir dire*, and not in writing—a most excellent provision, in my judgment. Now those three things were all put before us by Mr. Kay. There is a general observation, not exactly in answer to that, but an observation which might be made on the other side, which is this, that the Legislature has contemplated and made provision for our reversing a judgment of a Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses before him, and we have not. If we were to be deterred by such considerations as those that have been presented to us from reversing a decision from which we dissent, it would have been better to say at once that in such cases there should be no appeal. Two particular observations in addition, I think, this case gives rise to. One is that in my judgment there is no great difference in the testimony of the witnesses. This is not a case in which one has a reason to suppose that the witnesses are giving dishonest evidence. No doubt their judgments are biased and prejudiced to a considerable extent; but it is not a case in which there is reason to suppose that the witnesses as a rule, on one side or the other, are giving dishonest evidence. The other particular observation that I desire to make in this case is this, that I feel satisfied I can put my finger upon the error or mistake which the Vice-Chancellor made; and I am satisfied that, if he had had those materials before him which we now have, he would not have made the mistake, if—indeed, it can properly be said to have been a mistake of his making. [His Lordship went at considerable length through the evidence as to the use of asphaltum by the plaintiff, and continued.] Now I really do not scruple to say, with all respect, that it seems to me—I do not care at what time or under what circumstances—that when it was proposed by the plaintiff that he should be at liberty to show that he did not use mineral asphaltum for the purpose of making these varnishes, he ought to have been permitted to do so; because, without saying that any unfairness was intended, in point of fact nothing could be more unfair, as the result has shown, than the manner in which the plaintiff was dealt with. He was not asked whether he used mineral asphaltum, he was not asked whether he made these varnishes, and he was given no opportunity during the whole of his own case, nor until the last witness was called on the part of the defendant, of saying: “Well, it may be very true that mineral asphaltum is used in the preparation of the varnishes I make, but I do not use it.” [His Lordship then went at length into the merits of the case, and expressed his opinion that the plaintiff had abundantly proved that he and his family had suffered from the effects of sulphuretted hydrogen, and that the fact of a nuisance had been established, such as to entitle the plaintiff to relief by injunction against the defendant if he could trace that nuisance to the defendant's works as the source. It

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had been contended that the nuisance might have arisen from other works in the neighbourhood, and that the burden of showing that it proceeded from the defendant's works rested on the plaintiff. He was of opinion that it had been traced to the defendant's works, and that there was not a particle of evidence to show that any sulphuretted hydrogen had come from three other persons' premises. He might here observe that half a dozen respectable persons, who said that they smelt and had been annoyed by these vapours, were worth 500 who said they had not smelt them. They had not smelt anything, and that was all; but it did not outweigh the testimony of those who had smelt and had been annoyed by the smell. His Lordship then continued: I really do not scruple to say—I say it with the greatest and most sincere respect for the learned Vice-Chancellor, seeing what, in my judgment, it was which caused him to come to the conclusion which he has done, and believing he would have come to a different conclusion if he had had the materials before him which we have—I say, in my judgment the plaintiff has made out a very strong case indeed, which has met with no answer on the part of the defendant, and that the plaintiff is entitled to our judgment.

JAMES, L.J.—The order will be to discharge the order of the Vice-Chancellor, and in lieu thereof to grant a perpetual injunction in the terms of the prayer of the bill. The plaintiff must have his costs in the court below and here.

E. K. Karlake, Q.C., asked for the costs of taking and printing shorthand notes of the evidence in the court below.—We did not apply to the Vice-Chancellor for an order to have the evidence printed under the Rules of Court 1875, Order LVIII., rule 12, because he was so strongly against the plaintiff that he would have refused it; and the Court of Appeal could not well say whether the evidence should be printed or not till it had heard the case, therefore there would have been no use in applying to it.

Dauney for the respondent.—Order LVIII., rule 11 b, provides that evidence given orally shall be brought before the Court of Appeal by the production of a copy of the judge's notes. Not having assented to the printing of the evidence, we ought not to be required to pay the costs of it.

JAMES, L.J.—On the whole, I think the plaintiff is entitled to have the costs he asks for, as it is clear that in this case we could not have got on without the printed evidence. The whole case has been gone into before us, and both sides have been obliged to read almost the whole of the evidence both in chief and in cross-examination, and I think it would have been utterly impossible to select any part of it and say that the printing of this part was useful, but the printing of the other was an unnecessary expense. I think the plaintiff is entitled to the costs of the whole.

Dec. 20.—This case was now again mentioned to the court, a question having arisen on the drawing up of the order whether the order as to costs included the shorthand writer's fee for taking the notes and the costs of making a transcript of them, as well as the costs of printing. The taxing master refused to allow the costs of taking the notes and making the transcript, being of opinion that they were not properly included in the costs of printing.

The transcript had not been made until after the notice of appeal had been given.

Karslake, Q.C. (*Seeley* with him) for the appellant.—The transcript was not made for any purpose except for use upon the appeal, and the transcript was necessary for the printing, as the printers could not have set the evidence up from the shorthand writer's notes. We also claim the costs of the attendance of the shorthand writer for the purpose of taking the evidence.

Dauney (*Kay*, Q.C. with him) for the respondent.

JAMES, L.J., said—That the cost of making the transcript was part of the cost of printing. The transcript had in truth been made only for the purpose of the appeal, and the cost of making it was as much part of the cost of printing as was the setting up of the type by the compositor. But the costs of the attendance of the shorthand writer for the purpose of taking the evidence were not incurred with any reference to the appeal, and the appellant must pay those costs himself.

BAGGALLAY, J.A. and BRAMWELL, J.A. concurred. Solicitors for the appellant, *Paterson, Sons, and Garner*.

Solicitor for the respondent, *W. Beek*.

Dec. 7 and 21, 1876.

(Before JAMES L.J. and BAGGALLAY and BRAMWELL, J.J.A.)

Ex parte ATTWATER; Re TURNER (a)

Bill of sale—Unregistered—Possession taken before filing of petition—Prior secret act of bankruptcy—Relation back of trustee's title—Bills of Sale Act 1854 (17 & 18 Vict. c. 36) s. 1—Bankruptcy Act 1869 (32 & 33 Vict. c. 71) ss. 94, 95.

In the first section of the Bills of Sale Act 1854, which provides that a bill of sale not registered within twenty-one days shall be void against the assignees of the estate of a bankrupt, if the goods and chattels comprised therein are "at or after the time of such bankruptcy" in the possession or apparent possession of the grantor, the words "time of such bankruptcy" mean the time of the commission of an act of bankruptcy to which the title of the assignees of the bankrupt can relate back.

Therefore where an unregistered bill of sale holder took actual possession before the grantor filed his petition for liquidation of his affairs by arrangement, but soon after the grantor had committed a secret act of bankruptcy of which the bill of sale holder had no knowledge:

Held, that the holder of the bill of sale was not protected by the 94th and 95th sections of the Bankruptcy Act 1869, and the trustee in the liquidation was entitled to the goods comprised in the bill of sale.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

On the 24th Sept. 1875, Henry Turner, who carried on business as a homoeopathic chemist and publisher, executed a bill of sale of personal chattels to Charles Attwater, to secure repayment of an advance of 1000*l.* and interest.

On the 24th May 1876, Turner executed another bill of sale of the same chattels to Attwater to secure repayment of a further advance of 500*l.* and interest.

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

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Neither of these bills of sale was registered.

On the 24th Aug. 1876, Attwater took actual possession of the property comprised in the bills of sale.

On the 29th Aug. Turner filed a petition for liquidation of his affairs by arrangement, under which a trustee was subsequently appointed.

On the day before possession was taken, Turner had committed an act of bankruptcy by denying himself to several creditors who called at his place of business to see him, but of this Attwater had no knowledge when he took possession.

The trustee claimed to be entitled to the property comprised in the bill of sale, on the ground that his title related back to the act of bankruptcy committed on the day before possession was taken.

The registrar held that he was entitled to it.

In delivering judgment the registrar, after stating the facts, said: The two questions now to be determined are, firstly, whether the possession which was taken by the creditor on the 24th Aug. 1876, was a sufficiently good and complete possession; and, secondly, whether the prior act of bankruptcy rendered the title of the mortgagee void. [Having decided the first question, which is immaterial for the purpose of this report, in favour of the mortgagee, the registrar continued:] If, therefore, the question had been left in the form in which it was originally launched, and entirely dependent upon the question whether the possession was taken before the filing of the petition for liquidation, I should have no doubt, after the inquiry which has taken place, in deciding that the title of the mortgagee was good, and ought to be allowed to stand; but at the eleventh hour, after the case had come before the court, and was adjourned to enable the trustee to amend his notice of motion, a new case altogether is started and brought before the court. An affidavit was filed only a few days before the case came before me, in which the debtor himself—because it is a joint affidavit filed by the debtor himself and two of his *employés*—states he did on the day previous to the taking possession on the part of the mortgagee, commit an act of bankruptcy by denying himself to his creditors, inasmuch as he had given orders, and was in fact denied to several of his creditors by persons whom he employed. It cannot be disputed, and must be inferred, that the instructions were given and the denial was made with the object of defeating and delaying his creditors. First of all, that was *prima facie* an act of bankruptcy, and it appears to me that all the cases have decided that denial of a man to his creditors, with the intent to defeat and delay those creditors, and that his keeping house for such a purpose is an act of bankruptcy under the Act of Parliament. That is sufficiently established, and a man so acting must be held to have committed an act of bankruptcy unless the evidence of such act of bankruptcy can be rebutted in any way, and it can be clearly proved that there was no intention on the part of the debtor to deny himself to his creditors. No such attempt was made in this case. Whether or not it was not thought necessary, or not thought of sufficient consequence to be rebutted, no evidence was brought to set it aside, and no cross-examination took place of the witness, but it is left on the pro-

ceedings in its pure and naked form, as distinct evidence that on a certain day previously to taking possession on the 24th Aug. an act of bankruptcy was committed by the bankrupt, and that being so, and it being established by law that the title under liquidation, as well as under bankruptcy, will have relation back to the time at which an act of bankruptcy is committed, if this act of bankruptcy was committed a few days before the possession was taken, it seems to follow that the title of the mortgagee would be rendered incomplete in consequence of his not having taken possession previous to the debtor having committed an act of bankruptcy, unless it can be saved from being so under the provisions of this or any other Act. The case of *Ex parte Wright, re Arnold* (35 L. T. Rep. N. S. 21; L. Rep. 3 Ch. D. 70) was cited by Mr. Roxburgh, on the part of the mortgagee, as being a case entirely in his favour. I need scarcely say that since this case was argued before me I have taken the opportunity of looking carefully through that case, and in that case I find there is a very material distinction, and that the circumstances are very different. In *Ex parte Wright, re Arnold*, the bill of sale and mortgage had been duly registered, and the title of the mortgagee was good as against all the world, except as against the trustee in the bankruptcy, and the trustee in bankruptcy could only establish his title by establishing the fact that the holder of the bill of sale had notice of an act of bankruptcy when he took possession of the goods. But here the matter rests on a different basis: there they were able to establish that the act of bankruptcy was committed prior to the mortgagee taking possession, but in that, as in this, the act of bankruptcy was unknown to the mortgagee and accordingly it was held under these circumstances that the case came under the saving clause, the 94th clause of the Act, which says that nothing in this Act shall invalidate any payment made in good faith and for value received to any bankrupt or any contract or dealing, for valuable consideration, and without the knowledge on the part of the mortgagee of any act of bankruptcy, and in that case these conditions were fulfilled, and, therefore, the 94th section applied, that is to say, that part of the 94th section which exempts from the operation of the Act certain dealings. The title of the mortgagees was good in that case as against the trustee. But in this case the matter rests entirely on a different consideration. It is not the Act of 1869, the Bankruptcy Act, which renders the transaction invalid; it is the Bills of Sale Act 1854. By that Act it is enacted that transactions of this nature, unless registered, shall be invalid as against the trustee in bankruptcy, unless possession is taken before the bankruptcy. There is no saving clause in that Act, and it is impossible to argue that the saving clause enacted in the Act of 1869, which enacted that unless possession was taken before the bankruptcy the bill of sale should be invalid as against the trustee in bankruptcy, can be held to apply to the Act of 1854. But the precise conditions were not fulfilled, the mortgagee does not register the bill of sale. There having been a denial of the debtor to his creditors at a time preceding the taking possession there has been an act of bankruptcy established, and, however hard the case may appear to be (the act of bankruptcy being unknown), the court cannot but

decide against the mortgagee, and must make an order in the terms of the motion.

From this decision the bill of sale holder appealed.

Roxburgh, Q.C., Doria, and F. O. Crump, for the appellant.—At the time when the Bills of Sale Act 1854 was passed the Bankruptcy Act of 1849 was in force, and the 133rd section of the latter Act provided that “all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition” (a petition for adjudication of bankruptcy), should be valid notwithstanding any prior act of bankruptcy, provided the person dealing with the bankrupt had no notice of the prior act of bankruptcy. Therefore the words “time of such bankruptcy” in the first section of the Bills of Sale Act 1854 must mean the time of the fiat or of the filing of the petition. Unless that is so, a bill of sale holder, however diligent he may be in taking possession, would always be liable to be defeated by the commission of a secret act of bankruptcy. The trustee seeks to set up his claim by relation back to a prior act of bankruptcy under the Bankruptcy Act of 1869, but if those provisions apply, so do the 94th and 95th sections of the Act, which would protect a bill of sale holder who has taken possession without notice of any act of bankruptcy. This transaction is a “dealing” with the bankrupt, and comes within the protection of s. 94, sub-sect. 3, and s. 95, sub-sect. 1. In *Ex parte Arnold*; *Re Wright* (35 L. T. Rep. N. S. 21; L. Rep. 3 Ch. D. 70), it was held by this court that the taking possession of property comprised in a bill of sale was a dealing with the debtor for valuable consideration, which was protected by s. 94, sub-sect. 3, of the Bankruptcy Act 1869, that it took the property out of the order and disposition of the bankrupt notwithstanding a prior act of bankruptcy; and that the bill of sale holder was entitled to retain the property as against the trustee under the liquidation. That case is entirely in our favour. Mellish, L.J. there said that that sub-section was intended to protect every *bonâ fide* transaction not amounting to a giving away of the bankrupt’s property. They also cited

Graham v. Furber, 14 C. B. 134.

Winstow, Q.C. and Finch, for the respondent, the trustee under the liquidation.—This case is not governed by *Ex parte Arnold, re Wright*, which was a case of a registered bill of sale. There the bill of sale was rendered valid by registration, and the transaction was held to come within the saving clause of the Bankruptcy Act 1869, sect. 94, sub-sect. 3. Here the bill of sale is void under the Bill of Sale Act 1854, which contains no saving clause, and the transaction cannot come within the saving clause of the Bankruptcy Act 1869. The only question is, what is the meaning of the words “time of such bankruptcy” in the first section of the Bills of Sale Act 1854. *Fawcett v. Fearn* (6 Q. B. N. S., 20) shows that those words mean the time of committing the act of bankruptcy, and not the time when the fiat issues. They also cited:

Ex parte Jay, re Blenkhorn, 31 L. T. Rep. N. S. 260; L. Rep. 9 Ch. 697;

Ancona v. Rogers, 33 L. T. Rep. N. S. 749; L. Rep. 1 Ex. Div. 285;

Ex parte Schulte, re Matanle, 30 L. T. Rep. N. S. 478; L. Rep. 9 Ch. 409;

Bankruptcy Act 1869, s. 15.

F. O. Crump, in reply.

JAMES, L.J.—I am of opinion that it is impossible to get out of the plain meaning of the Bills of Sale Act. We have nothing to do with the policy or impolicy of that Act, or with the question whether the transaction with which it interferes may be a transaction desirable or undesirable in a commercial point of view. The Legislature has said in so many words that if a man takes a bill of sale and does not register it he is liable to the consequences of that Act, and one of the consequences of that Act is that the bill of sale is void as against the assignees in bankruptcy unless possession is actually taken before the bankruptcy. Now the question is what is the meaning of the word “bankruptcy” there. What did the word “bankruptcy” mean in the year 1854? It meant the commission of an act of bankruptcy which was followed by an adjudication, and it has received a judicial interpretation to that effect. It was held under the former Bankruptcy Act that the person executing a bill of sale became bankrupt when he committed an act of bankruptcy, and we cannot put any other legal meaning upon those words. The 94th section of the Bankruptcy Act 1869, has really nothing to do with the question. It is said that the 95th section protects certain transactions with bankrupts. That is a general enactment, and to hold that it affects the Bills of Sale Act would be to hold that general words in a subsequent Act would repeal a special provision in a special Act for a special purpose, which cannot be. I am of opinion, therefore, that the title of the person claiming under the bill of sale is not good as against the title of the trustee, and the appeal will, therefore, be dismissed with costs.

BAGGALLAY, J.A., concurred.

BRAMWELL, J.A.—I am entirely of the same opinion. I am not sure it was not in a case arising out of the Bills of Sale Act that I had occasion to say in this court the other day that it appeared a hard case. This really is not so, if anybody would look at the provisions of the Bills of Sale Act and the intention of those who passed it. It was intended to insure the registration of bills of sale, and it gives persons time to register them. If they choose not to do so, then the Legislature does not say that the bill of sale shall be absolutely void under all circumstances, but that it shall be void as against assignees of bankrupts and others under certain circumstances, but especially as against the assignees of bankrupts if at the time of the bankruptcy the goods are in the possession of the grantor of the bill of sale. Now a person who takes a bill of sale and advances money upon it, may, if he chooses, run that risk. If he does not choose to do it he need not, for he may register the bill of sale. Any hardship upon him therefore, or what appears to be such, is one of his own creating. Now, that being so, the first question we have to consider is whether the word “bankruptcy” there means “adjudication of bankruptcy,” or, having regard to the form which was in existence at the time the Bills of Sale Act was passed, the “issuing of the fiat.” Either of those expressions might have been used if the Legislature had thought fit; but instead of that the Legislature has used words which have been interpreted to mean, and which certainly I always understood to mean, the commission of an act of bankruptcy. The only remaining question is whether the Bills of Sale Act has been repealed in this respect by the 94th, or

more especially, by the 95th section of the present Bankruptcy Act (1869). I am of opinion that it has not been so repealed, not that there are not words in those sections which are inconsistent with the provision in question of the Bills of Sale Act, but because of that rule of law which says that, though subsequent laws abrogate prior inconsistent laws, that is not so where the prior law is not of general application. Now, the object of this first law here, the Bills of Sale Act, was to insure the registration of bills of sale, and the object of the Bankruptcy Act 1869 is not to make it less expedient or desirable that the grantee of a bill of sale should register it, or in any way to diminish the stringency of those provisions which the Bills of Sale Act contains with a view to the registration of bills of sale. The object of the 95th section of the Bankruptcy Act 1869 is entirely different. Therefore, this is not one of those cases in which a subsequent law abrogates a prior inconsistent law. One could illustrate it in this way: Supposing that the Bills of Sale Act had been limited to household furniture or stock in trade, it would be manifest that the general provisions of this 95th section would not repeal the provisions of the Bills of Sale Act. It is hardly necessary to cite an authority upon this point, but a somewhat similar case may be found in the *Attorney-General v. Lockwood* (9 M. & W. 378; affirmed in error, 10 M. & W. 464), which was decided thirty-five years ago in the Exchequer. It is somewhat upon the same line of argument, though not precisely in point. I am of opinion that in this case the title of the trustee must prevail.

Appeal accordingly dismissed, with costs.

Solicitors for the appellant, C. F. Knox.

Solicitor for the respondent, A. E. Copp.

July 19 and 22, 1876.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

COX v. BARKER; BARKER v. COX. (a)

Pleading—Specific performance—Demurrer—Multifariousness—Declaratory decree—15 & 16 Vict. c. 86, s. 50—Rules of court, 1875—Order XVI., rr. 4, 13; Order XVII., rr. 1, 8, 9.

By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife, on trust for her for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the state of the title being disclosed to the purchaser. The purchase money was paid to the trustees of the settlement, and a draft conveyance was approved in the form of an appointment by the husband and wife to the purchaser, but before actually completing the sale the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed. The widow, who was one of the executors, commenced an action against the purchaser, the other executors, and the devisees in trust under the husband's will;

and she had delivered a statement of claim asking the court to determine whether she could be compelled to concur in the conveyance to the purchaser; what was the effect of the contract for sale; what would be the devolution of the purchase money if the contract should be completed; and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation in respect of the plaintiff's life interest.

Held, that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for.

The purchaser also brought an action for specific performance of the contract for sale subject to the widow's life interest, with compensation in respect of that life interest out of the testator's personal estate, and claiming a lien on the purchase money. The defendants to this action were the widow, the other executors, and the devisees in trust. The devisees in trust and the executors having demurred to the statement of claim, the devisees disclaiming at the same time all interest in the purchase money.

These demurrers were directed to stand to the hearing of the action.

APPEALS from two decisions of Vice-Chancellor Bacon. In the first case the action was commenced on the 28th April 1876, by Mrs. Isabella Cox, the widow and executrix of William Sands Cox, deceased, against William Barker, the trustee of the marriage settlement of the plaintiff, the devisees in trust of the testator, his other personal representatives, one Thomas Cox, and the Attorney-General. The plaintiff delivered a statement of claim to the following effect:—By the settlement, dated the 25th Aug. 1866, made upon the marriage of the plaintiff and the testator, two freehold houses in Paradise-street, Birmingham, were conveyed to William Hatton and Osborne Reynolds, as trustees, to such uses as Mr. and Mrs. Cox should appoint, and, in default of appointment, to the use of the trustees during the life of the plaintiff, in trust to pay the rents to her for her separate use without power of anticipation, with remainder to the use of the testator in fee. The testator by his will, dated the 3rd Feb. 1875, bequeathed the residue of his personal estate to Davie, Hickman, Osborn Reynolds the younger, Lloyd, Goodman, and Woody, upon trust to convert and pay thereout legacies of 500*l.* to each of the children of Thomas Cox, and to invest the residue and pay the income of the investments to the plaintiff during her life for her separate use, and after her death to pay the residuary personal estate to certain charities; and, after reciting his marriage settlement, the testator devised all the real estate of which he should be seised at his death, or over which he had any power of appointment to the above-named six trustees, in trust to pay the annual income to the plaintiff during her life for her separate use, and after her death upon trust to sell the same, and to stand possessed of the proceeds in trust for such of the grandchildren of Thomas Cox as should be living at the death of the plaintiff. The testator appointed the plaintiff and the six trustees executrix and executors of his will.

In Sept. 1875, the defendant, William Barker, entered into negotiations with the testator for

(a) Reported by E. STEWART ROCK Esq., Barrister-at-Law.

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the purchase of the two houses in Paradise-street, Birmingham, and the price agreed upon was the sum which, invested in Consols, would produce an income of 180*l.* per annum (6000*l.* Consols). The circumstances of the case were fully explained to the trustees of the settlement, and a contract for purchase was entered into between the testator and Barker on the 25th Oct. 1875, which stated that the premises "are now settled to such uses as the vendor and Isabella Cox, his wife, shall jointly appoint, and the vendor will procure a proper assurance of the premises to the purchaser, to be executed by all necessary parties." An abstract of the vendor's title, including the marriage settlement, was sent to the purchaser's solicitor, and, pending the completion of the purchase, some correspondence took place on the subject of the investment and proposed settlement of the purchase-money.

On the 22nd Dec. 1875, 6000*l.* Consols were purchased by Barker in the names of Hatton and Osborne Reynolds, the trustees of the settlement, in pursuance of the agreement for sale, and a deposit which had previously been paid by Barker was thereupon returned to him. On the 23rd Dec. 1875, on which day the conveyance was sent by the purchaser's solicitor for execution by the testator and the plaintiff, the testator died suddenly without having executed it. The conveyance was in form an appointment by the testator and the plaintiff, under the power contained in their marriage settlement, without any conveyance by the testator and the plaintiff, or by Hatton and Osborne Reynolds, of their respective estates or interests in default of appointment. The draft of the conveyance had been previously approved by the solicitors acting for the plaintiff, but without her express instructions for this purpose.

According to the statement of claim the plaintiff, in conversation with the testator and William Hatton, pending the negotiations already referred to, said she thought it a pity to disturb the position of the trust property, but did not either agree or refuse to concur in the sale. She was not informed and was not aware that her consent was required to the sale. Being advised after the testator's death that it lay with herself and the trustees of the settlement to complete, or not to complete the sale to Barker, but that if the sale were so completed, the property might, for the purposes of the testator's will, be treated as converted into personal estate during his lifetime, and its destination under the will diverted from the grandchildren of Thomas Cox to the residuary charitable legatees, and believing that the testator had not present to his mind in contracting for the sale that the effect would be to vary the dispositions made by his will, the plaintiff declined to concur in or be a party to complete the sale.

At the death of the testator the plaintiff and the defendant, Thomas Cox, were his only next of kin. The will was proved by the plaintiff, Davie, Hickman, and Osborne Reynolds the younger alone. All the six trustees except Woody, who disclaimed in March 1876, accepted the trusts of the will. In an action brought by the plaintiff on the 25th Feb. 1876 against Davie, Hickman, Reynolds the younger, Lloyd, Goodman, and Woody for the administration of the real and personal estate of the testator, Rotten was appointed a trustee of the will in the place of Woody.

By her statement of claim the plaintiff desired to have the following questions determined by the court:

1. Whether, as between the defendant Barker and the real representatives of the testator, the contract of the 25th Oct. 1875 was binding on the defendant and such real representatives respectively, or whether such contract was or not conditional on the plaintiff's consenting to and actually concurring in the execution of the joint power of appointment vested in the testator and her, and what was the true construction of the contract as between the said parties.

2. Whether Barker was entitled, if he should so claim, to have the intended purchase completed by the trustees of the settlement as to the ultimate remainder only in the property, with a compensation out of the purchase-money for the life interest of the plaintiff therein.

[3 Related to the distinctions of the purchase-money if the contract were valid.]

4. Whether if the contract was not valid and binding as between all the above-mentioned persons, and was not completed in the testator's lifetime, it did or did not operate to convert the testator's ultimate remainder in the property comprised in it from real to personal estate for the purposes of his will, and as between his real and personal representatives.

5. If so converted, whether such property or the 6000*l.* Consols was of the nature of pure personalty, or of personalty savouring of the realty, for the purposes of the residuary bequest of personal estate contained in the will.

6. Whether the plaintiff could be compelled to concur in any conveyance of the property to the defendant Barker.

7. Whether, if not so compellable, her concurrence in any such conveyance would alter the ultimate destination of the testator's interest in the property under the dispositions contained in his will.

8. Whether any trusts of the proceeds of sale, or of the testator's interest in the same, were validly declared by the testator in his lifetime.

The plaintiff having claimed that these questions might be determined by the court as between the several parties thereto, the defendant Barker demurred to the whole statement of claim on the ground that the facts therein alleged did not show any cause of action to which effect could be given by the court against him, and, on other grounds, "sufficient in law to sustain this demurrer."

BARKER v. COX.

THIS was an action by Barker claiming specific performance of the contract of the 25th Oct. 1875 by a conveyance to the plaintiff of fee simple subject to Mrs. Cox's life interest, with compensation to the plaintiff out of the testator's personal estate in respect of such life interest.

To the statement of claim in this action two demurrers were put in.

1. A demurrer and disclaimer by the real personal representatives under the will of the testator raising the case that as the contract disclosed the state of the title the purchaser could not obtain specific performance with an abatement; and disclaiming any interest in the sum of 6000*l.* paid over to the trustees of the settlement in respect of the purchase-money.

2. A demurrer by Mrs. Cox and the personal representatives of the testator, admitting that the purchaser was entitled to such partial performance of the contract as was claimed by him, but demurring to the claim for compensation out of the testator's life interest on the ground that it was by the contract disclosed to the plaintiff that the testator was not entitled to sell as absolute owner. They also claimed the purchase-money as part of the testator's personal estate.

The demurrers in both actions having been argued in the court below,

Bacon, V.C. said: Having now heard all these demurrers, the first is by far the most important, as it is founded on what must be admitted to be quite a new rule of this Court. Now, I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions arose, to endeavour by one hearing and one decree to dispose of all the matters in litigation between all the parties who were interested in the subject of the litigation. That object seems to have been in the mind of Mrs. Cox when she filed her statement of claim. The statement of claim is remarkably fair and full, and contains no allegation that anybody can, with any reason, object to. It states clearly and explicitly the sort of entangled condition into which the subject of this contract had fallen, and the embarrassing position of the administration of the testator's estate. If there is anything to be ascribed to the provisions of the Judicature Act other than what I have mentioned, I am at a loss to discover it; and such being the meaning of the Legislature, it is the bounden duty of every court to give full effect to that meaning. The Act of Parliament, at the same time that it has enabled any person stating a claim to bring before the court all persons interested in that claim, and to include in the claim every question that can belong to it, or arise out of it, has at the same time carefully provided that no one shall be prejudiced by the fact of his being joined. The rules are distinct on the subject. Now the first demurrer is that of Mr. Barker, who says he is called upon to be a party to a litigation in the greater portion of which he has no kind of interest, that many of the questions raised do not concern him, and that he cannot be affected by their result in any way. That is the very thing which, in my opinion, the Legislature meant to accomplish. It meant to deal with cases in which there were many persons interested, and many interests involved, and to give the court power once for all to dispose of those cases, and to dispose of all the interests of many parties. I think Mr. Barker has no reason to complain. He has full liberty in his answer to bring forward every right that he can assign, and to bring it forward with no greater risk of failure of justice than would reasonably happen if he were the sole party to the action. It cannot be disputed that the Act (15 & 16 Vict. c. 86, s. 50), which enables the court to pronounce declarations in its full vigour. Whether any relief is to be founded on Mrs. Cox's claim will depend on the decision of the several questions which she has raised in her statement of claim. I cannot myself perceive that when the court comes to decide any one of these questions it will leave it with only the expression of an opinion. The court will not necessarily stop with a mere declaration, but will, as I should expect and believe,

give directions in the shape of a decree necessary to carry into effect the opinions which the court may have expressed. If, in the opinion of the court, the plaintiff is compellable to concur in any conveyance to Barker, then there must be a direction that she do convey; if she is not compellable, the answer to the question will be conclusive. I do not adopt the view that the provisions of the statute, which enable the statement of such a claim as this to be made, and the judgment of the court to be taken on it, mean that the court is to express an opinion only, and go no further, and I cannot see that Mr. Barker, in the face of this Act of Parliament, has any right to complain of the statement of claim delivered by Mrs. Cox. I see no harm in permitting Mrs. Cox's claim to go on in its regular course, and I see no reason why Mr. Barker, although he is nominally associated with other defendants, should not proceed to state his defence, and his title to relief, because title to relief, as well as defence, are included in the questions raised at the end of Mrs. Cox's claim. I think, therefore, that his demurrer cannot be allowed. I overrule it without costs.

With respect to the other two demurrers, his Lordship said that he should neither allow nor overrule them, but he proposed to save the benefit of them until the hearing of the action, when, if Mr. Barker's action came to a hearing, these demurrers could be argued. The costs would be reserved.

The defendant, Barker, appealed from the overruling of his demurrer in the first action.

Sir H. Jackson, Q.C. and Chapman Barber, for the appellant, contended that the statement of claim was demurrable, as it sought to obtain a mere abstract expression of opinion upon matters affecting in certain events the rights and interests of persons interested under the will of W. S. Cox. Although joined as a defendant with these persons, Barker had no interest whatever in these questions, while, as to the only question in which he was interested, namely, the validity of the contract of Oct. 1875, the plaintiff, by her statement of claim, neither repudiated nor sought specific performance of it. They submitted the court would not entertain a bill which raised a mere abstract question and asked for no relief. The Act 15 & 16 Vict. c. 50, did not enable a bill to be filed for the purpose of obtaining a mere declaration of right on which consequential relief was neither asked nor could be obtained. They referred to—

Rooke v. Lord Kensington, 2 K. & J. 753;

Jackson v. Turnley, 1 Drew. 617;

Bristow v. Whitmore, 4 K. & I. 743;

Barry v. Davey, 34 L. T. Rep. N. S. 842; 2 L. Rep. Ch. Div. 721.

Kay, Q.C. and Russell Roberts, for the plaintiff, were not called upon.

JAMES, L. J.—By this demurrer two objections are taken. One objection is for multifariousness, but that has ceased to be an objection by the express enactment of the Judicature Act, although, of course, it may be stated. Relief might be obtained in another manner, but this is not a ground of demurrer to a statement of claim. The other ground is, that the plaintiff merely prays declarations on certain questions, and that no decree giving relief can be made. The statement of claim, however, asks, not only for declarations,

but for further and other relief, that is, that the proper consequential order may be made, and there would be no difficulty in framing a consequential order based upon the findings on those questions. It would, I think, be easy to direct a conveyance to be made to the proper persons according to one finding, and to direct the money to be dealt with according to the other finding. Then it is said that in the three cases which were cited under the old law, it was held that, under the Act 15 & 16 Vict. c. 86, a plaintiff could not file a bill for a mere declaration, unless there were some consequential relief which the court had the power of giving. It appears to me that in those cases the court adopted rather a narrow view, though it certainly would not have done to ask the court to make a declaration upon mere abstract questions, and possibly it would not be right to ask a Court of Equity to decide something which would have to be determined in a court of law. In the present case declarations are asked with regard to certain rights for the purpose of clearing the estate which has to be administered. The case is very fairly stated, and it is right that the questions should be determined, the contract having been entered into by a deceased person, and his representatives having conflicting interests with regard to it. The real representatives take one view, and the personal representatives take another view, and the estate must be administered. It appears to me that the Vice-Chancellor was quite right in saying that there is a subject-matter for decision, and that it is proper that the questions should be answered; and that the court should retain in its hands the power of giving consequential relief. Then, as to the difficulty suggested, that the defendant Barker will be kept here as a party while questions in which he is not interested are dealt with and disposed of, one of the most beneficial of the rules under the new system is, that it is quite competent for the court to say, we will have those two questions in which he is interested tried first—the two first questions which relate entirely to the demurring defendant, viz., as to what are his rights under the contract—and the court can put those two questions in the course of the trial in the first instance, and determine them as between him and the other parties, and he will not be prejudiced in any way by the other matters which have to be disposed of. It seems to me it would be quite right that the court should determine, in the first instance, what are the rights of Mr. Barker as against the representatives of the testator. I think the Vice-Chancellor's order was quite right, and the appeal must be refused with costs.

MELLISH, L.J.—I am of the same opinion. The real question is whether more actions have not been brought here than was necessary, there being apparently three actions altogether. But that is not the question now before us. If there are too many actions an order may be made by the court to consolidate them, or to deal with them in some other way which will remedy that objection. I agree that this is not a demurrable statement of claim.

BAGGALLAY, J.A.—I am of the same opinion. So far as regards the objection of multifariousness, as the Lord Justice James has pointed out, that expressly met by the orders under the Judicature Acts, and any such difficulty as has been suggested is met by the 1st, 8th, and 9th rules of

Order XVII. I felt a good deal pressed at first by the decisions of Vice-Chancellor Wood in the cases of *Roake v. Lord Kensington*, and *Bristow v. Whitmore*, but it appears to me there is no room in this case for the objection which prevailed there. The 50th section of the 15 & 16 Vict. c. 86 empowers the Court of Chancery to make binding declarations of right without giving consequential relief; and Vice-Chancellor Wood was of opinion that it only empowered the court to make such declarations of right in cases in which some equitable relief might be granted if the plaintiff chose to ask for it. But, in this case it appears to me that, consequential upon the declaration of rights which is asked for, several forms of consequential relief might be granted. It is only necessary to mention one; 6000*l.* Consols have been placed in the names of the trustees of the settlement, and the consequential relief upon the declaration would be a direction as to the application of that fund.

BARKER v. COX.

THE trustees of the will of the testator appealed from the decision of the Vice-Chancellor ordering their demurrer to stand to the hearing.

Kay, Q.C. and *Woodroffe*, for the appellants, contended that as the plaintiff when he entered into the contract knew the state of the title, and no representation was made to him on the part of the vendor that the fee simple would be conveyed, he was not entitled to partial performance with an abatement in respect of Mrs. Cox's life interest, and his action, brought with full knowledge of the facts, must be dismissed with costs. The appellants had no interest in the purchase money, which did not even stand in their names, and every question could be decided on the demurrer.

Russell Roberts, for the executors, who had not appeared.

Sir H. Jackson, Q.C. and *Chapman Barber*, for the plaintiff, were not heard.

The following cases were cited:

Castle v. Wilkinson, L.Rep. 5 Ch. App. 534;

Barnes v. Wood, 21 L.T. Rep. N. S. 227; L. Rep. 8 Eq. 424;

Maw v. Topham, 19 Beav. 576;

Hooper v. Smart, 33 L.T. Rep. N. S. 499; L. Rep. 18 Eq. 683;

Wilson v. Williams, 3 Jur. N. S. 810;

Dart's Vendors & Purchasers, p. 1067;

Emery v. Wase, 5 Ves. 846.

JAMES, L.J.—I am of opinion that this demurrer was properly dealt with by the Vice-Chancellor. He did not intend to decide the matter finally, and the fact is, that these trustees are not the persons really interested in the question. They are only trustees, and in their character of trustees and executors they have no beneficial interest. The real question is as between Mr. Barker and the real and personal estates of the testator. The persons interested in the real and personal estates take different views of the matter; and, therefore, it is fitting that the whole matter should be determined, not upon the demurrer of the trustees, who have no interest in it in their character of trustees, but that it should be dealt with in the presence of all the parties. It appears to me that there ought to be no difficulty in having the whole thing disposed of, there being no disputed facts upon the statement of claim and defence, in the presence of everybody, just as cheaply

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and expeditiously as upon demurrer. The objection to deciding it upon demurrer is, that it would be a decision only between the plaintiff and the demurring parties, and would not determine the case as between them and the other parties. I think, therefore, that the Vice-Chancellor was quite right in saying, let this demurrer stand to the hearing, and then I will give a decision in the presence of all parties. The appeal will be refused with costs.

MELLISH, L.J. and BAGGALLAY, J.A. concurred.

Solicitors for Mrs. Cox, Kennedy, Hughes, and Kennedy, agents for Palmer, Son, and Broughton, Birmingham.

Solicitors for Mr. Barker, Gamlen and Son, agents for W. Cottrell, Birmingham.

Wednesday, Dec. 13, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRETT, J.J.A.)

Re NATIONAL FUNDS ASSURANCE COMPANY.(a)

Practice—Time for appealing—Winding-up order—Companies Act 1862, sect. 124—Judicature Act 1875—Rules 9 and 15 of Order LVIII.

Order LVIII, rule 9, provides that "the time for appealing from any order or decision made or given in the matter of the winding-up of a company, under the provisions of the Companies Act 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15." Rule 15 fixes the limit of twenty-one days for bringing an appeal from an interlocutory order.

Held, that under rule 9 an appeal from an order to wind-up a company ought to be brought within twenty-one days.

On the 29th July 1876, the Master of the Rolls made an order to wind-up the National Funds Assurance Company. The company gave notice of appeal, but their appeal was dismissed on the 6th Dec. 1876, on the ground that it was not set down in proper time. A new notice of appeal was given, and the Court of Appeal, on an *ex parte* application, ordered the appeal to be entered, reserving all objections to the respondents. Notice of an original motion was then given to advance the hearing and to stay the proceedings pending the appeal.

An objection was raised that the appeal was brought too late, inasmuch as rule 9 of Order LVIII, under the Judicature Act of 1875, provides that "the time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15," and rule 15 fixes the limit of twenty-one days for bringing an appeal from an interlocutory order. The motion now came on for hearing.

Ince, Q.C. and Seward Brice, for the appellants, contended that the statutory limit of twenty-one days did not apply to an appeal from the original

winding-up order. They relied upon the fact that the words in rule 9, which expressly mentioned appeals from orders made in the matter of the winding-up of a company, were the same as the words of sect. 124 of the Companies Act 1862, with regard to which in the case of *Re Universal Bank* (14 L. T. Rep. N. S. 691; L. Rep. 1 Ch. App. 428), Lord Chancellor Cranworth directed an appeal from a winding-up order to be received after the expiration of twenty-one days, and expressed an opinion in accordance with a decision of Vice-Chancellor Kindersley in *Re The Anglo-Californian Gold Mining Company* (5 L. T. Rep. N. S. 739; 1 Drew. & Sm. 628), upon the construction of the Winding-up Acts of 1848 and 1849, that the statutory limit of twenty-one days did not apply to an appeal from the original winding-up order. The third clause of rule 9, "in any other matter not being an action," could not extend to orders made under the Companies Acts which had been referred to.

Chitty, Q.C. and C. H. Turner, for the petitioner, submitted that the decision of Lord Cranworth in the case of *Re Universal Bank* was not binding on the court, inasmuch as it was given upon an *ex parte* application, and amounted to nothing more than a direction to his secretary to receive the appeal petition, every objection being, therefore, left open to the respondents on the hearing of the appeal. The decision of Vice-Chancellor Kindersley related to different Acts of Parliament; and even if Lord Cranworth's decision was binding on the construction of sect. 124 of the Act of 1862, yet the 9th rule contained the additional words, "any other matter not being an action," which were sufficient to include an appeal from an order to wind-up a company if it was not included under the previous words.

Whitehorne, for the official liquidator of the company.

Ince, Q.C., in reply.

JAMES, L.J.—I am of opinion that the limit of twenty-one days applies to an appeal from a winding-up order, unless the court extends the time. If the court had now for the first time to construe sect. 124 of the Companies Act 1862, I should have had no doubt that it applied to an appeal from a winding-up order. It is difficult to conceive any reason why such an order should be subject to a different rule from all other orders. All convenience and all justice are in favour of imposing the limitation of the time for appealing, for after the winding-up order had been made all the business of the company was suspended; everything was put into a state which demanded the utmost promptitude if it was desired to reverse the order. When the grounds of Vice-Chancellor Kindersley's decision are looked at, it is evident that it had no application to the construction of sect. 124, and Lord Cranworth's order was only a direction to his own secretary to receive the petition, the whole thing being left open for argument after it had been received. No one has been able to produce a single case in which the question has been argued or made really the subject of judicial decision. We have consulted the registrar and one of the chief clerks, who state that they are not aware of any such decision. There being, therefore, no established practice, I do not think

(a) Reported by E. STEWART ROCHER, Esq., Barrister-at-Law.

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the court are now precluded from giving to the words of rule 9 their natural and proper meaning.

BAGGALLAY, J.A.—I am of the same opinion. Rule 9 deals with three classes of appeals, and if the present case does not come within the first class, it certainly comes within the third, and therefore the appeal ought to have been brought within the twenty-one days.

BRETT, J.A.—I think that *prima facie* it would be a strange conclusion that an order to wind-up a company was not an order in the matter of the winding-up. For the reasons already mentioned, I am of opinion that Lord Cranworth's order was not a binding judicial decision on the construction of sect. 124, and under that section I think that the appeal would have been too late. The present case, if it is within sect. 124, is within the first branch of rule 9; if it is not within sect. 124, then Mr. Chitty's contention is right that it is within the third branch of rule 9. A consideration of great force in support of that view is this, that if a winding-up order was not within rule 9, it would be the only order in a matter not being an action which would not be within it. Such orders as orders made under the Trustees Acts and the Trustees Relief Act are clearly within it.

Ince, Q.C. asked that the time for appealing might be extended under rule 15. He made this application upon the ground that this was the first case under the new practice, and the parties had fallen into a misapprehension.

Their LORDSHIPS refused to extend the time.

Solicitors: W. Curtis; E. Beall.

SITTINGS AT WESTMINSTER.

Tuesday, Dec. 12, 1876.

(Before COCKBURN, C.J., KELLY, C.B., BRAMWELL and AMPHLETT, J.J.A.)

FOX v. WALLIS; ROBINSON v. WALLIS. (a)

Time for appeal from chambers—Notice of motion Order LIV., rule 6.

By Order LIV., rule 6, appeals from chambers "shall be by motion, and shall be made within eight days after the decision appealed against." It is not a sufficient compliance with this rule to give notice of motion within eight days, if the motion is made after the expiration of the eight days.

APPEAL from the decision of the Common Pleas Division, refusing to hear an appeal from an order made at chambers on the ground that the motion was too late.

Two separate actions were brought by the two plaintiffs against the defendant; the two actions related to the same subject-matter, and by an order made by consent were referred to an arbitrator together.

Afterwards an order was made by Huddleston, B., at chambers, varying the order of reference by giving power to the arbitrator to call in an assessor to fix the amount of certain costs which were in dispute between the parties. This order was made on the 12th May.

On the 20th May the defendant gave notice of motion, by way of appeal to the court, from the order; and some days later the motion was made

in court. The Court (Brett and Denman, JJ.) declined to hear the appeal, on the ground that by Order LIV., rule 6, the motion not having been made within eight days after the decision appealed against, was too late.

From this decision the defendant appealed.

Philbrick, Q.C., for the defendant.—The motion was not too late, and the court below ought to have heard the appeal. By Order LIV., rule 6, "In the Queen's Bench, Common Pleas, and Exchequer Division, every appeal to the court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against." The true construction of this rule is, that the motion shall be made within eight days, so far as it is within the power of the party to make it. Therefore it is enough if notice of motion is given within eight days, for otherwise if the court does not happen to sit during that time, the right of appeal is taken away. In *Crom v. Samuels* (35 L. T. Rep. N. S. 423; 25 W. Rep. 45), it does not appear that notice of motion was given within eight days. He also referred to

Wycherley v. Barnard, Johnson, 41.

Cole, Q.C. and Woollett, for the plaintiffs, were not called on.

PER CURIAM

Judgment of the Common Pleas Division affirmed.

Solicitor for plaintiffs, J. S. Robinson.

Solicitor for defendant, F. A. K. Doyle.

Dec. 15 and 16, 1876.

(Before COCKBURN, C.J., KELLY, C.B., BRAMWELL and AMPHLETT, J.J.A.)

BURCHELL v. CLARK. (a)

Construction of lease—Repugnant clauses—Admissibility of counterpart.

Where two parts of a lease are inconsistent the counterpart may be referred to for the purpose of determining which is correct.

In a lease the term was stated in the habendum as ninety-four and a quarter years, and in the reddendum as ninety-one and a quarter. In the counterpart it was ninety-one and a quarter in both places. After ninety-one and a quarter, but before ninety-four and a quarter years had expired, the owner of the reversion and the assignee of the lease in ejectment.

Held by Cockburn, C.J., and Bramwell and Amphlett, J.J.A. (reversing the judgment of the Common Pleas Division), that the term was ninety-one and a quarter years, and therefore plaintiff was entitled to recover.

Kelly, C.B., dissented.

APPEAL from the judgment of the Common Pleas Division on a special case stated in an action of ejectment brought by the owner in fee of certain premises against the assignee of a lease.

By the lease the premises were demised "to have and to hold the said premises . . . for and during and unto the full end and term of ninety-four years and one quarter of a year . . . yielding and paying therefor yearly and every year during the said term of ninety-one years and one quarter of a year hereby demised," &c.

The lease was executed by the lessor only. The counterpart, executed by the lessee, corresponded.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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except that in the habendum the term was ninety-one and a quarter years.

The question was whether the lease was for ninety-four and a quarter or ninety-one and a quarter years; if the former judgment to be for the defendant, if the latter for the plaintiff.

The Common Pleas Division (Brett and Archibald, JJ.) gave judgment for the defendant, and the plaintiff appealed. The special case is set out in the report in the court below (35 L. T. Rep. N. S. 372).

Finlay and G. R. Kennedy, for the plaintiff.—The obvious intention of the parties to the lease must be taken into consideration, and the lease and counterpart make it clear that the intention was to create a term of ninety-one and a quarter years. The counterpart may be looked at. It has been held that a counterpart is the same thing as a lease for the purpose of proof of the demise.

Houghton v. Kenig, 18 C. B. 235; 25 L. J. 218, C. P.; and

Roe d. West v. Davis, 7 East, 363,

referred to by the court in that case. The two documents ought to be read together, and treated as one for the purpose of determining the true construction, and if this is done the mistake in the lease may be corrected:

Spyre v. Topham, 3 East, 115;

Wilson v. Wilson, 5 H. of Lds. Cas. 40; 23 L. J. 697, Ch.; see also

Morton v. Woods, L. Rep. 4 Q. B. 293.

The passage from Sheppard's Touchstone, p. 53, which was relied on for the defendant in the court below, as showing that the lease must prevail over the counterpart, has a different meaning from that sought to be given to it. It would apply only where there was a difference between the lease and counterpart, and each was consistent in itself, not where the different parts of the lease are repugnant. The whole of the lease and counterpart should be looked at, not merely one part, as the defendant contends (Sheppard's Touchstone, pp. 52, 87). The court can reform the deed now if this is necessary.

Benjamin, Q.C. and J. Graham, for the defendant.—The grantor is bound by the only instrument which he executed, that is the lease, and the counterpart cannot be referred to for the purpose of altering what would otherwise be the clear meaning of the lease. In Sheppard's Touchstone, p. 88, the following is stated as the 7th general rule of construction: "That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary, and therefore herein a deed doth differ from a will; for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received." This rule is also adopted by Blackstone in his Commentaries, book 2, c. 23 (vol. 2, p. 381, in the 21st edit.). [AMPHLETT, J.A.—I have often argued at the bar that the last clause in a will should prevail, but never with success.] There must be rules of general application, and they ought not to be departed from except for very strong reasons. To determine what the term is the habendum should be referred to. [COCKBURN, C.J.—In Sheppard's Touchstone, p. 52, 7th edit., Preston inserts after "habendum" the words "which is a formal, and not an essential part of a deed." Here the term is not stated in the premises, and

therefore it is the office of the habendum to fix the term. "The office of the habendum is properly to determine what estate or interest is granted by the deed." Blackstone's Commentaries, book 2, c. 20, p. 298, in the 21st edit. [COCKBURN, C.J., referred to Smith's Landlord and Tenant, 2nd edit., p. 103.]—The original lessor executed the lease for ninety-four and a quarter years, and he could not dispute it, nor can the plaintiff. [BRAMWELL, J.A.—Suppose this were an onerous lease, could you fix the tenant for ninety-four and a quarter years, when he has only executed for ninety-one and a quarter?] The lessee is bound by acceptance as an estoppel, Sheppard's Touchstone, p. 53. [BRAMWELL, J.A., referred to *Pearce v. Maurice*, 3 B. & Ad. 396.]—The lease ought not now to be reformed as against the defendant.

Earl of Bradford v. Earl of Romney, 30 Beav. 431;

2 Tudor's Leading Cases in Equity, 4th edit., p. 27.

No question of reformation was ever raised until during the argument in the court below. (See L. Rep. 1 C. P. Div. at p. 605.)

Finlay, in reply.—The estoppel tells, if at all, more against the defendant than against the plaintiff. The plaintiff could not sue on the covenants after the expiration of ninety-one and a quarter years. The rule is that the construction of deeds is to be favourable, and as near the intention of the parties as possible, and also reasonable. (Sheppard's Touchstone, p. 86, rules 1 and 2.) He also referred to

Strickland v. Maxwell, 2 C. & M. 539;

Swan v. North British Australasian Company, 2 H. & C. 175; 32 L. J. 273, Ex.

COCKBURN, C.J.—This case has been so fully and elaborately argued, and everything that could have been said on either side has been so fully brought forward, and the matter appears to lie in such a comparatively narrow compass, that we are enabled to dispose of the case at once, although the court is not unanimous. In my opinion the judgment of the Common Pleas Division ought to be reversed. In the view which I take of the question, I am clearly of opinion that it is not necessary to overrule any of the canons of construction which have been referred to. Those canons were framed with a view to general results, and in any case to which they applied we should be bound by them. I am glad to think that we can decide the question before us in accordance with the real justice of the case without violating any of the rules of construction which have been generally adopted. It is perfectly clear that in the deed which was executed by the lessor there is a clerical error, for the grant purports to be for a term of ninety-four and a quarter years, while in the reddendum it is ninety-one and a quarter years; either, therefore, ninety-four and a quarter should be ninety-one and a quarter, or ninety-one and a quarter should be ninety-four and a quarter. Now the counterpart was executed at the same time as the lease, and a question is raised whether we can refer to the counterpart in order to find out the meaning of the lease. I agree that if there were only one deed, according to the canons of construction the habendum is the dominant part of the deed, and would prevail, and the reddendum, which is a subordinate part, must yield. I agree also that if there were a difference between the lease and the counterpart, if there were a mistake

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in the deeds in not making the counterpart correspond with the lease, according to the canon of construction laid down in Sheppard's Touchstone and adopted by Blackstone, the counterpart must give way, being the inferior instrument, and the lease, which is the superior instrument, must prevail. But here the difference is not between the lease executed by the lessor and the counterpart executed by the lessee, independently of any discrepancy in the different parts of the same instrument; here in the deed which was executed by the lessor there is a plain and manifest error, and the canon of construction does not exclude us from seeing where the mistake lies, even though we may have to look at the counterpart in order to do so. I can see no reason according to common sense, and I know of no authority to show that we may not ascertain where the mistake lies by reference to the counterpart. When we find that there is a mistake between two numbers in the lease, but that both in the habendum and reddendum in the counterpart, which deed the lessor accepted, one of these numbers occurs, this is very important as showing which of the two is right. If from any other part of the deed executed by the lessor we could solve the difficulty, and come to the conclusion that ninety-four and a quarter was inserted by mistake, we should undoubtedly be at liberty to do so, for instance, if in the covenant to pay rent the lessee had covenanted to pay for "the said demised term of ninety-one and a quarter years," it would be clear then that the number expressed in the habendum was a mistake, and the mistake could be corrected by the deed itself. If we are to treat the two instruments as one, I see no reason why we should not correct the lease by referring to the counterpart just as well as by resorting to the other part of the lease itself. If in the operative words in the earlier part of the lease the number ninety-one and a quarter had been mentioned, the habendum could be corrected by this, and so if it had been in the covenant to pay rent, and so the correction may be made by reference to the counterpart, where there is no such discrepancy. I see no reason why we should not resort to the counterpart, and by so doing we practically give the interpretation which beyond all question if the deed had been correctly drawn according to the intention of the parties, it would have borne. It is quite clear that there was a mistake, and I am, therefore, of opinion that the judgment ought to be reversed.

KELLY, C.B.—I have the greatest difficulty in coming to a conclusion in this case, because I cannot doubt that the real intention of the parties was that the lease should be for ninety-one and a quarter years, and it is only because, on considering the canons of construction, which have been adopted by the highest authority, I cannot see how any other construction can be adopted, that I think the true construction is that this is a grant of a lease for ninety-four and a quarter years, and not for ninety-one and a quarter years. I agree that we must look at the counterpart as well as the lease, but as they are two manifestly and absolutely inconsistent documents, it is necessary to decide which ought to prevail. If the lease is for ninety-four and a quarter years, and by the counterpart a term of ninety-one and a quarter years only appears to be granted, the

counterpart must yield. This seems to be the general effect of the rules of construction, and no one authority has been cited to show that where there are two inconsistent documents such as these the lease is to be sacrificed. As to reforming the instrument, I dismiss that question from my consideration, and also the suggestion that the instrument may be taken as if reformed. I dismiss all that, because I think we must decide with reference to the deed itself, and the construction to be placed upon it. I also dismiss the question of estoppel either as against the plaintiff or as against the defendant. If we look to the canon of construction, where in the premises the term of ninety-four and a quarter years is clearly stated, and anything else that comes afterwards refers to a shorter period, it seems clear that the latter part of the document must yield and the former part prevail. This principle is so clearly applicable that it is admitted that if the lease stood alone it would be for ninety-four and a quarter years. If this be so, then comes the question, how can we possibly say on the authorities that if there is a counterpart varying from the lease, the lease is to be construed otherwise. It seems clear to me that the counterpart must yield and the lease prevail. I do not mean to say that if the rules of law were otherwise than what I consider them to be, and the two instruments, were taken together, they would show this to have been the intention of the parties. We must look to see what the mistake is here. There being in the early part of the lease a clear grant of a term of ninety-four and a quarter years, the term is afterwards referred to, in consequence of some clerical error, as if it were ninety-one and a quarter years. Although I cannot deny that if we were to read the counterpart alone, and the counterpart is the document which is under the seal of the lessee, it would go to show that the term was ninety-one and a quarter years, still I think that if it is used to correct a mistake in the lease it is insufficient, and, further, the effect of using it for that purpose would be to make the counterpart prevail so as to set aside a grant of a term of ninety-four and a quarter years; the effect would be to set aside what was intended to be a complete grant, and make it a grant for ninety-one and a quarter years. I do not find any authority to show that, if once a term of ninety-four and a quarter years is granted by the lease, that can be altered by the counterpart. I have come to this conclusion with great reluctance, especially as I am differing from the view of the other members of the court; and I rejoice that they find themselves able to come to a different conclusion, and that their judgment must prevail, because I think the practical effect will be to do justice.

BRAMWELL, J.A. had left the court, leaving a note of his opinion, which was read by Amphlett, J.A., and was as follows: I am of the same opinion as the Lord Chief Justice, and for the same reasons. I think that no term was created of more than ninety-one and a quarter years. It is quite clear that no action could have been brought on a covenant in the lease after the expiration of ninety-one and a quarter years.

AMPHLETT, J.A.—I am of the same opinion. There are two questions, as to the reformation of the lease, and as to its construction. As to reformation, it is clear that it is impossible for us to reform the lease in this suit, because the point was never raised, and the defendant had no

opportunity of meeting it. In equity no deed will be reformed as against a purchaser for value without notice, and here there was no evidence that the defendant had notice of the discrepancy in the lease. It might be a nice question whether it was not the defendant's duty to know of it, but he has had no opportunity of meeting the point. Then what is the real construction of the instrument? According to the canon of construction laid down in Sheppard's Touchstone, p. 52, the lease and the counterpart are one document; they used formerly to be written on the same paper, and for the purpose of determining questions of construction we must look at both. We start with this, that both parties considered the lease and counterpart to be identical, but the lease is inconsistent with itself. There is clearly a mistake, for ninety-four and a quarter and ninety-one and a quarter are inconsistent, and only one of them can be correct. Then what does the canon say?—that in such a case the habendum must govern, because the grant is to be construed most strongly against the lessor, and therefore no doubt, if the lease stood alone the term of ninety-one and a quarter years would be corrected, and ninety-four and a quarter would govern. But the first thing that any man of business would do on meeting with such a discrepancy in the lease would be to look to the counterpart for explanation. The counterpart is the only document which was executed by the lessee, and it speaks of the term as ninety-one and a quarter years throughout. It is meant to be a copy, and it is so with one exception, and in that instance there is clearly an error in the lease. Looking at the two I think I am justified in saying that it was intended that the counterpart should be a copy of the lease, and it was not intended to copy the inconsistency. Probably the same rough draft was used for both, and the error was made in copying the lease. The canon is, that if the lease and the counterpart differ, the lease must prevail, and in a case coming within the ordinary rule, I do not doubt that it would be so. If all through the lease the term were ninety-four and a quarter years, and all through the counterpart ninety-one and a quarter, the lease would prevail, for then the canon would apply. But the canon is laid down presuming that there is nothing inconsistent in the lease itself, but that the lease and counterpart differ, and we ought not to act upon it where it is clear that there is a mistake in the lease. I think, therefore, we may fairly say that the canon does not apply, and in so saying we do not overrule the canon, but we give it a reasonable construction. Some of the cases which have been cited here are important, and show that the same rule prevails at law and in equity as to construction—that if there is a manifest error on the face of the document the court may correct it. The case of *Spyve v. Topham*, where words which appeared in the release and were contradictory to the lease, were rejected, is a strong authority. Lord Ellenborough there says that the cases are satisfactory in authorising the court to put a construction on the deed in support of it which, from the reason and good sense of the thing, they would probably have done without such authorities. Another case in point is *Wilson v. Wilson*, in the House of Lords, where the whole question is fully gone into. That was a suit for specific performance of articles of agreement by which a deed of separation between

husband and wife was to be executed, and by a mistake in the draft deed the trustees were made to covenant to indemnify the husband against his own debts. There being an agreement *in fieri*, it was not a suit for rectification of a written instrument. The House of Lords there held, in accordance with reason and common sense, that the name "John" in the indemnity clause of the draft deed ought to be altered into "Mary," and this decision was carried into effect, not by reforming a written instrument, but by ordering the execution of a deed in the terms intended to be agreed upon. I think, therefore, on these short grounds, that we are fully justified in holding that according to the proper construction, ninety-four and a quarter in the lease must be read as ninety-one and a quarter. That being so, the defendant must stand in the same position as the original lessee, and the construction must be the same as it would have been in an action to which the original lessee was a party. If the proper construction is that which I have stated, it is clear that the original lessee or his assignees could not convey more than they had. I think, therefore, that the judgment ought to be reversed.

Judgment reversed.

Solicitor for plaintiff, W. W. Hayne.

Solicitors for defendant, Mackeson, Taylor, and Arnould.

Tuesday, Dec. 19, 1876.

(Before COCKBURN, C.J., and BRETT and AMPHLETT, JJ.A.)

ROSE v. THE NORTH-EASTERN RAILWAY COMPANY. (a)

Train overshooting platform—Passenger injured in alighting—Evidence of negligence.

In an action for negligence the question whether the facts amount to negligence is for the jury.

Plaintiff was a passenger by defendants' railway.

The train in which she was overshoot the platform.

The porters called to the passengers to keep their seats, but not so that plaintiff could hear. The train was not backed. Plaintiff waited some time, and then got out, and was injured in alighting.

Held, reversing the judgment of the Exchequer Division, that there was evidence to go to the jury of negligence on the part of the defendants.

APPEAL from the judgment of the Exchequer Division of the High Court of Justice.

The action was for damages for injury suffered by the plaintiff in consequence of the negligence of the defendants' servants. On Whit-Monday, 17th May 1875, the plaintiff took a ticket from Usworth to Washington on the defendants' line, where she arrived between 11 a.m. and 12 o'clock. As the train came into the station the porters called out, "Washington, Washington." It was a long train, and the front part of the train passed beyond the platform, the carriage next the engine, in which the plaintiff was, stopping about twenty yards beyond the end of the platform. The railway officials on the platform called to the passengers to keep their seats, but the plaintiff and the persons in the carriage with her did not hear them. The plaintiff waited a little while, and the train was not put back; she then got out, and in getting down her dress caught in the step of the carriage, and she fell on the line, and was injured.

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The train was never backed. It was admitted by the defendants' counsel at the trial that the plaintiff did not act unreasonably or negligently. The case was tried before Mellor, J., at the Newcastle Spring Assizes 1876, when a verdict for the plaintiff for 100l. was taken by consent, with leave to the defendants to move to enter a nonsuit on the ground that there was no evidence of negligence fit to be left to the jury. The court (Kelly, C.B., and Cleasby, B.) gave judgment for the defendants, and the plaintiff appealed.

The case is reported in the court below, (34 L. T. Rep. N.S. 761), where the evidence given at the trial is set out.

Digby Seymour, Q.C. (*Gainsford Bruce* with him), for the plaintiff, referred to *Siner v. The Great Western Railway Company* (L. Rep. 4 Ex. 117; 38 L. J. 67, Ex.; 14 L. T. Rep. N. S. 114); and *Bridges v. The North London Railway Co.* (L. Rep. 7 H. L. 213; 43 L. J. 151, Q. B.; 30 L. T. Rep. N. S. 844). He was stopped by the court.

Wilberforce, for the defendants.—The question is whether there was any invitation to alight, and it is quite clear that calling out the name of the station is not such an invitation. The effect of the authorities is to show that the facts proved at the trial do not amount to evidence of negligence. He cited

Siner v. The Great Western Railway Co. and Bridges v. The North London Railway Company (ubi sup.); *Robson v. The North-Eastern Railway Co.*, (L. Rep. 10 Q. B. 271; 44 L. J. 112, Q. B.; 32 L. T. Rep. N. S. 551; affirmed in the Court of Appeal, 35 L. T. Rep. N. S. 535).

Digby Seymour, Q.C. was not heard in reply.

COCKBURN, C.J.—I do not wish to speak with any disrespect for the learned judges who decided this case in the court below, but it seems to me to be the clearest case possible, and I am of opinion that the judgment is wrong and must be reversed. I quite agree that the mere fact of the end of the train passing beyond the platform does not of itself imply negligence. It is impossible to regulate the speed of the train so exactly as in every instance to prevent this, and sometimes, as in the case of an excursion train, the train may be longer than usual, and so part of it may necessarily reach beyond the platform. But when that happens there is a duty cast on the company, and it becomes necessary for them to take measures to ensure that persons alighting from the train should have such means provided as experience and common sense may suggest to obviate the difficulty and risk to which they may be exposed. It is the duty of the company not to expose the passengers to unnecessary danger. The train may be backed and the passengers may be told to keep their seats until the train has been backed, so that they may be enabled to alight at the platform; but I cannot but think that some such course should be adopted, or the passengers should be asked whether they wish to have the train backed, or are content to get out where they have stopped. Either the train should be backed or there should be somebody at hand to assist those who may require assistance in alighting, for it is not everyone who is active enough to step down from the carriage on to the line. It being therefore necessary that something should be done, the question is, was there enough done here? I agree that if the train overshoot the platform, and the porters

called out to the passengers to keep their seats, and the passengers were nevertheless to get out, it would be their own fault if they met with any accident; but it is not enough if the porters call out to the passengers to keep their seats, unless the carriages are backed, or something is done to enable people to alight in safety. It is not enough to call out, unless the porters take care that what they call out shall reach the ears of the persons concerned. In the present case the porters called out, but not so as to give warning to the plaintiff, and even if they had given warning to the plaintiff, they did not back the train. Under such circumstances what is the passenger to do? Can it be said that the passenger is bound to wait in the carriage, and be carried on to the next station? If she did so she would be travelling without a ticket, and would be called upon to pay the extra fare, and besides would be put to very great inconvenience. If it were an express train a passenger might very likely be carried fifty or sixty miles beyond his destination. I agree that the passenger must wait a reasonable time, but if the plaintiff sat still until she was convinced that the train was going on without being backed to the platform, and if, as was the case here, it actually did go on without ever being backed, that is clearly evidence that the company did not take due care for the safety of the passengers. I agree that if a passenger is careless in getting out and is injured, it is his own fault; but this is not the case, and it is clear that the company have not done what it was incumbent on them to do, they ought to be made liable. Here it is clear that the plaintiff did nothing negligent, and that she was exposed to risk in getting out. I do not think the question depends much on authority. It is clear from the case of *Bridges v. The North London Railway Company* that it is for the jury to decide whether there has been negligence or not. In this case we are not called upon to say whether the verdict was right. I do not mean to say that I think it was not; indeed, my opinion is the other way; but we must not confound the two questions, and all we have to decide here is whether there was any evidence to go to the jury of negligence on the part of the defendants. I think there was, and that the judgment ought to be reversed.

BRETT, J.A.—The only question in this case is whether there was any evidence to go to the jury, for the leave was to enter the verdict for the defendants if there was no evidence. It is admitted that there was no negligence on the part of the plaintiff, and the only question is whether there was any evidence of negligence on the part of the defendants. It is enough to say that there was evidence that after the carriages had got beyond the platform the defendants did not take reasonable care to provide the passengers with proper means of alighting in safety. If there was any evidence the jury were entitled to say that there was negligence, and that it was the cause of the accident. It was long disputed how much it is a question for the jury in cases of this kind whether there was negligence or not. For my own part I always thought the point was settled by the judgment of the Court of Exchequer Chamber, delivered by the Lord Chief Justice, in *Cockle v. The South Eastern Railway Company* (27 L. T. Rep., N. S. 320; L. Rep. 7 C. P. 321; 41 L. J. 140, C. P.), but it is not

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sequently came before the House of Lords, in *Bridges v. The North London Railway Company*, and there it was decided that the question is for the jury, and judges are not to decide what is a reasonable course. I think that *Robson v. The North Eastern Railway Company*, is a strong case in support of this view. There Blackburn, J., whose opinion had formerly been the other way, following the decision of the House of Lords, holds that the question is for the jury.

AMPHLETT, J.A.—I am entirely of the same opinion. I was one of the judges who had to consider the case of *Robson v. The North Eastern Railway Company*, so I will only add a few words to what has been already said in the present case. There was a difference of opinion before the case of *Bridges v. The North London Railway Company* was decided by the House of Lords, as to whether, on the facts of particular cases, the question if there was negligence was for the jury or for the judge. That point has now been settled by a court whose decision is binding on us. The case of *Robson v. The North Eastern Railway Company* is a decision of the Court of Appeal. Mr. Herschell very fairly admitted in the court below that it more than covers this present case, and I think it does. The only argument in answer to that decision in the court below was that it was under appeal; but now it has been affirmed exactly on the grounds stated by the Lord Chief Justice in *Cockle v. The South-Eastern Railway Company*, and in the present case. It was held there that the passenger did not act unreasonably in getting out where there was danger of being carried on to the next station. I entirely agree that the decision of the court below ought to be reversed.

Judgment reversed.

Solicitors for plaintiff, *Pattison, Wigg, and Co.*, for *R. Scott Hopper*, Newcastle-on-Tyne.

Solicitors for defendants, *Williamson, Hill, and Co.*, for *Richardson, Gutch, and Co.*, York.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 17, 1876.

(Before the MASTER of the ROLLS.)

Ex parte WILLIAMSON. (a)

Solicitor—Articled clerk—Interruption of service—Implied cancellation of articles—Assignment of articles—6 & 7 Vict. c. 73, s. 13.

In 1861 *W.* was articled to *R.*, a solicitor. In 1863 his articles were cancelled. In 1865 he re-entered the service of the same solicitor, and remained till 1867, when he left. His articles were not cancelled on the second occasion. In 1869 his articles were assigned with *R.*'s consent to *L.*, with whom he remained a period, which, together with the former periods of service, made up the five years. *W.* applied that the several periods might be reckoned together as constituting five years' service.

Held, that though there was no formal, still there was a virtual, cancellation of the articles in 1867, and that the case came within 6 & 7 Vict. c. 73, s. 13, and that the different periods might be reckoned together as one period of service.

(a) Reported by J. E. THOMPSON, Esq., Barrister at-Law.

THIS was an application on behalf of William Smedley Williamson, an articled clerk, that the several periods hereinafter mentioned might be reckoned as amounting to the necessary period of five years of clerkship, and that he might be admitted accordingly. An affidavit was filed, in which Williamson stated that by an indenture dated 2nd Dec. 1861, he was duly articled to Thomas Roberts for the full term of five years; that he remained with Roberts for one year eleven months and eight days, and then, on the 10th Nov. 1863, with the said Thomas Roberts' consent, his articles were considered as cancelled, and he left his office, and entered a merchant's office at Liverpool, where he remained for seven or eight months. For some time he continued unemployed, but in the month of Feb. 1864, he applied to the said Thomas Roberts to allow him to complete the full period of his service, and was re-articled by an indenture dated 24th Feb. 1865, for the period of three years and twenty-three days, being the remainder of the period of five years. While in Roberts' service he passed his intermediate examination, in Hilary Term 1866, and continued in Roberts' service till the 5th March 1867, having then served a further period of two years and twelve days—the total service having been three years eleven months and twenty days. He was then advised change of air and rest for his health's sake, and passed several months at the seaside and on the Continent. In October 1869, wishing to continue his service, the said Thomas Roberts consented to assign him for the remainder of the term to Marcus Louis, of Ruthin, in the county of Denbigh, and by an indenture, dated 26th Oct. 1869, he was duly assigned and re-articled to Louis for the remaining period of the five years, which expired on the 5th Nov. 1870, since when he has not carried on any employment.

C. H. Turner, for the applicant, referred to *Ex parte Trenchard* (L. Rep. 9 Q.B. 406), where the applicant, after serving for more than two years, obtained a commission in the army, and then re-entered into articles, and applied that the period during which he had served might be counted. The application was granted. [JESSEL, M.R.—The court in that case held that his obtaining a commission amounted to a virtual cancellation of the articles, as he was not at liberty to sell out of the army at any time. Here there was no cancellation of the second articles, and the period had run out.] There was virtual cancellation here, and the applicant had actually served the full time, and does not seek, as it was sought in *Ex parte Mosses* (L. Rep. 9 Q. B. 1; 29 L. T. Reps N. S. 420), to have any time allowed during which he was absent. The application was made under sect. 13 of 6 & 7 Vict. c. 73, which is as follows: "If any attorney or solicitor, to or with whom any such person shall be so bound, should happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor, or if such contract shall by mutual consent of the parties be cancelled, or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the court wherein such attorney or solicitor shall have been admitted, such clerk shall, and may in any of the said cases, be bound by another contract or other contract, in writing, to serve as clerk to any other practising attorney or solicitor, or attorneys or

in manner hereinbefore mentioned, shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner hereinbefore directed, and subject to the like regulations with respect to the original contract and affidavit of the execution thereof."

JESSEL, M.R.—The words of the Act are wide enough, and my impression is that the applicant is within the Act, and I make the order accordingly.

Solicitors: *Lewis and Indermaur.*

Friday, Nov. 17, 1876.

TAYLOR v. CORPORATION OF OLDHAM.(a)

Sewers — Powers of local authority — "Street" — Local Act (Oldham Borough Improvement Act 1865), sects. 16, 27, 59, 60, 62, 160, 366 — Public Health Act 1875, sects. 16, 299 — Sewage Utilisation Act 1865, sect. 4.

The term "street," both in its general meaning, and by the Oldham Borough Improvement Act 1865 (Acts Local and Personal, 28 & 29 Vict. c. 311), includes a private road, for passage over which a toll is charged, and over which the public have no right of way.

The plaintiff was the owner of a private road at Oldham, and set up a toll bar at one end, and charged tolls for passengers. The defendants, without any further notice than the erection of a board with a printed notice thereon, proceeded to dig and construct sewers in the said road. The plaintiff moved for an injunction to restrain them from proceeding with the work.
Motion refused.

Held, that the corporation was empowered to construct such sewers, both under sect. 4 of the Utilisation of Sewage Act (28 & 29 Vict. c. 75), s. 16, and the Public Health Act 1875 (28 & 29 Vict. c. 55), and by their Private Act.

The special rights and powers given by a Private Act of Parliament are not taken away by the general provisions of a Public Act.

THE plaintiffs are the present trustees of an indenture dated 3rd March 1837, whereby certain plots of ground, with the appurtenances, became vested in certain persons therein mentioned upon trust for "the Higginshaw and Lower Moor Road Company," thereby constituted. The object of the said company was to maintain the said road, and for that purpose to raise a sum not exceeding 1600*l.* in thirty-two shares of 50*l.* each, and no person, with the exception therein mentioned, was to travel on or use any part of the said road without paying such toll as was therein provided.

The said road was duly completed, and toll bars erected, and the title of the company acknowledged from time to time by the defendants.

Some time previously to Oct. 1876, the defendants caused a notice, dated 3rd May 1876, to be posted up on a part of the said road or street, headed, "The Oldham Borough Improvement Act 1865," and addressed to all persons interested in the said road, to the effect that unless certain drainage works therein specified should be com-

upon, or under the said road or street, and sewer and drain, or otherwise complete the said street, or such part thereof as should not have been done, in such manner as they should think fit, and might charge the several owners of buildings or lands in such street with the expenses of the execution by them (the defendants) of such works or incidental thereto, in the manner alleged to be prescribed by the said Act, the same to be paid or recoverable as therein provided in that behalf.

The said notice, as the plaintiffs alleged, was not brought to the knowledge of the plaintiffs previously to 20th Sept. 1876.

On or about 20th Sept. 1876, the defendants, without the consent of the said company or of the plaintiffs, and without any further notice than that above mentioned, acting, as they alleged, under the provisions of the Oldham Borough Improvement Act 1865, caused openings and excavations to be made in the surface and soil of the said road, called Shaw-road, for the purpose of laying or constructing a sewer, and threatened to proceed in the said excavations and construction without further notice to, or the consent of, any persons whatever. The defendants had in fact already caused several holes or shafts to be opened and made in Shaw-road, and were proceeding to cause cuttings or tunnels to be made to connect the said holes or shafts to a depth ultimately attaining 30ft. or thereabouts.

The plaintiffs claimed an injunction to restrain the defendants against proceeding with their works, and damages for the injury done thereby to the plaintiff's road.

Ince, Q.C. and E. W. Byrne, for the plaintiffs.—This is a close of land which has never been dedicated to the public. The defendants have been trespassing on our land and digging holes in it. There is no right of way for the public, and we had put up toll bars. The defendants have no authority under their private Act. See sect. 27 of the Private Act, in which this road, though spoken of for the sake of convenience as a "road" or "street," is treated as private property. It is in effect declared to be private property, which the corporation, if they wish to exercise any rights over it, must purchase. That section is not in any way repealed by the Public Act. [JESSEL, M.R.—What do you say is the meaning of the 5th subsection? That is the only point on which difficulty arises. Does the 5th subsection include this? It gets rid of sect. 60, does it not?] I go further. The Public Act does not repeal the Private Act, which in effect says: "Your close is not a street; if the corporation wish to treat it as a street they must buy up your rights." [JESSEL, M.R.—The third subsection seems to help your argument.]

Chitty, Q.C. and Macnaghten for defendants.—This is a street within the definitions in the Private Act [read to words "commencement of the Act"]. In sect. 27 this particular road is spoken of as a street. We have proceeded regularly under sect. 16. [JESSEL, M.R.—That section hardly applies to private property.] Yes; if a man makes his private property into a street, and there are compensation clauses in this Act. (See also sect. 59, on which we rely, and sects. 60 and 65 and 62, which provide for compensation. [JESSEL, M.R.—That makes the whole thing ra-

(a) Reported by J. E. THOMSON, Esq., Barrister-at-Law.

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ional. These large powers are vested in the corporation for the sake of the public health. But you cannot go under sect. 16.] We claim under sects. 16 to 21; and also under sect. 16 of the Public Health Act of 1875. [JESSEL, M.R.—I think you can go under sect. 60, but not under sect. 16. Sect. 16 gives you a power when you are continuing a sewer.] We are continuing the sewage system. The 16th and 60th sections are to the same effect, except that in one there is compensation, and not in the other. Then this is a street under sect. 16. Street has a very large definition: (See the case of the *Vestry of St. Mary's, Islington*, L. Rep. 9 Q. B. 278.) [JESSEL, M.R.—The 16th section of the Public Health Act 1875, helps you.] See also section 299 of the Public Health Act of 1875. [JESSEL, M.R.—My impression is that sect. 27 helps you more than sect. 16.] There was a similar clause in the Public Health Act 1848. [JESSEL, M.R.—My attention was not called to the 3rd sub-section of sect. 27. With regard to a private street, unless you have powers independently of the Act, you are prohibited from making sewers unless you buy.] There is no express prohibition in the Act. It is only implied. [JESSEL, M.R.—You cannot under sect. 27 touch this particular street.] Under the 16th section and the earlier ones we can. [JESSEL, M.R.—No; nor under the 60th. The only power there is to make sewers under streets.] That is plain by the 3rd sub-section. [JESSEL, M.R.—It is saved by sect. 366. I see by the Public Health Act of 1848 sewers are vested in the sewer authorities. It is not a mere easement. *Millar*, *as amicus curiæ*, referred to *Bigg v. Corporation of London* (38 L. T. Rep. N. S., 336; L. Rep. 15 Eq. 376)]. There is an express decision, *Thomson v. Nutter*, 31 J. P.) which decides that a sewer is an easement. [JESSEL, M.R.—It is not so. It required an Act of Parliament to set this right. But I see the 45th section of the Act of 1848 is very like the 16th section of the Act of 1875. Were you the local board at the time of the passing of the Improvement Act of 1865? Yes. [JESSEL, M.R.—The 366th section states the right you then had. If you had this right at the passing of the Act of 1865, you have not lost it.]

The following are the sections in the respective Acts referred to in the arguments and the judgment:—

The Oldham Borough Improvement Act 1865, Local and Personal Acts (28 & 29 Vict. c. cccxi).

Sect. 16. If at any time any street or court (not being a highway repairable by the inhabitants at large) formed, set out, or laid out, either before or after the commencement of this Act, is not sewered, drained, levelled, flagged, and paved, or macadamised to the satisfaction of the corporation, they may at any time, and from time to time, order that it be freed from obstruction, sewered, drained, levelled, flagged, paved, macadamised, and otherwise completed with such materials at such levels, with such inclinations, and with sewers and drains of such dimensions, and that the soil thereof be raised, lowered, or altered in such manner, and within such time, as the order directs; and thereupon the respective owners of the buildings and lands in such street or court shall, at their own respective expense, remove all obstructions in, upon, or under, and sewer, drain, level, flag, pave, macadamise, and otherwise complete such street or court within the time and in the manner prescribed by the order.

Sect. 27. With respect to the road or street called Shaw-wood the following provisions shall take effect:

Then sub-sects. 1 and 2 give the corporation a right to purchase all private rights of way, and other rights con-

nected with levying tolls and otherwise over the said road, and that such rights should be in the nature of land.

Sub-sect. 3. On the completion of such purchase and taking, all the rights and interests aforesaid shall be by virtue of this Act absolutely extinguished, and the corporation shall remove and abate all gates, &c., or other obstructions then existing in, on, or over any part of the carriage-way or footway of the said road or street, and thenceforth the said road or street shall be and continue a street open to the passage of the public, and free from encroachment, and shall be subject to all the provisions relating to the sewerage, draining, levelling, flagging, and paving or macadamising, or otherwise completing of streets not being highways repairable by the inhabitants at large.

Sub-sect. 5. Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street.

Sect. 59. All existing and future public sewers and drains within the borough, and all existing and future sewers and drains in and under the streets and courts, with all the works and materials thereunto belonging, whether made or provided at the cost of the corporation, or otherwise, and the entire management of the same, with the appurtenances, shall vest in and belong to the corporation, and the corporation shall maintain, cleanse, and finish the same.

The 60th section gives the corporation power to construct sewers necessary for the effectual drainage of the borough, the conversion of open drains into sewers, the carrying under cellars and streets, the continuing of them to the most convenient place for the collection of sewage matter so as not to cause a nuisance; and, if necessary, to construct works within or beyond the borough, and to remove obstructions to any of the above purposes.

The 62nd provides compensation for works connected with the exercise of these powers.

Sect. 180: If any such delay or omission (i.e., on the part of the corporation in reinstating streets, &c., after the construction of sewers) as aforesaid takes place, the persons having the control or management of the street, bridge, sewer, drain, pipe, tunnel, work, or obstruction in respect of which such delay or omission takes place, may cause the work so delayed or omitted to be executed, and the expense of executing the same shall be repaid to such persons by the corporation.

Sect. 366 enacts: Nothing in this Act shall take away or abridge any right, power, or authority which the corporation have or may enjoy under the Municipal Corporation Acts, or otherwise, independently of this Act.

Utilization of Sewage Act 1865 (28 & 29 Vict. c. 75) sect.

4: Sewer authorities shall have power to construct such sewers as they may think necessary for keeping their district properly cleansed and drained, and shall, as respects all sewers constructed by them or under their control, whether the same were made before or after the passing of this Act, have all the powers that local boards have in respect of sewers vested in or constructed by them under the 45th and 46th sections of the Public Health Act 1848, and other Acts therein specified.

Public Health Act 1875, sect. 16: Any local authority may carry any sewer through, across, or under any turnpike road or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street; and after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary) into, through, or under any lands whatsoever within their district. They may also (subject to the provisions of this Act relating to sewage works without the district of the local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage.

The 299th section of the Act of 1875 provides that when complaint to the Local Government Board has been made of default on the part of the local authority in providing and cleansing sewers, the board, on being satisfied of the offence, may make an order giving the local authority a certain time to do the work, and if the latter fail to do so, the board may have the work done by its own officer, and charge the expense thereof on and recover the same from the local authority. And any person appointed by the Local Government Board to do the work shall have

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the same power in all respects as was vested in the local authority for that purpose.

JESSEL, M.R.—The first question I have to consider is, whether, independently of the local Act, there is any power in the corporation to do this work. Of course, if they had this power at all it must have been under the general Act, and I must say I cannot help thinking that the persons who were parties to this local Act, which received the Royal Assent on July 5th 1865, and which, following the terms of the preamble, was intended to comprise all the Acts which in any way related to the local government of this corporation with reference to streets, will be a little surprised to find that by means of another Act of Parliament, the public Act having received the Royal assent a few days before, the whole of that intention has been defeated so far, and that the corporation will, therefore, for many years, be under the control of two Acts. I think also that those persons interested in claiming special exemption, and special provisions as regards their own particular lands, will be a little surprised to find that by reason of this general saving in the local Act and all other powers, as regards the corporation then existing, in an important Act (not passed, no doubt, at the time) they assented to the provisions of the local Acts, but it had unfortunately received the royal assent a few days before. Whatever you may think of the extraordinary results, which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must treat them according to the ordinary rules of construction—that is, literally, unless there is something in the context, or in the subject, to prevent that reading. I find in the 366th section of the Local Act this provision: "Nothing in this Act contained shall take away or abridge any right, power, or authority which the Corporation have, or may enjoy, under the Municipal Corporation Acts, or otherwise, independently of this Act." An argument was addressed to me to the effect that that meant Municipal Corporation Acts or other like Acts. I am unable to appreciate the argument. I do not know what Acts like the Municipal Corporation Acts are, and consequently I cannot understand what it is that is similar to a Municipal Corporation Act not being a corporation Act. As the Municipal Corporation Acts include all the Acts which are Corporation Acts, I must read "otherwise" to be "otherwise," and to have its proper meaning, and therefore it means "otherwise" independently of this Act. In other words, that all the rights, powers, and authorities which the Corporation had, independently of this Act, were preserved to them. Now this Act received the royal assent on the 5th July 1865, and consequently preserved to the Corporation, as I read it, any rights or powers they had not repealed by this Act. One of the Acts upon which great stress was laid last time, it now turns out, upon investigation, was repealed, and that another Act, only passed a few days before, was not repealed (I suppose, accidentally, nobody knowing anything about it), and had received the royal assent on the 29th June 1865. So that on the 5th July this other Act was in force, and if I am to read the section of the Local Act, as I do read it, to be general, then the Corporation had the power under the Public Act to make the sewer under this street. That there can be no question about. At least, I think not, because they are to have power to construct "such

sewers as they think fit." Now by sect. 4 of the Sewage Utilisation Act 1865, the powers of which are similar for this purpose to those of the Public Health Act 1875, the sewer authority, which this Corporation was, have all necessary powers "for keeping their district properly cleaned and drained." [His Lordship read down to the words "Public Health Act 1848."] There is no substantial difference. The result therefore is, that under this particular Act they have the powers vested in them for constructing a sewer under the street which are vested in authorities of this kind by the other Public Act. That being so, the only question which remains is whether that power has been taken away. Now the actual Public Act in question was repealed by the Public Health Act of 1875. It was repealed by what is called a Consolidation Act, that is it was repealed for the purpose of having its provisions consolidated into one Act. For the purpose for which I am now dealing with the Public Health Act of 1875, I take the Public Health Act of 1848 to have been substantially copied, because there is no appreciable variation. Therefore, in considering the effect of the Act of 1875 on the Local Act, I really must treat the Public Health Act of 1875 as a mere continuation of the powers of the Sewage Utilisation Act of 1865, not that it was really so in form, but that it was so in effect. In other words, if the intention of the Legislature in passing the Local Act was to preserve the general powers under the Sewage Utilisation Act, which I am bound to rule it was (whatever my own opinion may be upon the subject not being judicial), then I am of opinion that the rule which says that ordinary general legislation does not override special legislation, has no application to the case before me. General legislation was expressly reserved by the Local Act; and the Consolidated Act, being a mere continuance of that general legislation, is not in substance a new power conferred on the corporation, but simply a continuation of their old powers. It is in no way interfered with by the provisions of the Local Act. Now that brings me to the next point, viz., what is the power? If the power is contained anywhere, it is contained in the 16th section of the Public Health Act 1875: "Any local board may carry any sewer through, across, or under any turnpike road or any street, or place laid out or intended for a street." The question I have to consider is this: Is the place in question "a street or a place laid out as or intended for a street?" In considering that, I must also take into account the interpretation clause of this Act of Parliament, which says that a "street includes any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." I must also take into consideration that the Act expressly calls them "streets," whether they are on public property or private property, and whether the public have any rights over them, or have no rights over them. There is a series of sections beginning with the 150th, the marginal note of which explains what I mean: "power to compel paving, &c., of private streets." The word "streets" in the Act of Parliament clearly extends to places which are in all respects private, and over which the public have no right. If it is anything, therefore, this is a private street. Now, what is it? It is a strip of land which seems to have been sold for the purpose of being made or turned into a road. What

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exact rights the owners of the land reserved to themselves, except that it is said they reserved some, I do not know. The fact is, they built houses on each side of this private road, and these houses exist, and have been used by the occupiers from that day to this, and these houses are within the borough of Oldham. Now, the first question I have to consider is, Is it a street or not? I have no doubt it is a street. In the first place I was told that it could not be a street at all, unless the owners of the houses had a right of way along it. In this particular instance there is no evidence at all as to whether there was or was not a right of way. As I said before, all I know is, that there were some exceptions, but it is not denied that they do exercise such a right of way, and do pass and repass, and therefore I shall presume, in the absence of express evidence to the contrary, that they have some right of way, and if it is necessary, which I do not think it is, I shall assume that the owners of the houses have some sort of right of way in the street. That appears sufficiently for the purpose of this motion. I do not think it is necessary. The definition of a street is correctly laid down in the Imperial Dictionary, which I have sent for. "The street itself is no doubt the properly paved or prepared road, that is, the street. It sometimes includes the houses along each side of it. But that is not its proper meaning. It is called a street even without houses. There are some streets with no houses. But the usual common meaning of the word street, is a road with houses on one or both sides of it." Now, tried by that test, this is a street. It has houses on both sides of it. Therefore, in common parlance, it is a street. There is no need of a definition, because street is to include "street" according to this interpretation clause. It is really a street; supposing that were wrong, I find "street" is to include "road," and it certainly is a road. But not only that, it is to apply to any "place laid out as, or intended for, a street." It is laid out as a street, and distinguishable from any other street, so that in every way that you can define it, it appears to me to be within the section. Is it the common sense of the section? The learned counsel pressed upon me that we must have some regard to common sense, in the meaning of the section. I by no means wish it to be thought that I disregard it. It would be monstrously absurd to interpret the Act in any other way. What is the Act for? It is a Public Health Act with regard to the owners of these private courts and alleys, who are the worst people in the world for laying out money, because in these places the poor live, the people whose tenements are not provided with sewers and drains, are the very people who suffer from the want of sewage and drains, which are so requisite for public health. Is it to be imagined that the Legislature intended to except the very worst places from the operation of the powers of the Act? I should say, if the Act was passed for anybody, it must have been meant to include these people, who for the sake of gain, and requiring high rents in proportion to the wretched tenements they allow the poor to occupy, have neglected these ordinary and necessary sanitary precautions. If I am to interpret it by what I might think to be the mind of the Legislature, I should suppose that the first people to be included would be the owners of these crowded courts and alleys, on which the public have no

strict right whatever, but which are intended to be used as streets and houses for the dwellings of the poor, without providing them with what, according to modern science, is known to be absolutely necessary for their well being. Looking at it in that way, common sense is entirely in accordance with what I conceive to be its true legal meaning. That being so, in my opinion, this is a street within the meaning of the Act, and the defendants have power to make the sewer under it, without any notice whatever. Now it must not be omitted to be mentioned, that if they do take property under these Acts, they must make compensation, consequently no injury is done to any one by their exercising these powers. They give health to the inhabitants, and they pay for the property which they take for a purpose which is a gain, and which common sense would dictate. It is on the same principle that when roads and canals and other public works are to be executed, there are powers given to take private property for that purpose, making due compensation. That gets rid of the argument on that Act. Now with regard to the local Act. I must say (and this may have hereafter a bearing on the question of costs) that I think the corporation was entirely mistaken in the course they pursued, because, as I read the 27th section (and if it was necessary I might call in aid that the very local Act calls these places a street or road, but I do not think it is necessary, and it is very difficult to describe it in any other way), as regards this particular road, I cannot help thinking that the corporation made a bargain on the 27th section which they did not intend to repudiate, by giving notice under the 16th section; the corporation, by the 27th section, obtained the right to purchase the private rights over this road. They were to do it within a year. And when they completed the purchase, then it was to be subject to the provisions relating to sewerage, &c., which affect streets not being highways. When we come to look at the 16th section, which is the section in question, it obviously applies to a private street—a street not being a highway, and, consequently, according to all ordinary rules of interpretation, when you find this particular power is to be subject to those provisions in the completion of the purchase, you import into it a negative: that is, that until completion it is not to be so subject. On that ground I have no hesitation in saying that the advisers of the corporation were mistaken, and their counsel have given up that point. Then there is another point of much more difficulty, on which I have heard a great deal of argument, as to whether, introducing this 3rd sub-section of sect. 27 of the Local Act, they might do it under another section of the same Act of Parliament—the 160th. No doubt it is not very easy to reconcile all the clauses in this Act, and I am very far from saying that there is not a good deal to be said in favour of the view which has been presented to me with a great deal of energy; but I think in all these Acts of Parliament the first thing you have to consider is, that when you have general provisions, whether contained in the same Act, or another Act of Parliament, and when you have special provisions as to a particular property, in the ownership of an individual, you must read the special provisions as excepted out of the general. That is the only way of reconciling these Acts of Parliament. It is the

committees know), to insert the clauses which are agreed on, and then these persons who have obtained their insertion leave the room, and have nothing further to do with the Act of Parliament. The committee would not listen to them on the general clauses. They would only say: "It is no business of yours. You have been provided for, and you have had all your clauses put in." If you once admit the doctrine, that the general provisions are to override the special ones, anybody who could get a clause in the Act ought to be heard on every clause of that Act. I can only say I think it would be simply impossible to conduct private legislation at all, if any such doctrine were admitted, or prevailed. I consider it to be the established rule, that when you find general provisions of this sort, either in the same Act or in other Acts, they are not to control or repeal the special provisions, which are considered to provide for the particular property. I should, therefore, on that ground, not be disposed to hold that the 59th and 60th sections were intended to override the 27th. It is said they do not override them at all. The 60th clause enables the corporation to make from time to time the sewers which are necessary for the effectual drainage of the borough. That is general—"under any street." It cannot, properly speaking, affect the 16th section, because the meaning of the section is that where it is a private street the corporation is not to make the sewer; that is, not at the public expense. The owners of the houses are to make the sewer, and it is only on their refusal that the corporation is to make it. Then what is to happen? The owners of the houses are to pay for it. They have no business to throw the burden of making the new sewers in their private streets on the whole of the town, which they would do if the 60th section was intended to apply. But it is not, because it is a general provision, and you must except out of it the special provision, on the principles which I have mentioned. Then it goes further, because the 59th section makes the corporation owners of the sewers when once made. The words are: "All existing and future public sewers and drains within the borough, and all existing and future sewers and drains," and so forth, are to vest in the corporation, whether made or provided at the cost of the corporation or otherwise." Now, that is a very useful provision. It was found under the old law, and it was sometimes held that the sewer authorities (they were not sewer authorities in those days) had only an easement, and it was found to be very inconvenient, and consequently, therefore, in the modern Acts the property in the sewers has been vested in the sewer authorities, that is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement, or right of sewage or drainage, the absolute property in the sewer (which means not merely the brick barrel, or whatever it may be made of, forming the sewer, but the whole interior of the sewer, that is the whole of the soil included in it, and, if I may say so, the barrel of the sewer), is now vested in the sewage authorities, and if the sewer is a large one, it amounts in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation. That being so, what would follow if

would make the sewer under the provisions of the Act, and then become the owners, for all substantial purposes, of the subsoil; of course making compensation to the owners. But I find that the 5th sub-section of sect. 27 is this: "Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street." If I am right as to the meaning of the 59th and 60th sections, they do acquire it by compulsion, because they make compensation for the interest in the soil of the road or street. Why should I depart from the literal meaning of the words when I find that they exactly accord with what I should describe as the common sense of the arrangement—viz., that you shall not make a sewer under this street, and shall not interfere with it at all, unless you pay for it. That is the meaning of the arrangement between the parties, and that the literal meaning of the Act. The words are: "Nothing in this Act shall empower." It is not "nothing in this section." I asked the learned counsel who argued it so strenuously for the plaintiff, what possible meaning there could be to it, if that was not it. The answer, which was more ingenious than successful, was that it was a saving clause, and that he did not feel bound to put any meaning on it at all, and that a saving clause does not necessarily import that the thing that it is saving was included in any of the provisions. That, at all events, is not a satisfactory answer, when you do find something that does affect the property in question. It would be available, if it was desired to press the saving clause, to say, as has sometimes been tried, that you must import a provision in the Act, affecting the subject matter to which the saving clause applies. If that were so, then it might be well to say this was put in *ex abundanti cautela*, and you cannot imply from the effect of the saving clause that there is an enactment affecting the thing saved, when the saving clause is not there. But when you have a saving clause and find another enactment which does directly affect the subject matter of the saving clause, then I think the natural construction, and the proper one, is to say that the saving clause was intended to be an exception out of the Act, and not to say that it was put in *ex abundanti cautela*, when it is really wanted for the very purpose which by the terms of the saving clause itself it does effect. I think, therefore, if it stood on the local Act alone, or on the local Act independently of the Sewage Utilization Act, I should have been in favour of the plaintiff, but as it is, and for the reasons I have given, I am in favour of the defendants. I therefore enforce the motion, making the costs costs in the cause.

Solicitors: *Clarke, Woodcock, and Rylands, for Tweedale, Son, and Lees, Oldham; Chester, Urquhart, Mayhew, and Holden, for H. Booth, Oldham.*

(Before Vice-Chancellor MALINS.)

July 24 and Nov. 18, 1876.

Re MERCERON'S TRUSTS; DAVIES v. MERCERON. (a)
 Will—Construction—"Die without issue" read as
 "Die without such issue."

M. by his will gave a sum of Consols in trust for his daughter A. for life, and after her decease unto and among all and every such child or children she might happen to leave at her decease, when and as they should respectively attain twenty-one, and in case she should "die without issue" to such persons as she should by will appoint.

A. had one child only, who died in her lifetime leaving children. A. by will appointed the fund among the children.

Held that the words "die without issue" in M.'s will must be read as "die without such issue," and that A.'s appointment, therefore, took effect.

JOSEPH MERCERON, by his will dated the 10th May, 1838, gave and bequeathed unto his trustees 66,666l. 13s. 4d. Consols upon trust to receive the interest and dividends thereof and pay 1000l. per annum, being the interest of 33,333l. 6s. 8d. to his daughter Ann Brutton and 1000l. per annum being the interest of the other 33,333l. 6s. 8d. to his daughter Elizabeth Bruce, during their natural lives for their sole and separate use. And from and immediately after the decease of either of his said daughters he gave and bequeathed the said 33,333l. 6s. 8d. Consols, being such daughter's share, unto and among all and every such child or children she might happen to leave at her decease to be equally divided between them when and as they should respectively attain the age of twenty-one years, and if but one child then to such only child. And in case either of his said daughters should die without issue then he directed that the said 33,333l. 6s. 8d. Consols, being the share of her so dying, should be transferred by his trustees to such person or persons, and in such manner as she by her will and testament in writing might direct and appoint, and he gave the residue of his property to his son Henry.

The testator died on the 14th July 1839. Ann Brutton had issue one child only, who died in her lifetime, having attained twenty-one and leaving five children.

Ann Brutton died on the 20th Jan. 1876, leaving her five grandchildren surviving, and having made a will dated the 19th March, 1873, whereby, in exercise of the power given to her by the will of Joseph Merceron, and of all other powers or authorities enabling her thereto, she appointed the 33,333l. 6s. 8d. Consols among her five grandchildren in the shares therein mentioned.

In consequence of questions having arisen as to the capability of Ann Brutton to exercise the power by reason of her having left no children but grandchildren only surviving her, the fund was paid into court in the matter of the above named action, which had been instituted to administer the estate of Ann Brutton, and a petition was now presented for payment of the money out of court.

The question was whether the expression "die without issue," in the will of Joseph Merceron, could be read as "die without such issue," i.e., without children, in which case the will of Ann Brutton would be a valid appointment.

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

Glasse, Q.C. and C. H. Turner for the
 tioner.

J. Pearson, Q.C., Bristowe, Q.C., Higgin
 Locock Webb, Q.C., Onen, Prior, Rodwell,
 Watson, and Borthwick, for other parties.

The following cases were referred to :

White v. Hill, 16 L. T. Rep. N. S. 126; L.
 Eq. 265;

Heasman v. Pearce, 26 L. T. Rep. N. S. 299; L.
 7 Ch. 275;

Martin v. Holgate, L. Rep. 1 Eng. & Ir. App.
Treharne v. Layton, 33 L. T. Rep. N. S. 327; L.
 10 Q. B. 459;

Pride v. Fooks, 32 L. T. Rep. O. S. 358; 3 D.
 J. 252;

Bruden v. Willet, 20 L. T. Rep. N. S. 516; L.
 Eq. 472;

Bythessa v. Bythessa, 23 L. J. 1004, Ch.;

Butler v. Gray, L. Rep. 5 Ch. 26;

Savage v. Tyers, L. Rep. 7 Ch. 356;

Kellett v. Kellett, L. Rep. 3 Eng. & Ir. App. 161

In re Heath's Settlement, 23 Bea. 193;

Andree v. Ward, 1 Russ. 260;

Westwood v. Southey, 2 Sim. N. S. 192;

Candy v. Campbell, 2 Cl. & Fin. 426;

Ellicombe v. Gomperts, 3 My. & Cr. 127.

Malcolm v. Taylor, 2 Russ. & My. 416.

MALINS, V.C. stated the provisions of will, and continued. — With regard to Brutton, the event which has happened is She was at the time of the testator's will the of Mr. Brutton; she had a daughter, who in lifetime attained twenty-one and married and in the lifetime of her mother, Mrs. Brutton, ing five children. The question, therefore, is, Mrs. Brutton being dead, and there beir end of her life interest, who takes the cap First it is contended that her daughter to because she attained twenty-one. Now the g to "all and every such child or children she happen to leave at her decease, to be ec divided between them." The first contenti that, although the daughter was not living a decease of the mother, yet she took becaus attained twenty-one. If that contention c sustained there is an end of the interest residuary legatee, because the capital wou in the daughter on her attaining twenty-one all other questions are put an end to. The said that that could not be the case, beca words are so clearly contingent that it coul vest in a child who did not survive her m and that is my opinion. These very words been the subject of adjudication in many containing words so similar that it is imposs draw any substantial distinction between The gift is only to all and every "such of children she may happen to leave at her dec There have been many cases in which these have occurred; I have myself put this pretation upon several cases, that where a gi follows the words "dying without leaving i it means "without having had issue;" but the contingency itself is attached to the fo the gift, and it is under such words as to " every such child or children she may hap leave at her decease," those words are c contingent, so that, in my opinion, the da of Mrs. Brutton herself did not take any in Then the gift over is "in case either of m daughters should die without issue," &c. on one side it is said that these words n she should die without issue of any desc whatever; and that event has not happen

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cause the daughter, Mrs. Brutton, did leave five grandchildren; if, therefore, the literal words of the will are adhered to, it is perfectly plain that, so far as this part of the case goes, the manifest intention of the testator will be defeated. I quite agree that when you wish to give effect to a testator's intention, that intention must be clearly and satisfactorily collected from the words he has used. Now, what are the intentions of this testator? He makes such provision as he thinks proper for his son, to whom he gives his general residuary estate and his real estate. But it is quite clear that he devoted to the use of his two daughters 33,000*l.* each for life, and then to their children. If either there are no children, or, there being children, they cannot take, then the next object of the testator's bounty is the daughter herself, who is to take the absolute dominion over the 33,000*l.*, and to do as she thinks fit with it. It is a case, in my opinion, in which there were two primary objects of the testator's bounty, namely, the daughter and the daughter's children, and, failing these, the next object was that the daughter herself should have the control over the property, to do as she thought fit with it, but in no event was the residuary legatee to take unless on failure of a disposition by the daughter herself. Now how can all these intentions be effectuated? The testator says the money is to go to the children of his daughter to be equally divided between them when and as they shall respectively attain the age of twenty-one, but if she dies without issue then she is to dispose of it as she thinks fit. What issue did he mean? He did not mean dying without issue generally. Supposing she had died leaving a child of the age of twenty, and that child had died under twenty-one, she would not have died without issue. "Dying without issue" does not mean issue at the period of her death, but remote issue; but that was not the intention of this testator. If I were to read this as "dying without issue," then in the case I have just put, and according to the literal construction of these words as contended for by Mr. Bristowe and Mr. Watson, the gift must have failed, because she did not die without issue, and the issue intended to take could not take because they did not attain twenty-one. Therefore, I am of opinion that this case falls in with that numerous range of cases in which the court has put a rational interpretation upon the wills of testators, that where there is a gift to one for life with remainder to a class of children on attaining twenty-one or on marriage, and a gift over on death without issue, it means not a general failure of issue, but a failure of the particular class of issue who were the objects of the gift and were to take under the preceding limitation. Now, in favour of this construction many cases have been cited. *Bythesea v. Bythesea* was a case in which the gift over was to take effect upon the very event to which I have referred. *Malcolm v. Taylor*, which has been referred to, is a decision of Lord Brougham, confirmed by the House of Lords, and is an authority very frequently relied upon, and one which appears to me to lay down the law in a rational and satisfactory manner, and to be entirely applicable to this case. The rule laid down is this: "Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one, being a son,

or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue," the same words as here, "it is to be intended as a dying without such issue as would take by force of the prior limitations." This makes a rational construction. The primary object is the daughter and her children, the second object is the appointees of the daughter. Supposing in this case the gift over had been to the other daughter, and he had said "and in default of issue of Mrs. Brutton over to Mr. Bruce, the primary object would be Mr. Brutton and her children, and the second object Mrs. Bruce and her family. Failing the first object the gift would take effect. So, in this case, the gift takes effect because the first object fails. Now, *Malcolm v. Taylor* represents a general class of cases which are rational and carry into effect the intention of the testator by merely postponing the second gift for the sake of the first. I am clearly of opinion that the testator, when he used the words "die without issue," meant "this class of issue," namely, those children who should survive the mother, and there being no such children the property was to go over. Now, the case mainly relied upon against this contention is the decision of Knight Bruce and Turner, L.JJ. in *Pride v. Fooks*. The case is a very peculiar one, and with all respect for those learned and distinguished judges, I cannot help thinking that even in that case a more liberal interpretation might have been put upon the will of the testator; but, however, it is evident that the decision proceeded upon the very emphatic language contained in that particular will. Mr. Glasse has drawn my attention to a passage which I have seen before, where Turner, L.J., does not attempt to lay down any general rule. He says, and with perfect accuracy, that you cannot in these cases lay down any general rule, but you must look at the particular language of every will, and looking at the language of the will in *Pride v. Fooks*, Knight Bruce, and Turner, L.JJ., came to the conclusion that the gift over did not take effect. I think that even in that case, if the words had been like the present, the construction would have been otherwise, and the gift over would have taken effect. Therefore I am of opinion that the case of *Pride v. Fooks* does not stand in the way of the conclusion at which I arrive. Therefore, taking this gift as a gift to the trustees for the benefit of the daughter for life, with remainder to her children, as a contingent gift which in the event failed, with a gift over if she died without issue, I read that as being "dying without such issue," that is, dying without issue as she did; therefore the gift over took effect. But there is another point in the case which though I think it far from clear, and upon which I do not intend to rest my decision, is not, I think, in favour of the residuary legatee. I think, looking at the whole frame of this will, it is quite clear that the testator dedicated or devoted the 66,000*l.* for the benefit of his daughters, and that he never intended that, in any event whatever, the son should have any interest in these two sums. Now the law is clear, and it has not been disputed (I refer to the case of *Mayor v. Townshend*, 3 B. 433; and *Whitell v. Dudin*, 2 Jac. & Walk. 279), and the House of Lords has followed it as a settled rule, which may

be stated thus: that whenever a will gives property to a person absolutely, and then proceeds to dispose of that property for the benefit of the wife and children of the donee, and it turns out that there is no wife to take and no children to take, the gift over fails, the cutting down fails, and the original gift remains; and as it was absolute so it remains absolute. If, therefore, there is an absolute gift of this 33,000*l.* to Mrs. Brutton, as her share of the testator's property in the 66,000*l.*, if that is once devoted to her absolutely, and is given to her for life, and then to her children, and the particular class cannot take, that gift to the children being cut down, the original gift to Mrs. Brutton remains, and the absolute property would remain in her. Now I think it is far from being clear, and if I had not been in favour of the appointees of Mrs. Brutton on the other ground, I should have required a great deal more consideration of this point; but my inclination of opinion upon that point is also in favour of the appointees claiming under the will of Mrs. Brutton because it is "her share" of 66,000*l.*, and, if it is so, then it once being devoted or given to her, and the contingent gift of it failing, the contingency is cut down, and the original gift remains in force. The result would be precisely the same, because Mrs. Brutton, by her will, referring to the power of appointment which she had over this property, makes a specific gift of it, and does so by virtue of the power under her father's will, and all other powers and authorities enabling her in any way to do so. If, therefore, in the events which have happened, she had not a testamentary power under her father's will, even then, if I am right in my construction, she had the ownership, and by virtue of that ownership she could dispose of it as she pleased, and the result would be the same. Therefore, upon all these grounds, I am clearly of opinion that the appointees under the will of Mrs. Brutton are entitled to the property.

Solicitors: *Lewis and Indermaur; Robert Voss; Fisher and Fisher.*

Thursday, Nov. 30, 1876.

GREAT AUSTRALIAN GOLD MINING COMPANY v.
MARTIN. (a)

Practice—Service of writ out of the jurisdiction—Order XI., rules 1 and 3.

An order having been obtained to serve a writ on a defendant out of the jurisdiction, he moved to discharge it, on the ground that neither the indorsement on the writ nor the affidavit in support of the application for the order showed any case within Order XI., rule 1.

At the time of the motion the defendant had not been served with a statement of claim.

*Held, that the court would treat the motion as the original application, and was at liberty to take notice of the allegations in the statement of claim, and the court, being of opinion that the statement of claim showed a *prima facie* case against the defendant, refused to discharge the order.*

This was a motion on behalf of the defendant, Sir James Martin, Kt., Chief Justice of Sydney, New South Wales, that an order dated the 10th Jan. 1876, that the plaintiffs should be at liberty to issue a writ of summons against the defendants,

and should be at liberty to serve such writ on the said Sir James Martin at might be discharged and the writ set aside.

The action was brought by the Great Australian Gold Mining Company, a company registered in England in 1873, against Sir James Martin, James Nichols, and Edgar Hungerford Minton, the plaintiffs claim being for the delivery of the plaintiffs of all the debentures and shares of the plaintiff company obtained by the defendants respectively from the plaintiffs by the fraud and conspiracy of the defendants, and for consequential relief and for delivery up to be cancelled the contract between the plaintiffs and the defendants, Charles James Nichols and Edgar Hungerford Minton, for purchase of the mine lease, a contract was obtained by the fraud of the defendants from the plaintiffs' company, and damages sustained by the plaintiffs in consequence of the fraud and conspiracy of the defendants respectively, and for repayment to the plaintiffs of all moneys received by the defendants respectively on account of such contract, and the aforesaid shares and debentures, and for an injunction to restrain the defendants respectively from taking any proceedings for the winding up of the plaintiffs company, and for general relief in respect of the matters aforesaid.

The order for service out of the jurisdiction made in chambers. The affidavit filed in support of the application stated what was the plain claim, but did not state the grounds more particularly than as appearing by the indorsement on the writ above set out.

Sir James Martin stated on affidavit that he never directly or indirectly entered into contract with the plaintiffs for the sale to him of any mining or other property, or received any debentures or shares in the company; he never had any interest whatever in the mine lease, the subject matter of the suit, or received any money or security for money due, share, scrip, or property of any kind in connection therewith. That he had no knowledge of any contract for the sale of such land or mine lease, and never had any communication in reference to any such sale. That he never made representation to anyone as to the value of said land or mine lease, and never was associated with anyone in making any such representation. With reference to what had passed between himself and the persons said to be the owners of the land, Sir James Martin by his affidavit stated as follows, viz., that in the year 1873 defendant Nichols and one Kavanagh proposed to him that he (Sir James Martin) with Sir Thomas Aubrey Murray should, for a consideration of money or shares, or both, join as promoters in putting before the public a certain proposed company, Hawkins's Hill said to contain gold reefs, represented as belonging to Nichols. That he answered Sir T. A. Murray both declined to have anything to do with promoting the sale of the land, or floating the proposed company. That he ultimately proposed that for a pecuniary consideration to be paid on the sale of the property effected Sir J. Martin and Sir T. A. Murray should act as trustees of the funds contributed by purchasers of shares until the sale was closed, the property transferred and accepted, and they agreed to that proposal. That before agreeing, Sir J. Martin requested to see

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

viously too highly coloured, and they were struck out. That he believed what Nichols and Kavanagh told him as to the existence of the gold reefs, and that he and Sir T. A. Murray consented to act as trustees of the funds as above mentioned. That they both distinctly refused to be connected with the matter in any other way, and declined to be parties to any representation to the public about the land, but that they saw no objection to act as stakeholders for the subscribers while they had the opportunity of making inquiries in the colony before the money was handed over by them. That he accordingly drafted the following paragraph for the prospectus: "The application and allotment fees for shares in this company will be paid into the joint credit of the several gentlemen who have consented to act as trustees at the Bank of New South Wales, London, to be held by them until the company is formed and the property transferred and accepted by the trustees to be appointed by the shareholders at the first general meeting."

Shortly afterwards Sir J. Martin discovered that a prospectus had been issued, in which eight persons were named as directors, three of whom were Kavanagh, Nichols, and Sir T. A. Murray, and that there were four trustees, namely Sir T. A. Murray and the three defendants.

In the prospectus the bankers of the company were stated to be the London and Westminster Bank, Temple Bar Branch, and the money paid on application was directed to be remitted to the credit of the directors, of whom Sir J. Martin was not one. Sir J. Martin at once repudiated his trusteeship on becoming aware of the manner in which his name had been used with persons and on terms to which he had never given his sanction. He also stated that he had never received one shilling's worth of benefit in reference to his trusteeship. The statement of claim which alleged that the funds in England of the company had been fraudulently abstracted by the defendants had been served upon two of the defendants, but not upon Sir James Martin.

Higgins, Q.C. and Sangster Green for the motion.—We submit that the order for service out of the jurisdiction was improperly obtained, and that the court had no power to make it. The several cases in which such leave may be given are enumerated in Order XI. rule 1, and we contend that the endorsement on the writ of summons shows no case coming within any of the clauses of that rule. (a) The claim on the writ is that

(a) Order XI., rule 1.—"Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are, or is, demanded in such action, was made or entered into within the jurisdiction; and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was, or is, to be done, or is situate within the jurisdiction."

Rule 3. "Every application for an order for leave

with which Sir James Martin is concerned, nor has there been any breach within the jurisdiction with which he is concerned. We have not yet been served with a statement of claim, and the court will not look into it. Order XI., rule 3, provides that the application for leave to serve the writ out of the jurisdiction shall be supported by evidence showing the grounds upon which the application is made. In this case the affidavit filed in support does not show the slightest ground for the charges made against the defendant. It is not enough to throw out vague indefinite charges of fraud. In *Maclean v. Dawson* (33 L. T. Rep. O. S. 158; 4 De G. & Jo. 150) the court had before it the bill showing the nature of the case, but in the present case the chief clerk had before him nothing but the writ. They cited also—

Hawarden v. Dunlop, 2 Dr. & S. 155;

Preston v. Lamont, 35 L. T. Rep. N. S. 341; L. Rep. 1 Ex. D. 361;

Casey v. Arnott, 35 L. T. Rep. N. S. 424; L. Rep. Weekly Notes 1876, p. 252;

Drummond v. Drummond, 18 L. T. Rep. N. S. 886; L. Rep. 2 Ch. 32.

Glasse, Q.C. and Freeling for the plaintiffs.—

In all the old cases the court looked into the pleadings. We admit there must be an affidavit in support of the application, but that does not mean that it is to consist of the whole evidence in the case. We have done all that is requisite. The merits cannot be tried on the defendant's *ex parte* statement by affidavit. If the rule is as laid down by Kindersley, V.C., in *Hawarden v. Dunlop*, the court is now at liberty to exercise its discretion *de novo*, and then the statement of claim is part of the case. [MALINS, V.C.—If that rule is correct I am at liberty now to hear the statement of claim.] The allegation in the statement of claim is that a fraud has been committed by the defendant, resident out of the jurisdiction, upon a company registered in England by abstraction of the funds in England invested in his name. [MALINS, V.C.—It is part of the case that this is an existing document which contains statements which the plaintiffs conceive entitle them to relief against Sir James Martin, as well as against the others. I do not read it, but I take notice of its existence. I understand the rule now is that the question must be dealt with as if the court were now for the first time applied to for leave. Therefore, if I were now for the first time hearing the application for leave to serve the writ abroad, I should probably read that document. At all events I take from counsel the effect of it.] They were stopped by the court.

Higgins Q.C. in reply.

MALINS, V.C.—This case raises a question of practice under the new rules, which is of very considerable importance, and as to which it is not very easy to construe the orders which have been drawn up. It is a case in which one of the defendants, Sir James Martin, being resident in Australia, an application was made to the chief clerk upon an affidavit for leave to serve the

to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made."

rit upon that gentleman in Australia. The third rule of Order XI. is this: [His Lordship read the rule.] Now the writ does not very distinctly state, or can it very distinctly state, the grounds upon which the application is founded. [His Lordship said the claim indorsed on the writ.] The plaintiffs here are a company registered in England, which complains of the conduct of the defendants. The statement is that the company has sustained injury by the conduct of the defendants. It is stated to be fraudulent conduct, and I need not repeat that of course the court assumes that the charge is utterly groundless; that there will be a total failure to prove it, and, for the purpose of my decision, I assume that when this case comes to a hearing the claim will be dismissed with costs. But I apprehend the true and rational construction of this order is this: that if a case is stated, which, the court sees will, if proved, would entitle the plaintiffs to a decree, that is a case in which the defendant against whom the relief is sought being a British subject resident abroad, should be served out of the jurisdiction. If, on the other hand, the court sees that the claim made was as was put in the case of *Nucleon v. Dawson* when it will decline to act. Lord Justice Knight Bruce said in that case (4 De G. & J. p. 156), "I apprehend, however, that it is incumbent on the court to look into the bill, though not supported by evidence, for it is easy to conceive the case of a bill so plainly absurd, or relating to such a subject matter, or to a controversy between persons so circumstanced, that the court ought at once to decline to act." I adopt that, and if I saw by the statement here that it was so absurd that no relief could ever be given upon the claim, even if the facts stated in it were proved, then I should say I could not give leave for any man to be troubled with the service of a writ for such an object, and I should refuse the application. Then Turner, L.J., says in the same way (p. 157), "I wish, however, to state distinctly that, in my opinion, the court has a discretion in these cases, and that I consider it to be the duty of the court to look into the bill for the purpose of satisfying itself how such discretion ought to be exercised. The discretion ought, in my judgment, to be as carefully exercised upon an application to discharge an order allowing service out of the jurisdiction as upon the original application for the order." Therefore, I think I am not at liberty to disregard the facts. From the statement made by Mr. Glasse, I assume that at all events there is a fair case to be tried between the parties. There being a case to be tried between the parties, and one of the defendants being a British subject resident abroad, I take it to be quite clear that the discretion of the court ought to be exercised in giving leave to serve that defendant with the writ. But it is said the case does not fall within the first rule of Order XI. Now, in order to determine that question I must see what is the nature of the relief asked. There is a company registered in England in 1873, and the statement is that it has been injured by the improper or fraudulent conduct of the defendants, or some of them, and that fraud committed by the defendant although resident abroad, refers to acts which they did or caused to be done in England—namely, by drawing the funds out of their proper custody in England for an improper purpose. The rule (Order XI. rule 1) says:

"Service out of the jurisdiction of a writ of summons." (evidently, therefore, directed to service not of the statement of claim but of the original writ, "or notice of a writ of summons may be allowed by the court or a judge whenever" [His Lordship read the section down to the words "entered into within the jurisdiction."] I do not think it seems to fall within that. "And whenever there has been a breach within the jurisdiction of any contract wherever made"—that seems to be the case here, viz., withdrawing funds from England which ought to have remained where they were—"and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction." On the whole, although I do not mean to state it as an absolutely clear case, I think it does fall within the latter part of the rule. The injury complained of is not so ridiculous that I am entitled to disregard it. It is a case at all events as to which there is a question to be tried between the parties, and it seems to me that the case falls within that rule. Then, there being a discretionary power, I think that I properly exercise that discretion by not allowing the order to be discharged, and giving Sir James Martin an opportunity of meeting the case. I am bound to say that his affidavit does, in my opinion, if not wholly, to a very great extent, exonerate him from the charges that are made. The motion to discharge the order is refused. The costs of both parties will be costs in the cause.

Solicitor for the plaintiff, *W. F. Stokes*.

Solicitors for Sir J. Martin, *Peachey and Lloyd*.

Saturday, Dec. 9, 1876.

CLARKE v. ROCHE. (a)

Practice—Summons to County Court judge to sign a case—21 & 22 Vict. c. 74, s. 4—Jurisdiction of single judge.

An application under 21 & 22 Vict. c. 74, s. 4 for an order directing a County Court judge to sign a case on appeal, should be made to the "Superior Court," and not to a single judge thereof.

ADJOURNED SUMMONS.

This was an application on the part of the defendants for an order directing a County Court judge to sign a case on appeal.

A. Brown for the plaintiff took the preliminary objection that the court had no jurisdiction to hear the application on summons. He referred to 19 & 20 Vict. c. 108, s. 43, and 21 and 22 Vict. c. 74, s. 4. [MALINS, V.C.—The substance of the latter section seems to be that the order cannot be made by a single judge.] In *Furber v. Sturmev* (31 L. T. Rep. 183; 6 W. R. 625), a summons was taken out under 19 & 20 Vict. c. 108, s. 43, calling upon a County Court judge to show cause why he should not sign a case; and an order was made by a single judge at chambers requiring him to sign a case. A rule having been obtained to rescind this order, the main argument relied upon was, that the order was irregular, because no affidavit of the facts had been filed before the summons was issued. In that case the application was properly made to "a judge" of a Superior Court. He also referred to

Re Ellershaw, L. Rep. 1 Q. B. Div. 481.

(a) Reported by JAMES E. HOBBS, Esq., Barrister-at-Law.

CHAM. DIV.]

HARTLEY v. DILKE—PONTIFEX v. MIDLAND RAILWAY COMPANY.

[Q.B. Div.]

E. Cutler, in support of the summons, referred to

The Judicature Act 1873, s. 25, sub-s. 8.

MALINS, V.C.—I am clearly of opinion that I cannot make the order. Sect. 4 of the Act 21 & 22 Vict. c. 74, after reciting that it is desirable that the powers given by sect. 43 of the Act 19 & 20 Vict. c. 128, to any Superior Court, or a judge thereof, should be exercised only by such Superior Court, and not by a single judge, provides that "no rule or summons requiring a judge . . . of a County Court to show cause why any act relating to the duties of his office should not be done, nor any rule or order directing such act to be done, shall be issued or made except by the Superior Court; and the said sect. 43, and any provisions of the said Act having reference thereto, shall be read and construed as if the words, 'or a judge thereof,' were not inserted in the said section." The result of that section is, that the order is to be made by the Superior Court only, and not by a single judge. The Legislature, to my mind, has decided that the application is not to be made to a single judge. I shall, therefore, make no order on this application.

Solicitors, *Cardwell and Tassman; W. Rogers.*

Tuesday, Dec. 19, 1876.

HARTLEY v. DILKE. (a)

Practice—Substitution of notice for service—Absconding defendant out of jurisdiction—Rules of Court, 1875, Order IX., r. 2.

Substitution of "notice for service" of the bill in a suit dealing with the interest in a certain newspaper of an absconding defendant out of the jurisdiction, ordered to be effected by advertising the prayer of the bill, and the writ indorsed thereon in the *London Gazette* and the *Times*, and the particular newspaper.

MOTION.

On the 15th Dec. 1876, the bill in this suit was amended by adding Charles Vennell (then out of the jurisdiction) as a defendant.

It appeared from an affidavit of Charles Bailey, an inspector of police, that, in Aug. 1872, a warrant was granted for the apprehension of Charles Vennell; that every effort had been made to apprehend him, but without success; and that, to the best of the deponent's belief, he was not living in this country.

The bill, as amended, prayed that an account might be taken of what was due to the plaintiffs in respect of certain sums therein mentioned; and that, if necessary, the defendant, Charles Vennell, might be declared a trustee of his interest in the said newspaper (the *Weekly Dispatch*) and copyright, and that all proper directions might be given for vesting the same in the plaintiffs, or as they should direct.

On the amended bill there was indorsed the usual writ, pursuant to the provisions of The Improvement of Jurisdiction of Equity Act 1852.

Order IX., r. 2, of the Rules of Court, 1875, is as follows: "When service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the court or a judge

that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

Glassey, Q.C. and *B. B. Rogers*, for the plaintiff applied to the court under Order IX., r. 2, to leave to substitute "notice for service" on Charles Vennell, the absconding defendant, by advertising the prayer of the amended bill, and a copy of the writ indorsed thereon in the *London Gazette*, the *Times*, and the *Weekly Dispatch*. They referred to Cons. Order XXII., r. 4.

MALINS, V.C. made the order asked for, marking that, under the circumstances, it would be sufficient to advertise once in each of the above mentioned papers.

Solicitors, *Miller, Smith, and Bell.*

QUEEN'S BENCH DIVISION.

Wednesday, Dec. 20, 1876.

PONTIFEX v. MIDLAND RAILWAY COMPANY. (a)

Practice—Costs—Action founded on contract—*tort*—Carrier—Stoppage in transitu—Commons Act 1867 (30 & 31 Vict. c. 142), s. 5.

The statement of claim alleged that the plaintiff delivered to the defendants, and the defendants received from the plaintiff as vendor certain goods as carriers, for reward, consigned by the plaintiff to W. and Co., the intending purchasers. That the plaintiff subsequently, and before any of the goods had been delivered to W. and Co. pursuant to the said consignment, and before they had claimed delivery of the said goods from the defendants, discovered that W. and Co. were in insolvent circumstances, and that upon none of the goods having then been paid for, he, as unpaid vendor, gave notice to the defendants not to deliver any part of the goods to W. and Co., but to hold them to the plaintiff's order, and before any of them were delivered to W. and Co. the plaintiff required the defendants to re-deliver the same to him, but they refused and neglected to do so, and contrary to, and after they had received the plaintiff's notice, they delivered them to W. and Co., who had not then paid the plaintiff, that the plaintiff now has been paid for the goods, and by reason of the defendants' default in delivering them to W. and Co., notwithstanding the notice and order given to them by the plaintiff, he has wholly lost the said goods, and the plaintiff claims 12l. 10s. 6d. This sum the defendants paid into court.

Held, that the action was founded on *tort*, and that the plaintiff was therefore not deprived of his action by sect. 5 of the County Courts Act 1867.

STATEMENT OF CLAIM—

The plaintiff is a merchant, carrying on business under the style of E. and W. Pontifex and J. Wood, at the Farringdon Works, Shoe-lane, London.

On the 27th Oct. 1875, the plaintiff delivered to the defendants, and the defendants received from the plaintiff as the vendor, certain goods, namely three casks of composition pipe, as carriers thereof for reward to them in that behalf, consigned by the plaintiff to Messrs. Henry Winfield and Co.

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

Q.B. Div.]

PONTIFEX v. MIDLAND RAILWAY COMPANY.

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44, Bloomsbury-street, Birmingham, the intending purchasers, who have not paid the plaintiff for he same or any part thereof.

The plaintiff subsequently and before any of the goods had been delivered to Messrs. Winfield and Co., pursuant to the said consignment, and before they had claimed delivery of the same from the defendants, discovered that the said Messrs. Henry Winfield and Co. were in insolvent circumstances, and thereupon, on the 22nd Nov. 1875, none of the goods having been then paid for, he, as unpaid vendor, gave notice to the defendants not to deliver any part of the goods to Messrs. Winfield and Co., but to hold them to the plaintiff's order, and before any of them were delivered to Messrs. Winfield and Co., the plaintiff required the defendants to re-deliver the same to him, but they refused and neglected to do so, and contrary to and after they had received the plaintiff's notice and order, they, on the 17th Dec. 1875 delivered them to Messrs. Winfield and Co., who had not then paid the plaintiff for any part thereof. Shortly after Messrs. Winfield and Co. had got possession of the goods they closed their house of business at Birmingham and absconded, and the plaintiff does not know where they are now to be found. The plaintiff has never been paid for any part of the said goods, and by reason of the defendant's default in delivering them to Messrs. Winfield and Co., notwithstanding the notice and order given to them by the plaintiff, he has wholly lost the said goods, and the price and value thereof, namely 12*l.* 16*s.* 6*d.* The plaintiff claimed 12*l.* 11*s.* 6*d.*

This sum the defendants paid into court.

Thereupon the master at chambers taxed the costs, and made an order, giving the plaintiff his costs of action.

This order was set aside by Lopes, J., at chambers, on the ground that the action was founded on contract, and that inasmuch as the plaintiff had recovered less than 20*l.*, he was not entitled to his costs.

F. O. Crump, for the plaintiff, now moved for an order to rescind that of Lopes, J. The question arises under the County Courts Act 1867 (30 & 31 Vict. c. 142), s. 5, which is as follows: "If in any action commenced after the passing of this Act, in any of Her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the court or a judge at chambers shall by rule or order allow such costs." The sole question, therefore, is this: Was this an action founded on contract or on tort? If it was founded on tort, the plaintiff is entitled to his costs, having recovered more than 10*l.* It is undoubtedly an action founded on tort. Although the relation between the plaintiff and the defendants began by contract, that contract was put an end to by the notice given by the plaintiff to the defendants not to deliver the goods. From that time they became mere bailees to the plaintiff. He was stopped by the court.

W. G. Harrison for the defendants.—This is clearly an action founded on contract. If that be so, the form of the statement of claim is imma-

terial. If it is founded on contract, that is quite sufficient. To show this it is necessary to look at the previous Acts and the cases decided under them. The first Act in order of date is 9 & 10 Vict. c. 95: Sect. 129 of that Act enacts, that if any action shall be commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, for any cause other than those lastly hereinbefore specified, for which a plaintiff might have been entered in any court holden under this Act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.* if it be founded in tort, the said plaintiff shall have judgment to recover such sum only, and no costs." There the words are "founded on contract." Then came 13 & 14 Vict. c. 61, s. 11 of which enacts, "That if in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, in covenant, debt, detinue, or *assumpsit*, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover that sum only, and no costs." It will be observed that the words are different to those made use of in the former Act. The words "founded on contract" are in this section omitted, and the particular form of contract is enumerated. Under this Act the case of *Tattan v. The Great Western Railway* (2 L. T. Rep. N. S. 596; 29 L. J. 184 Q.B.) was decided, a decision which entirely upset the law on this subject. Cockburn, C.J. in giving judgment, said, "I own I regret that the law should be left in a somewhat anomalous position on this question of costs; and that, as in this particular case, where a person may shape his cause of action either as one of contract or of tort, he may in the one case obtain costs, but in the other be entitled to no costs, according as he may have shaped his declaration in tort or contract; and it would have been better if the Legislature had indicated more clearly their intention, and had said what in such a case should be the rule as to costs." It was in consequence of this case that the Act of 30 & 31 Vict. c. 142, s. 5, was passed, in which the words "founded on contract" were reintroduced. Under that Act there has been the decision of *Baylies v. Lintott* (28 L. T. Rep. N. S. 666; L. Rep. 8 O.P. 345), in which the other cases on the subject are discussed. There can be no doubt that this action is founded on contract. Look first at the form of the statement of claim; it alleges a contract, and a breach of that contract, for the supposed tort is nothing but a breach. The contract was that defendants should deliver to the consignees or redeliver the goods to the plaintiff. Moreover, the form of the statement of claim is not the question; the question is what is the substance and root of the cause of action. The only contract alleged is that between the plaintiff and the defendants, the breach is for not delivering the goods under that contract, which contract has not been put an end to. If it is not contract that the defendants should redeliver the goods to the plaintiff, all I can say is

Q.B. Div.] FINCH AND ANOTHER v. THE GUARDIANS OF THE POOR OF THE YORK UNION. [Q.B. Div.]

that in that case the defendants have committed no breach, and there is, therefore, no cause of action at all.

[MELLOR, J., was on the Bench, but being interested in the Midland Railway Company, took no part in the case.]

KELLY, C.B.—Had not the learned judge at chambers taken a different view of this case from that which I have taken, I should have thought that it was one quite free from doubt. The plaintiff delivered goods to the Midland Railway Company under a contract to carry them to Birmingham, and there to deliver them. After that contract had been made, the plaintiff having reason to suppose that the consignee had become insolvent, gave notice to the defendants before they had parted with the goods, not to part with them. The moment that notice was given, the contract was at an end. The contract was to deliver these goods to the consignor's order, and the moment that was countermanded, the contract was ended. If, therefore, at the moment the order had been received by the defendants the plaintiff had presented himself with a waggon and called on the defendants to deliver the goods to him, he would have been entitled to them, and supposing the defendants had then refused to deliver them to the plaintiff, under the old law an action of trover would have been maintainable. Now the words of 30 & 31 Vict. c. 142, s. 5, are as follows: [Reads it.] The question therefore is this: Is this an action founded on contract or tort; or in other words, if the action had been brought before the Judicature Act would this have been an action of assumpsit or trover? It would clearly have been an action of trover, and assumpsit would not have been maintainable. The sole promise by the defendants was to deliver to the consignee at Birmingham. That was at an end as soon as that order had been countermanded. The defendants then refused to deliver the goods on demand, but delivered them to another person, and there was then a wrong done to the plaintiff for which an action would have been maintainable. Under these circumstances, I think the learned judge was wrong, and that the order should therefore be rescinded. *Order accordingly.*

Solicitor for plaintiff, J. M. Pontifex.

Solicitors for defendants, Beale and Marigold.

Friday, Nov. 10, 1876.

(Before MELLOR and LUSH, JJ.)

FINCH AND ANOTHER v. THE GUARDIANS OF THE POOR OF THE YORK UNION. (a)

Pauper lunatic—Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97, ss. 96, 97, 98, 121)—Maintenance—Power of justices to make retrospective order.

Under sect. 96 of the Lunatic Asylums' Act 1853 a retrospective order may be made by the justices for the maintenance of a pauper lunatic for a longer period than twelve months.

J. P. was convicted of felony at York on the 18th Oct. 1869. He was removed to plaintiffs' asylum on the 28th Sept. 1870, and his sentence expired 18th Feb. 1871, when he became a lunatic wandering at large. The corporation of York paid for his maintenance up to June 1873 when

they refused to do so any longer. In Oct. 1875 plaintiffs obtained an order from two visiting justices upon the defendants for maintenance for J. P. for two years and a quarter. This defendants refused to pay.

Held, that under sect. 96 of the Lunatic Asylums Act 1853, the justices had power to make such an order.

THIS was a special case stated by order of the court before whom the action was originally tried, and was as follows:

The action is brought by plaintiffs upon an order made by two visiting justices of plaintiffs' asylum at Fisherton near Salisbury, and dated the 23rd Oct. 1875 by virtue of powers conferred upon them by the Criminal Lunatics Act 1867, and the Lunatic Asylums Act 1853, for the sum of 102l. 14s., that being the balance due for the support of one James Powell, from the 23rd June 1873, to the 23rd Oct. 1875, and for a further sum of 11l. 18s. for the support of the said James Powell from the 23rd Oct. 1875 to the 29th Jan. 1876, being at the rate of 17s. a week.

James Powell was convicted of felony at York on the 18th Oct. 1869, and sentenced to sixteen months' imprisonment with hard labour.

He became insane, and was removed to the plaintiffs' asylum on the 28th Sept. 1870, by an order of the Secretary of State, made under 27 & 28 Vict. c. 29, amending 3 & 4 Vict. c. 54.

James Powell's sentence expired on the 18th Feb. 1871, when as he was still insane he became in the position of a "lunatic wandering at large in the place where the offence was committed," and is York.

The corporation of York, through their treasurer, paid for the maintenance of James Powell in plaintiffs' asylum until the expiration of his sentence, and afterwards until June 1873, when they refused to pay for his support any longer.

Plaintiffs, on the 23rd Oct. 1875, applied to two visiting justices of their asylum, and obtained the order mentioned.

The said order was duly served upon defendants, who refused to pay the sums therein ordered to be paid by them.

The plaintiffs, after the expiration of twelve days from the date of the order, brought the action under 16 & 17 Vict. c. 97, s. 121.

The question for the opinion of the court is are the plaintiffs entitled to recover the whole or any and what portion of their claim.

Herschell, Q.C. (Bromley with him) for the plaintiffs.—The questions for the determination of the court is whether the justices had power to make a retrospective order for a longer period than one year. This order is for two years and three months, and the defendants contend that ought not to extend beyond twelve months and is therefore, *pro tanto* bad. But the words of the sections are clear: "It shall be lawful . . . for two justices, being visitors of such asylum (in which the pauper lunatic is confined) to make an order upon the guardians of the union or parish from which . . . such lunatic is or has been sent to confinement for payment to the proprietor of the asylum of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of such lunatic in such asylum, and any such order may be retrospective or prospective or partly retrospective and partly prospective; and the guardians upon whom such order shall be made

(a) Reported by A. H. POYNER, Esq., Barrister-at-Law.

made shall from time to time pay to the said proprietor the charges aforesaid" (16 & 17 Vict. c. 97, s. 96). The Legislature have not limited the time to which a retrospective order may extend—where they intended so to limit it they have done so in terms, as will be seen by reference to the two following sects. 97 and 98 of the same Act. This is a strong argument in favour of plaintiffs' claim.

Poland. (Grain with him) for the defendants.—If plaintiffs' contention is correct an order may be made which will cause the ratepayers of one year to pay for the maintenance of a pauper for fifty years; such could not have been the intention of the Legislature. Sects. 95, 96, 97, 98 are a series of enactments intended to be read together. Sect. 95 makes the parish in which a lunatic is confined primarily liable for his maintenance, and sect. 96 gives the proprietor of an asylum the right to recover from such parish. But such liability is only in force until the proper settlement has been discovered as authorised by sect. 97, and if the parish of settlement cannot be discovered then the charge is to fall upon the county under sect. 98. The innocent parish, so to speak, is only made temporarily liable by these provisions, but if the plaintiffs are correct, the proprietor of an asylum might lie by for fifty years, and then upon an order such as the one in question, might recover from the innocent parish all the charges incurred during that time, whereas the innocent parish could only recover back from those who ought strictly to pay the whole amount, the charges for a single year as limited by sects. 97 and 98. This would be a very great hardship. The Legislature have used the word retrospective in sect. 96, and we give due weight to that if we read it as retrospective to the extent of the other sections, i.e., for twelve months. He then cited

Bradford Union v. Clerk of the Peace for Wilts., 18 L. T. Rep. N. S. 514; L. Rep. 3 Q. B. 604.

Kettering Union v. Northampton Asylum, 13 W. R. 894.

MELLOR, J.—There may have been some mistake or omission in drawing up this Act, but I do not see my way to add to it. The words of the sections are clear in themselves, and it may be that the Legislature thought that self interest would prevent a proprietor of an asylum lying by for any length of time, whereas it might be quite necessary to limit the time allowed to a public body for making a retrospective demand. However, that may be our duty is simply to interpret the Act, and that being so our judgment must be for the plaintiffs.

LUSH, J.—I am of the same opinion. To give any other interpretation to the section would be to make law rather than to expound it.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Gregory, Rowcliffes, and Rawle.*

Solicitors for the defendants, *Sharp and Ullithorne.*

Supreme Court of Judicature

COURT OF APPEAL

SITTINGS AT LINCOLN'S INN

Nov. 7, 11, and Dec. 2, 1876.

(Before JAMES, L.J., and BAGGALLAY and WELL, J.J.A.)

HARVEY BATHURST v. STANLEY; CRAVEN v. STANLEY. (a)

Will—Shifting clause—Eldest son—Const.

A testator devised certain real estate to the B., the second son of Sir T. for life, with remainder to his first and other sons in tail male remainder to J., the third son of Sir T., with remainder to his first and other sons male, with remainder to C., the fourth son for life, with remainder to his first and other sons in tail male, with remainder to the right heirs. And the testator declared in case the said B., or J., or C., should be the eldest son of Sir T., then, and in such case so often as the same should happen, that he thereinafter devised to him becoming the son of Sir T. and the remainder to the first other sons of his body should cease, determine, become void, as if he were actually dead issue male of his body, and the devisees should go to the use of such person or persons by virtue of the devisees thereinafter contained would then be entitled as the person or persons next in remainder to the same estate, in case a person so becoming the eldest son of Sir T. then dead without issue male.

The testator died in 1819. Sir T. died in 1863, and was succeeded in the title and family estate by his eldest son, on whose death without issue in 1863, R. succeeded to the title but not to the estates. On R.'s death without issue in 1863, O. succeeded to the title, but not to the family estate. O. had previously died without issue.

The testator's heirs-at-law filed a bill claiming to be entitled to the devised estate on the ground that by becoming sole surviving son had become the eldest son of Sir T. within the meaning of the shifting clause:

Held (Bramwell, J.A. dissentiente) that a son could not become "eldest son" within the meaning of the shifting clause after the death of his father, and that as Sir T.'s eldest son had survived him the shifting clause had no effect.

Decision of Jessel, M.R. reversed.

THIS was an appeal from a decision of the Master of the Rolls.

The hearing in the court below is reported in 34 L. T. Rep. N. S. 639, where the facts of the case are fully stated.

The Master of the Rolls held that the "eldest son" in the shifting clause meant the eldest son for the time being, and that on John becoming sole surviving son of Sir Thomas Stanley, the estates went over under the shifting clause, and that the testator's heirs-at-law were entitled to them.

From this decision Sir John Stanley appealed.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

[CT. OF APP.]

HARVEY BATHURST v. STANLEY; CRAVEN v. STANLEY.

[CT. OF APP.]

Cotton, Q.C., Fry, Q.C., Wolstenholme, and Keke-wich, for the appellant.—This clause must be construed strictly, it being a limitation over by way of a springing use to deprive a person of what would otherwise be a vested estate. The court favours vesting at the earliest possible period. The words "eldest son of Sir Thomas Stanley" mean the son who came into possession of the family estate at his father's death. In *Re Bayley's Settlement* (25 L. T. Rep. N. S. 249; L. Rep. 6 Ch. 590), where a father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail, it was held by James and Mellish, L.JJ. that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates. In giving judgment James, L.J. there said: "The words used in this settlement have acquired a meaning fixed by authority, which gives effect to what must have been the intention of the settlor, that where one son takes the bulk of the estate he is not to share in the provision made for the others. And in these cases the words 'eldest son' have been held to mean not 'firstborn son,' but the son who takes the family estate. That is clearly so with respect to portions; and it would be very inconvenient if we were to adopt the rule as to vesting suggested by the appellants, and apply one rule to personality and another to realty in such cases." That was a case of a settlement, and the reasoning of the court there applies *à fortiori* to the present case, which is a case of a will, in which the court seeks to give effect to the intention of the testator. *Collingwood v. Stanhope* (L. Rep. 4 E. & J. 43) is a strong authority in favour of our contention. The testator's meaning in depriving a younger son of the devised estates on his becoming eldest son was to prevent him from having both the family estates and the devised estates. He used "eldest son" in the sense of "son succeeding to the family estates." As Lord Hardwicke said in *Duke v. Doidge* (2 Ves. Sen. 203n), "Eldership not carrying the estate along with it is not such an eldership as will exclude." That was a strong case: a father, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for younger children, appointed the estate to a younger son, and it was held that the eldest son was entitled to a portion under the trusts of the term. The words of the will must mean "eldest son in the lifetime of his father;" for a younger son cannot become the eldest son of his father after the father's death; one cannot be son of a dead man. In *Corrance v. Corrance* (18 L. T. Rep. N. S. 535-7; L. Rep. 1 P. & D. 495, 503) Wilde, J.O. says: "The word 'parent' is a word of relation. It expresses the relation between father or mother and child, and it is, therefore, properly applicable so long, and so long only, as that relation exists. If there is no 'child' there is no 'parent.' If there has been a child there have been 'parents.' With the death of the child the relation ceased, and the appellation of 'parent,' though it may, in the looseness of common talk, continue to be attributed to those who once stood in that relation, ceases to be properly applicable." The same thing may be said of the relation between father and son. The other points of the arguments on behalf of the appellant are so fully stated in the judgment of

Bramwell, J.A., *infra*, that it is unnecessary to set them out here.] They also cited

Doe d. Luscombe v. Yates, 5 B. & Ald. 514.

Southgate, Q.C., Bagshawe, Q.C., and Bagst. for the plaintiffs in the first suit.—As for the argument that a shifting clause of this kind may be construed very strictly, we rely on the words used by Lord St. Leonards in *Harries v. Round* (2 Dc G. M. & G. 201): "I agree that provisions of this sort, which are to defeat an estate, are not to have an unnatural or an unnecessarily enlarged construction put upon them. As, however, the party who creates the estate has also a right to limit it over or to defeat it, a fair construction ought to be given to the words which he uses for that purpose." The fact that the younger son did not, in fact, succeed to the family estate by becoming eldest son, does not prevent the shifting clause from taking effect: (*Livesey v. Livesey*, 2 H. L. Cas. 419). On a strict construction of the words of the will we are entitled to succeed. The testator does not say "becoming the eldest son of Sir Thomas Stanley in his lifetime," and there is no reason why the words "in his lifetime" should be imported. The words in the shifting clause "then and in such case and so often as the same shall happen" show that the testator contemplated the limitation taking effect over and over again. "Eldest son" means "eldest of the sons," and there is nothing to prevent a son becoming eldest after his father's death. They also referred to

Roddy v. Fitzgerald, 6 H. L. Cas. 823;

Lambard v. Peach, 4 Dr. 553;

Lewin on Trusts, 6th edit. p. 340.

Chitty, Q.C. and Badnall, for the plaintiffs in the second suit, cited

Meyrick v. Laws, 30 L. T. Rep. N. S. 77; L. Rep. 9 Ch. 236;

Gardiner v. Jellicoe, 7 L. T. Rep. N. S. 510; 12 C. R. N. S. 568, 637;

Re Theod's Settlement, 3 K. & J. 375.

Davey, Q.C. and Smart, for other parties.

Cotton, Q.C. in reply, referred to

Matthews v. Paul, 2 Wils. C. C. 64; 3 Swanst. 33.

Cur. adv. roll.

Dec. 2.—The following written judgments were now delivered.

JAMES, L.J.—This suit—for the two bills may be treated as one suit—is really an action of ejectment to recover possession of large estates which have devolved upon the defendant under the will of a Mr. Errington, and are now held by him. By that will (after a devise to certain persons which lapsed) the estates were devised as follows [His Lordship read the devise to the use of Rowland Stanley, the second son of Sir Thomas Stanley, of Hooton, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of John Stanley, the third son of Sir Thomas Stanley, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of Charles Stanley, the fourth son of Sir Thomas Stanley, for life, with remainder to his first and other sons in tail male, with remainder to the use of the testator's right heirs, and continued] and with a defeasance as follows: "And I do hereby declare it to be my will that in case the said Rowland Stanley, or John Stanley, or Charles Stanley, shall become the eldest son of the said Sir Thomas Stanley, then and in such case, and so often as the same shall happen, the estate hereinbefore devised to

him becoming the eldest son of the said Sir Thomas Stanley, and the remainder to the first and other sons of his body, shall cease, determine, and become void, as if he were actually dead, without issue male of his body, and then and thenceforth the estates hereby devised shall immediately go and remain to the use of such person or persons as by virtue of the devises hereinbefore contained would then be entitled as the person or persons next in remainder to the same estates, in case such person, so becoming the eldest son of the said Sir Thomas Stanley, was then dead, without issue male of his or their body or bodies, and the same person or persons shall in every such case be entitled to take the same estate and estates in the said premises hereby devised as he or they would have been entitled to take therein by virtue of this my will, if such person so becoming the eldest son of the said Sir Thomas Stanley were actually dead, without issue male as aforesaid." The contention against the defendant is that he has become the eldest son of Sir Thomas Stanley, and that thereby the shifting clause has taken effect, and that the estates now stand limited to the use of the testator's right heirs. The facts are these: Sir Thomas Stanley died in 1841 leaving William his eldest son. Rowland, the second son, had in the meantime, on the death of Mrs. Errington in 1819, taken the devised estates. William died in 1863, and was succeeded in the baronetcy by Rowland. Rowland died in 1875, and was succeeded in the baronetcy by the defendant John. Charles had died in the meantime, so that on the death of Rowland, John was the only surviving son. The question is, whether thereby John became the eldest son of his father within the meaning of this proviso; and in answering this question, it must be borne in mind that, according to a fixed canon of construction, a condition to operate as a defeasance of a vested estate must be shown to have happened strictly, and to the letter of it; that the law does not admit, in favour of the defeasance, of any substantial or *cypres* performance or happening of the thing to be done or to happen. And there is this further rule, that the law is always in favour of a construction which vests the estate absolutely and indefeasibly at the earliest moment. In answering the question whether Sir John has become the eldest son under the proviso in this will, I first ask myself this question. Putting aside for a moment the will and all context and all considerations arising under it, has Sir John, as a matter of fact, become the eldest son of his father? I, for myself, answer that abstract question in the negative. I have no idea that I have become the eldest son of my father, because many years after his death my elder brother has died leaving me surviving. I think no one has ever said or thought that William the Fourth or the King of Hanover after him ever was the eldest son of George the Third, or that Charles the Tenth became the eldest son of the Dauphin, his father, because by the death of his brothers and their male issue, he became King of France. Again, a man cannot literally become eldest son or oldest unless he has juniors. Sole surviving and oldest are certainly not synonymous terms. If he is eldest because he has no seniors, then he is at the same time youngest because he has no juniors. It is said that eldest must in this case mean and include the last survivor, because the testator

talks of the then youngest becoming the eldest son of his father. But the father might have had a score of other sons, and Charles might have become and been the eldest of a whole tribe of sons. No doubt it would be a very capricious and absurd limitation to make Charles's estate go over to the heirs at law if his father had other sons, but not to go over if he had not. But the gist and substance of the argument on the part of the plaintiffs, as will be seen hereafter, is that it is open to a testator to be as capricious as he likes. With these preliminary considerations in my mind, I proceed to consider what the meaning of "becoming the eldest son" is according to the context, from which alone, and not from the literal import of the words, that meaning is to be gathered; and in doing this I feel that I am not only at liberty, but bound, to look at the whole will, and what the testator was doing, and under what circumstances. The Stanley sons were his relations in this way: they were the sons of his great niece who had married Sir Thomas, the then baronet. Sir Thomas was the head of the eldest branch of the ancient family of Stanley (himself the ninth Baronet), and was in possession, as tenant for life only, of very large family estates, which were limited to his sons in tail, so that William was then heir apparent and next remainderman in tail. He was a young boy, and his brothers mere children. The testator passes over the eldest son altogether for no conceivable reason, except that he was the eldest son, and makes the limitations which I have mentioned to the other sons then living. In the ordinary course of events the eldest son would succeed to the family estates, and it might be anticipated that he would in due course marry and have a son to succeed him. Is it possible to conceive that the testator really meant that if this, the natural event, the event which of course the testator must have anticipated and hoped for, happened—if the eldest son having become the Baronet died leaving a son to succeed to the family title and estates, and leaving Rowland surviving, then that Rowland and all his descendants should be turned penniless, or at all events landless, to make room for John; but that if Rowland died a day before his elder brother, then Rowland's family would retain the estates and John get nothing; that he meant that if the deaths of the four sons occurred in the very order in which the will contemplates that they would occur, the elder dying first and so on, all of them leaving sons, that the mere fact that the youngest survived his brothers was to deprive them and their families, the objects of his bounty, for whom he had made such elaborate provision, by whom he had intended that the name and arms of Errington should be perpetuated, of all provision whatever and give the estates over to his heirs at law whom he had postponed to the Fermors and to the Stanleys? It may be said that this is a consequence which he did not foresee, that events had happened which he had not thought of, and that we cannot alter his will in consequence. It frequently happens so no doubt with regard to wills, but that is ordinarily because a testator makes his provisions not recollecting that the deaths of his devisees may not take place in the exact order mentioned in his will. Thus, where a will contemplates that A. is to die and to be succeeded by B. and so on, B. may perversely die before A., and so throw the whole frame and scheme of the will

templated order of events, but in the natural and normal and contemplated order would be the necessary result of the state of things which the testator contemplated would happen. But it is said again, that a testator may be as capricious as he pleases; but this is something much more than caprice; it is a manifest absurdity which ought not to be attributed to a testator; it is even more—it is an act of refined cruelty to make his devisee live with this sword of Damocles hanging over him, trembling lest any mischance should cut short the thread of his elder brother's life. Are we really obliged to give to this will a meaning which would make it almost an act of heroic virtue and duty in the devisee to commit suicide if he heard that his elder brother was dying, and so avoid the family ruin which would follow from the misfortune of his surviving? In my opinion, no sane testator would make the estate of his devisee and that devisee's line of issue go over merely because the devisee survived his elder brother, such survival not in the slightest degree altering his position, and that no ordinary Englishman writing to Englishmen, meaning merely to say "if B. shall survive his elder brother," would use the periphrasis of "become his father's eldest son." I may refer here, to show the length to which the courts have gone rather than impute an absurdity to a man, to the case in the House of Lords of *Abbott v. Middleton* (7 H. L. Cas. 68). It is really on the same principle of rejecting a literal construction which leads to manifest absurdity that the courts have held in the many cases to which we have been referred that an "elder son" means the man who gets the estate, and that "younger children" include an elder who does not get it. It is on this principle that in so many cases "survivors" has been read "others." And it is only on the same principle, viz., to avoid obvious absurdity, that the word "children" is made to include "child," or the word "eldest" or "first-born son" can be made in any case under any circumstances to mean and include an "only son." You suppose the testator to be a person of ordinary common sense, and you apply your own common sense in interpreting his words. But this will admits of another construction, which, to my mind, is the natural construction of it. In all ages and in all countries where primogeniture has prevailed the eldest son has a character, position, and status most marked and peculiar. We know what a position the king's eldest son holds in this country, what he held in France, what he holds in Germany and Russia. The same great distinction between the eldest son and the cadets of a family goes through every grade of territorial magnates—duke, baron, squire, and knight of the shire. The eldest son is the coming sovereign, he is the young lord and master, while the father is the old lord and master; the eldest son is the person who, in the ordinary settlement of such estates as the Stanley and Errington estates, would, with the father, be able to dispose of them and make a new disposition at their will and pleasure. When Mr. Errington made his will he knew that the eldest boy was in this position, and he left him out of his will, leaving him, during his father's lifetime, to be provided for by his father as eldest sons are, and at his father's death to take what would come to him thereupon. But

another son would take his place, and, therefore, carrying out the same idea of excluding the elder son and his line, he introduced the provisions in question. And I read the words, "become the eldest son of," as meaning this: "if he shall become eldest son to," i.e., "if he shall fill the character and have the status and position of eldest son." And this could only be in the father's lifetime. And, indeed, I do not see how, strictly and properly, a person's relation or position to another person can change after that person's death. You talk of a man, no doubt, as the son of a deceased man, but the relation of father and son was dissolved by death, and what you mean is that he was his offspring. You talk of the eldest surviving son, but that means the eldest of a class whom you sufficiently designate by that description; and the context may compel you, in order to avoid palpable absurdity, to include in that description an only surviving son. Here the context seems to me to show the contrary, and that it means the eldest son of a living man. The words "the eldest son of A." and "A.'s eldest son" are in the English language exact equivalents and cannot be translated into any other language (as I believe) except by one and the same form of expression; (a) and if the expression here had been "shall become Sir Thomas Stanley's eldest son," there would to my mind be no reasonable possibility of a doubt. A man would not become another man's eldest son after the latter's death any more than he could become his eldest servant, or his son-in-law, or his next of kin. No doubt you talk of a dead man's grandchildren, descendants, successors, &c., but "grandchildren" is only short for "his children's children;" "descendants" means "descendants from him;" "successors" means "successors to him." The mistake in this case appears to me in not noticing that "eldest son" is not the same as "eldest of the sons," the proper synonym of which is "eldest brother." But it is said that you would still leave this absurdity or caprice untouched, that if the eldest son had died during his father's lifetime leaving a son and heir, the second son would, even according to my construction, have become the eldest son of the living man, and lost the estate through that mere accident, and without any reasonable ground or motive for depriving him of it. The answer which I give is that the second son in that event would not have become the "eldest son" within the meaning of this clause, would not fill the character or have the status of "eldest son." I will give illustrations of what I think is meant and what I think is not meant by "eldest son," from English history. When Prince Henry died, his brother Charles became the eldest son of King James the First, but when Frederick died, leaving his son Prince George, no one became for any practical purpose, or in any substantial sense, or was ever considered to have become, the eldest son of George the Second. There is a document, which Mr. Errington was in all probability as familiar with as with his manual of devotions—the table of precedence. In that the word "eldest son" occurs repeatedly, the eldest son of a duke, eldest son of

(a) The German language admits of two forms of expression somewhat similar to those admissible in English: "Der älteste Sohn des A." and "A.'s ältester Sohn."—REF.

a marquis, and so on. If a duke's eldest or first born son dies in his father's lifetime without issue male, then, but not otherwise, the next son becomes the eldest; if the first born son dies after the father's death, then the next son does not become eldest son of the duke, but becomes the duke. In matters of title, in matters of dignity, "eldest son" has a technical meaning, and the same technical meaning is, I believe, to be found in the same matters in other countries—*filis aîné, figlio maggiore*, as contrasted with the cadets or junior branches. The word "eldest son" does not mean first born son or "oldest of the sons," but, heraldically, and in ordinary English parlance, means a man who has a living father and no senior in age or line, i.e., no senior in blood. By the construction which the plaintiffs seek to put on the proviso, the whole matter is kept in suspense and uncertainty during the whole lifetime of several persons, so that no owner could during all that time know what would be the position or prospect of his family or of himself. But by the construction which I think on other grounds the more probable, more reasonable, and more natural construction of the words, the status of everybody would be ascertained at or before the death of Sir Thomas Stanley, the father. It was suggested in the course of the argument that "becoming the eldest son" might possibly mean "becoming the baronet," or "becoming the head of the family." I do not think it possible to get any such meaning out of the words, or upon any principle to make any such implication or guess. In my view of the case, actually becoming baronet was not required. Becoming next in succession to the baronetcy and headship would cause the shifting, and that was the event provided for. I am of opinion, therefore, that the plaintiff, on whom the burthen of proof lies, has failed to prove the defeasance, and I give my voice in favour of the appellant. And the costs must follow the event.

BAGGALLAY, J.A.—Having had an opportunity of reading and considering the judgment which has just been delivered by the Lord Justice, and entirely concurring in the views which he has expressed, and in the reasons which he has assigned, I have but few further observations to make upon the case now under our consideration. The question involved in this appeal is, what construction should be put upon the words, "becoming the eldest son of Sir Thomas Stanley," as used in the shifting clause of Mr. Errington's will for the purpose of denoting the contingencies upon the happening of which the provisions of the clause were to come into operation. Now two interpretations have been suggested of these words: the one that has been adopted by the Master of the Rolls, and the other that which has been enunciated by the Lord Justice; the former attributes to the words the meaning of "becoming the eldest in age for the time being of the sons of Sir Thomas Stanley," and fixes no period for the happening of the contingency short of the whole duration of the life of the person becoming in such sense an eldest son; the latter regards the words as denoting a change of status beyond or in addition to that of mere survivorship, and requires that such change should occur during the life of Sir Thomas. In the events which have happened the substantial distinction between the two interpretations, so far as the present succession to the estate is concerned, is in the duration of the period within which the contingency was to happen. The appellant or the

respondent will be successful according as this period was or was not limited to the life of Sir Thomas Stanley. Now the Master of the Rolls has treated the interpretation which he has placed upon the words as being the only strict interpretation of the language used by the testator. If this were so, however capricious might be the results to which such an interpretation would or might have led, it must prevail unless controlled by the context, or by a due consideration of such of the surrounding circumstances as may properly be called in aid. But I am unable to assent to the view of the strict interpretation of the words. In my opinion, a strict interpretation of the language used by the testator in the shifting clause requires that the event of becoming the eldest son of Sir Thomas Stanley should occur in the lifetime of Sir Thomas, inasmuch as a person cannot in any grammatical sense or meaning of the words "become" the eldest son of his father after his father's death; though a person who has been the eldest son in his father's lifetime would continue to be and would be accurately described as his eldest son after his death. But though this interpretation of the words cannot, in my opinion, be regarded as a strict interpretation, it may, nevertheless, be the interpretation which ought to be adopted if it be required by the context. But so far from this interpretation being required or supported by the context, its effect would be to defeat the testator's intentions as expressed in the other portions of his will in almost every event which could be reasonably contemplated at the time when the will was made. In the earlier part of his will Mr. Errington had declared his wishes and intentions as regarded the destination of his Northumberland estates in a series of limitations as to the meaning of which there cannot be the slightest doubt or question; each life estate (and there are four such estates) is followed by estates in tail male to the sons in succession of the tenant for life, and nothing can be more certain than that the testator intended (so far as his intentions can be ascertained from the language of the limitations) that neither John Stanley nor Charles Stanley should succeed to the estates so long as there should be any such issue living of Rowland; and as regards Charles, so long as there should be any such issue living of John; and, further, that his own right heirs should not succeed to the property except in the event of there not being any such issue living of either Rowland, John, or Charles. And the intention of the testator to secure the provisions so made by him for the sons of the several tenants for life is further evidenced by the provisions of the name and arms clause, by which he expressly directed that the failure of any of the tenants for life to comply with such provisions should not prejudicially affect the estates limited to their sons. Now, if the interpretation adopted by the Master of the Rolls is the correct interpretation of the language used in the shifting clause, all these carefully expressed intentions of the testator in favour of the issue of the several tenants for life would have been entirely defeated if Rowland, John, and Charles, as well as their eldest brother William, had died in the order of their respective seniorities of age, and if each or any of Rowland, John, and Charles had left sons or male issue of sons capable of succeeding under the previous limitations. The possibility, if not the probability, of the happening

would have been in complete accordance with the order of succession which he had himself selected as well as with the ordinary expectations of the duration of human life. Again, the adoption of the same construction would necessarily lead to the following result—that whilst the testator has carefully guarded against the failure of the limitations in favour of the sons of any tenant for life by reason of an act of negligence on the part of their father in not complying with the provisions of the name and arms clause, he has nevertheless directed that such limitations shall wholly fail as regards the sons of each and every of the several tenants for life, being sons of Sir Thomas Stanley, upon the happening of events over which such tenants for life could not possibly exercise any control and in respect of which they could not be guilty of any negligence, viz., their respectively surviving all their elder brothers. But if to interpret the words “becoming the eldest son of Sir Thomas Stanley” as equivalent to “becoming the eldest in age for the time being of the sons of Sir Thomas Stanley,” is to give to them an interpretation which is neither the strict interpretation nor a modified interpretation required or supported by the context, it follows that it is the duty of the court to reject it. In such a case it might also be the duty of the court, if the words used by the testator were of such ambiguous and doubtful construction that no reasonable or certain interpretation could be given to them, to reject altogether the provisions of the shifting clause and to give full effect to the previous limitations; and I was for some time pressed by the consideration that that might be the proper course to pursue in the present case; but upon more mature consideration, I am satisfied that there is no occasion to adopt such a course, inasmuch as the language of the shifting clause does, in my opinion, admit of a clear and reasonable construction, and one which would have rendered the various portions of the will harmonious at the time when it was executed, and adapted to the several contingencies which at that time might be reasonably anticipated, though in some respects the testator's wishes and intentions may have been defeated in consequence of the happening of events which were not contemplated by him, and for which no provision was made. That construction is the one which has been explained in detail by the Lord Justice, and to which I need not further allude. Upon the whole, I am of opinion that this appeal should be allowed.

BRAMWELL, J.A.—I am of opinion that the decree of the Master of the Rolls was right and should be affirmed. The question is not an abstract one, what is the meaning of the words “become” “eldest” and “son” in themselves; it is what is their meaning in conjunction and as the testator has used them. “Eldest son” may mean one thing abstractedly, another in conjunction with other words. If nothing else appeared, I should say eldest son meant eldest born. Here it manifestly does not mean that, for it supposes that each of all four sons may be eldest. If anyone said that William the Fourth was the eldest son of George the Third, he would not merely use careless and inappropriate language, but he would be wrong and convey a wrong idea to his hearer. If he said that, on the death of George the Fourth,

throne, his language might be inaccurate critically and hypercritically considered, but it would convey no erroneous idea to the hearer. As to dealing with the matter “strictly,” I think that word had better be left out, “whatever it may mean,” as the Master of the Rolls says. For if it means “correctly” it is superfluous; if it means anything else, it is wrong and mischievous. Probably it means this, and then it is right in substance, though not an apt word—viz., that the estate being in the defendant at one time, it is for the plaintiff to show that by the words of the will, and in the events that have happened, it is out of him, that the burthen of proof or demonstration is on the plaintiff. And I perfectly appreciate Mr. Cotton's argument that it is not for him to give the words a meaning, that his client is entitled to succeed unless it is shown that the meaning is such as disentitles him. But if a sensible meaning is given to them which does disentitle him, it calls on him to give a better. I am of opinion the plaintiff has shown that the words are not meaningless, that he has given a meaning to them, and that no better is suggested for the defendant. The words are few: “In case the said Rowland Stanley, or John Stanley, or Charles Stanley shall become the eldest son of the said Sir Thomas Stanley, then,” &c. Now as no one of them was the eldest born son, and never could become so, the words mean something other than eldest born, and consequently can only mean “become eldest surviving son.” As to this I do not understand there is any controversy. Then it was said or hinted that a man could not be eldest unless there were more than one younger. This is a desperate point. If it were well founded, the limitation to the first son of each of the three, Rowland, John, and Charles, would fail unless such son had a brother, as he could not on the argument in question be first where there was no second. It seems to me, therefore, there can be no doubt that the words mean “become by the death of his elder brother or brothers, the oldest or older, or only son of Sir Thomas Stanley.” Then the next point made was that “son” supposes “father;” that a man cannot become the eldest son of another unless that other is living; that, consequently, the words must be read as though they were “become the eldest son of Sir Thomas Stanley in Sir Thomas's lifetime.” I need not say that I treat this argument with the greatest respect. I do not think it open, if well founded, to the objection that it inserts words. For then it shows those words “in his, Sir Thomas's lifetime” are as much there as the word “surviving.” But I think the argument is not well founded. I think it does insert words for which no sufficient reason can be given, and it is at least certain that the testator might have inserted them if he thought fit. I think the natural meaning of the words is “become the eldest son, living or dead Sir Thomas Stanley.” No doubt the word “son” supposes father, but father alive or dead. “Posthumous son,” is not inaccurate. It is not inaccurate to say, “A. B. died and left four sons; John is his eldest surviving son.” But it is said that here the words are “become” the eldest son, and that a man cannot become anything unless all the conditions necessary to his being so exist. But

see to what this leads: suppose the words had been, "in case Rowland Stanley, or John Stanley, or Charles Stanley, the second, third, and fourth sons of Sir Thomas Stanley shall become the eldest," there would be no ground for the argument in question. Yet, can it be said there is a difference between those and the present words? The fallacy is in coupling the word "become" with "son;" it should be coupled with "eldest." That is the only thing he can become. He is son already. Moreover, the testator says: "In case either shall become the eldest son, then and in such case, and so often," &c. There is no limit of time, and the testator evidently supposes it may happen more than once. I know that the qualification supposed by the defendant is not one of time, it does not depend on any effluxion of time, but on an event which may happen in five or fifty years, viz., the death of a son, living the father; but I say that the testator contemplated a succession of events which he could hardly suppose would all happen in Sir Thomas Stanley's lifetime. Suppose Sir Thomas Stanley had been dead when the will was made, would the language of the shifting clause be unmeaning? It might be said, no, for his being dead might be proved as one of the surrounding circumstances. Be it so. Suppose he had died after the making of the will, but before the testator, would the clause become inoperative? But then reasons are given to show that what the plaintiff contends for cannot be the meaning of the words, or, if it might be, that there is or are one or more preferable. A forcible argument is that it cannot be that the testator meant that in the natural course of things the Stanleys should lose the devised estates, and yet that on the plaintiff's contention that would happen. For that, in the ordinary course of nature, William would survive his father; Rowland would survive William; John Rowland, and Charles John, so that each of the three brothers would be eldest in turn, and each lose the estate. The first observation on that is, that (supposing the perils of infancy over) the eldest son will probably survive his father, the second the eldest, the third the second, and the fourth the third, at least I suppose so. But the consequence contended for, is, nevertheless, not the probable one. The probabilities are against any one son surviving his father and three brothers. Supposing them all adults, an annuity for the lives of the father and eldest three sons, and the survivor, would be a much better thing than an annuity for the life of Charles. But this is not worth pursuing. I repeat what I said on the argument: there is no mistake greater than the common one of arguing that a man did not mean what he has said, because he did not mean all its consequences, forgetting that it may well be that they were not present to his mind, and that he had no meaning or intention about them. Assuming they were in this case, the will may be capricious, but it would have a possible and probable operation, viz., Rowland, John, or Charles dying and leaving issue, living an elder brother. Let us now see if the suggested meaning is less capricious. In the first place, the same consequences would follow if the three sons, William, Rowland, and John died in succession living their father, though each left issue, a thing not likely, but possible. Another thing, both possible and probable, or not improbable, is that Rowland should die, living his father

and elder brother, leaving children, then the father and elder brother die, the latter childless, and yet John would not take, the eldest son of Rowland having the Stanley estates and the devised estates; or William might die leaving children, Rowland would lose the estate, and John take it, and his children keep it if he died before Rowland, the father still living; or Sir Thomas might have died leaving all four sons children, then William might have died a child, and then Rowland would, according to the construction contended for, have both the patrimonial and devised estates. I think, then, the meaning of the words contended for by the plaintiff is the natural meaning, attended, indeed, with consequences the testator probably did not intend. I think the meaning contended for by the defendant is not the natural meaning, and equally attended with consequences that could not have been intended. Another mark of caprice or improvidence is that no provision is made for further children of Sir Thomas Stanley, though he might well have them, as the four sons ranged in age from one to four years, as is mentioned in the judgment of the Master of the Rolls. If I had to decide according to what I believe the testator meant, I should decide adversely to the plaintiff. For I judge or guess that he meant that if any brother came to the title the estate should go from him and his issue; his reason probably being that in such case that son and his family would probably be sufficiently provided for. That has happened. No doubt the testator might have said so, and has not. Mr. Chitty gave a reason why he did not make the estate go over on the patrimonial estates devolving on either of the sons; possibly some reason might be given for his not saying they were to go over if the title devolved. But the speculation is unprofitable, for the case does not turn on its correctness. If I was told he meant either what I consider he has said, or what in the judgment of the Lords Justices he is considered to have said, and I entered on the guess which of the two he meant, I should say the latter. But the question is not what he meant, but what he has said. I am of opinion he has said what is contended for by the plaintiff. He has made a will which, whatever is the meaning of the words, is and must be considered capricious, if they express his intention, and shortsighted if they do not. I have doubted whether the clause could not be treated as meaningless and void on the ground of the irrational consequences of the only meaning I can give to it. No such point has been suggested at the bar or on the bench. I will, therefore, do no more than throw it out for consideration, merely saying that I think it would not be sustained. I am of opinion the decree should be affirmed.

Solicitors for the appellant, *Gregory, Rowcliffes, and Rawle.*

Solicitors for the respondents, *Meynall and Pemberton; George Bonnor.*

Nov. 30 and Dec. 21, 1876.

(Before JAMES L.J., BAGGALLAY and BRETT, JJ.A.)

Ex parte SAFFERY; Re COOKE(a).

Bankruptcy — Fraudulent preference — Rules of Stock Exchange — Bankruptcy Act 1869, s. 6, subsect. 2, s. 92.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

A stockbroker and member of the London Stock Exchange, finding himself unable to meet his engagements, wrote to the secretary of the Stock Exchange to that effect, and was declared a defaulter. On the following day he attended a meeting of his Stock Exchange creditors, who, having heard his statement of debts and assets, agreed to accept a composition from him. At the request of the official assignees of the Stock Exchange, and in compliance with the rules of that body, he handed over to them his balance at his banker's, which formed the greater part of his assets, for distribution among his Stock Exchange creditors. At the meeting at which the creditors resolved to accept the composition the debtor stated that he had no creditors outside the Stock Exchange, and that certain large advances which were known to have been made to him by his father-in-law had been made by way of gift, and not by way of loan. This was not correct, and a few days afterwards he was adjudicated a bankrupt on the petition of his father-in-law, and the trustee in bankruptcy claimed the money which had been paid to the Stock Exchange assignees and by them distributed among the Stock Exchange creditors in accordance with the regulations of the Stock Exchange:

Held, that the money must be refunded, inasmuch as any cessio bonorum made by an insolvent on the eve of his bankruptcy for the benefit of some only of his creditors, to the exclusion of the rest, is a fraud upon the bankruptcy laws.

THIS was an appeal from a decision of Mr. Registrar Pepys sitting as Chief Judge in Bankruptcy.

The facts of the case were as follow:

On the 27th April 1876, Mr. John Edward Cooke, a stockbroker and member of the London Stock Exchange, being unable to meet his engagements, was declared a defaulter.

In an affidavit Cooke deposed that, on the 26th April, when he found himself unable to meet his engagements, he wrote to the secretary of the Stock Exchange, expressing his regret that he could not fulfil his engagements; that before writing the letter he saw Mr. Parker, one of the secretaries, and told him that he (Cooke) would have to declare himself, and asked him whether it was advisable to call together some of his largest creditors first, or to declare himself insolvent at once; Mr. Parkes said it would not be right to tell one more than another, and that Cooke had better declare himself at once; that he then did so by writing the official letter before referred to, and that his failure was publicly announced in the Stock Exchange room in the usual way at 11 a.m. on the 27th April.

Immediately on his default being announced in the house the usual official notice thereof was sent by the official assignees to Cooke's bankers, the Bank of England.

A meeting of his Stock Exchange creditors was held on the afternoon of the 28th April, and Cooke attended with his books in accordance with a notice he had received from the official assignees, and stated that his assets amounted to 8000*l.*, while his Stock Exchange debts amounted to 24,790*l.*, and the creditors resolved to accept 3*s.* 4*d.* in the pound.

At the request of the official assignees he thereupon gave them a cheque for 5000*l.*, the balance

at his bankers, for distribution among his Stock Exchange creditors.

The official assignees also collected 360*l.* from members of the Stock Exchange for differences due by them to Cooke, and they paid to the Stock Exchange creditors a dividend of 3*s.* 4*d.* in the pound, which absorbed 4260*l.*, leaving a balance of 1100*l.* in their hands.

On the 13th May, Cooke filed a petition for liquidation of his affairs by arrangement, but the creditors refused to agree to a liquidation, and on the 1st June Mr. Edward Mackenzie, the debtor's father-in-law, who claimed to be a creditor for 107,850*l.*, filed a petition in bankruptcy against him, under which he was adjudicated a bankrupt, and Mr. J. J. Saffery was appointed trustee of his estate.

The trustee claimed to have the 5360*l.* refunded by the Stock Exchange assignees.

The following is a brief summary of the rules of the Stock Exchange, which are material to the present case:

Rule 6 of the Stock Exchange rules empowers the committee to expel or suspend any member who may be guilty of any dishonourable or disgraceful conduct, or may violate any of its regulations or fail to comply with the committee's decision.

Rule 142 provides that any member unable to fulfil engagements shall be published and declared a defaulter.

Rule 143 provides that any member declared a defaulter, and any member not a defaulter becoming bankrupt, shall cease to be a member.

Rule 144 provides that creditors shall not make any compromise with members giving private information of failure to their creditors, but shall immediately communicate with the chairman, deputy chairman, or two members of the committee in order that the member may be at once declared; and in case the committee have knowledge of private failure, the name of the defaulter shall be publicly declared.

Rule 148 gives creditors for differences a prior claim on all differences received by or due to a defaulter's estate.

By Rule 145 the committee will not recognise any payment or claim on a defaulter's account which does not arise from Stock exchange transactions.

Rule 156 provides that a defaulter shall not be eligible for re-admission until payment from his own resources, independently of his securities, of at least one-third of the balance of loss on his transactions, whether on his own account or that of his principals.

Rule 160 provides that non-members shall be allowed an equal participation of assets subject to the same conditions as members, provided their claims be admitted by the creditors, or, in case of dispute, by the committee. And that a person whose claim is so admitted may be represented at the meeting of creditors by any member whom he may select.

Rule 166 provides that two or more members shall be appointed as official assignees annually by the committee, their duty being to obtain from every defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings, to examine strictly his accounts, to investigate bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the directions of the majority of the creditors present.

And rule 167 provides that the official assignees shall collect and pay the assets to the credit of their joint account at a banker's, and divide the same as soon as possible.

In an affidavit, Charles Branch, who was appointed chairman of the meeting of the bankrupt's creditors, called at the London Stock Exchange on the 28th April, deposed that at such meeting, at the suggestion of his solicitor, Mr. George Henry Lewis, "I enquired from the said John Edward Cooke whether he had received any advances from any member of his family, more

particularly from his father-in-law, and he informed the said meeting that he had received no advances whatever from his father-in-law. I then asked the said J. E. Cooke whether he had received any money from his father-in-law, and he said he had. I asked him whether the money he had received from his father-in-law was a gift or a loan; he said his father-in-law had assisted him by way of a gift, but that he had borrowed no money whatever from his father-in-law, and was not indebted to his father-in-law, and had no liabilities outside the Stock Exchange. That the meeting of the 28th April was adjourned till the 3rd May, upon which day the said J. E. Cooke attended the adjourned meeting, and then for the first time stated that he was indebted to Mr. Mackenzie, his father-in-law, in a large sum of money, and a gentleman attended the said meeting from Messrs. Cunliffe and Co. who stated he was solicitor to Mr. Mackenzie, and that Mr. Mackenzie claimed to be creditor for 107,850*l.* for money lent and stock misappropriated; and that upon the day previously, namely, the 2nd May, in accordance with a resolution passed at the said meeting of the 28th April a dividend of 3*s.* 4*d.* in the pound was paid to the creditors on the Stock Exchange."

John Bainbridge Lyon, one of the official assignees, deposed that at the time of distributing the sum of 4260*l.* in payment of the dividend of 3*s.* 4*d.* in the pound neither he nor his co-official assignee had received any notice whatever that Cooke had committed any act of bankruptcy or was unable to pay his creditors other than the members of the Stock Exchange, Cooke having informed his creditors at the meeting of the 28th April that he did not owe any debt other than to members of the Stock Exchange; and that on the 13th May they did receive notice that Cooke had committed an act of bankruptcy by filing a petition for liquidation.

Mr. George Henry Lewis made an affidavit confirming Branch's account of the meeting of the 28th April.

The registrar having held that the trustee in bankruptcy was not entitled to the sums received by the Stock Exchange assignees, the trustee appealed.

Lanyon (with him *Benjamin*, Q.C.) for the appellant.—This transaction was bad on three grounds. First, it was a fraudulent transfer of the debtor's property, or part thereof, within sect. 6, sub-sect. 2 of the Bankruptcy Act 1869. *Ex parte Tate* (35 L. T. Rep. N. S. 531), shows that a person taking such a transfer must prove that he took it in good faith, and that the knowledge of the debtor's insolvency will deprive him of the protection of the provision at the end of sect. 92. An assignment of part of a debtor's property may be fraudulent as against creditors though there be no preference:

- Williams's Bankruptcy Practice*, 2nd edit., 18, 19;
- Ex parte Pearson, re Mortimer*, 28 L. T. Rep. N. S. 796; L. Rep. 8 Ch. 668;
- Devon v. Watts*, Dougl. 88;
- Ex parte Lückes, re Wood*, 26 L. T. Rep. N. S. 113; L. Rep. 7 Ch. 305;
- Ex parte Halliday, re Liebert*, 28 L. T. Rep. N. S. 324; L. Rep. 8 Ch. 223;
- Ex parte Cohen, re Sparke*, 25 L. T. Rep. N. S. 473; L. Rep. 7 Ch. 20;
- Ex parte Wensley*, 1 De G. J. & S. 273.

Secondly, this action is bad as a fraudulent preference of one class of creditors under the 92nd

section of the Act, and it is not within the provision of the proviso at the end of that section "in good faith" in that proviso means in the insolvent state of the debtor:

- Butcher v. Stead*, 33 L. T. Rep. N. S. 541; 7 S. & J. 839;
- Ex parte Tate* (*ubi sup.*)

Thirdly, he made a declaration of insolvency, and, by absenting himself from his usual business, committed an act of bankruptcy:

- Bernasconi v. Farebrother*, 10 B. & C. 549;
- Ex parte Meyer, re Stephany*, 25 L. T. Rep. 33; L. Rep. 7 Ch. 188.

De Gez, Q.C. and *Finlay Knight*, for the respondents, the Stock Exchange assignees.—This was not an assignment of all the debtor's assets, only of 5000*l.* out of 8000*l.* Therefore it did not come within sect. 6, sub-sect. 2, as distinguished from sect. 92: (*Ex parte Norton, re Golden*, 16 Eq. 397). The payment here was made entirely spontaneously, but was made in compliance with the Rules of the Stock Exchange under the pressure caused by the bankruptcy knowledge that his only chance of being admitted as a member of the Stock Exchange was compliance with its rules. Therefore the payment was not in law a voluntary payment: (*Stratton Barton*, 11 Ex. 647). There having been no pressure, this was not a fraudulent preference: (*Edwards v. Glyn*, 2 Ell. & Ell. 20.) Then the Stock Exchange creditors are entitled to retain what they have received, because they received it with notice of any act of bankruptcy, and believe the truth of the bankrupt's statement, that he had no creditors outside the Stock Exchange. This was cited:

- Ex parte Topham, re Walker*, 28 L. T. Rep. N. S. 8 Ch. 614;
- Hartshorn v. Sladden*, 2 Bos. & Pul. 582.
- Lanyon*, in reply, referred to:
- Robson on Bankruptcy*, 3rd edit., 136-7;
- Bills v. Smith*, 12 L. T. Rep. N. S. 22; 6 B. & C. 258;
- Belcher v. Jones*, 2 M. & W. 258;
- Ex parte Reader, re Wrigley*, 32 L. T. Rep. N. S. 20 Eq. 763.

Our address

Dec. 21.—JAMES, L.J., now delivered the judgment of the court, as follows:—In this case the bankrupt was a member of the Stock Exchange. Finding himself one day unable to meet his engagements, he submitted himself to the jurisdiction which is established by that Exchange in such cases. He attended an official meeting of the creditors. There he was interrogated as to his assets and liabilities, and he stated, among other things, that he had at his bankers a sum of 5000*l.* He was thereupon requested, or perhaps he said that he was "requisitioned" to hand over the 5000*l.* to the official assignee of the Stock Exchange for distribution among the creditors, and he complied with the requisition. It should, perhaps, be stated that the inquiry was made of him as to his outside debts, and that he stated in substance that there were none of any importance. It happened that he came to the knowledge of the Stock Exchange creditors, or some of them, that an advance had been made to the debtor by the bankrupt, and the bankrupt stated that that advance was by way of gift and not by way of loan, and is not correct. In all probability the bankrupt himself hoped and anticipated that the advance might be taken of the transaction by his

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The relative, however, was not minded to take that view of the transaction retrospectively. Proceedings in bankruptcy ensued. A trustee of the bankrupt's estate was appointed, and the trustee in bankruptcy applied to the official assignees of the Stock Exchange, and requested them to hand back that 5000*l.* Whether he was entitled to make that demand was the question before the registrar, and is the question before us. We are of opinion that that demand was lawfully and rightfully made by the trustee in bankruptcy, and upon this broad, general, and universal principle, that any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such persons otherwise than according to the provisions of the bankruptcy laws, is a plain and palpable fraud on the bankruptcy laws—a plain and palpable fraud upon the creditors who are excluded or disappointed, or who may be delayed or hindered thereby. The old cases of assignment for the benefit of creditors—cases of fraudulent preference—are merely illustrations of the general principle which underlies the whole of the administration of the estates of insolvents in this country. It was, however, suggested that this was done merely in obedience to the rules and regulations of the Stock Exchange. The answer to that is, that the Stock Exchange is not an *Alsatia*; the Queen's laws are paramount there, and the Queen's writ runs even into the sacred precincts of Capel-court. Then it was argued that this case might be brought within those cases in which an importunate creditor has been allowed to retain the fruits of his importunity. Now a creditor may lawfully and successfully importune his debtor for payment, but no creditor or creditors can by any amount of importunity or coercion obtain a largess from an insolvent in direct and express contravention of the bankruptcy laws. It was also suggested that in this particular transaction the debtor was not minded to give a preference to anybody, but was only acting for his own benefit and emolument with a view to being reinstated again on the Stock Exchange. Putting the matter in plain language, it was this: An insolvent on the eve of bankruptcy takes some of his creditors' money to provide himself with a comfortable resting-place after his bankruptcy, and the body of his Stock Exchange creditors say to him: "Cheat your other creditors for our benefit, and we will re-admit you as a proper and worthy member of our fraternity." If anything were wanting, this supplies it. It shows how improper and utterly illegal the whole of the transaction was. The order of the registrar must, therefore, be discharged, and an order must be made in accordance with the motion made by the trustee under the bankruptcy for the payment of the money by the official assignee of the Stock Exchange, who must pay all the costs both in the court below and here.

Appeal accordingly allowed with costs.

Solicitors for the appellant, *Lawrence, Plows, Boyer, and Baker.*

Solicitors for the respondent, *Lewis and Lewis.*

Thursday, Dec. 21, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Ex parte CAPPER; Re NEWMAN. (a)

Building contract—Liquidated damages—Penalty—Proof—Bankruptcy Act 1869, ss. 23, 31.

*In April, a building contractor entered into a contract with the governors of a school to build and complete a school house by the end of the year. The contract contained a variety of stipulations, with remedies for the breach of them, providing amongst other things, that the contractor should pay to the governors the sum of 10*l.* for every week after the end of the year during which the work should remain unfinished; and it ended with a clause providing that in case the contract was not in all things duly performed by the contractor, he should pay to the governors the sum of 1000*l.* as and for liquidated damages.*

The contractor failed before the end of the year, and his trustee in bankruptcy abandoned the contract:

*Held (reversing the decision of Bacon, C.J.), that the sum of 1000*l.* was really a penalty, and that the governors were entitled to prove only for the amount of damage actually occasioned by breach of the contract.*

This was an appeal from a decision of Bacon, C.J.

The hearing in the court below is reported ante, p. 558, where the facts of the case are fully stated.

*The Chief Judge having held that the sum of 1000*l.* named in the contract was liquidated damages and not a penalty, and that the governors of the school were entitled to prove for the amount without showing any damage, the trustee in the bankruptcy appealed.*

*Bagshawe, Q.C. and F. O. Crump for the appellant.—The fact that the contract speaks of the 1000*l.* as "liquidated damages" does not prevent the sum stipulated to be paid from being a penalty. As Bramwell, B. said in *Betts v. Bird* (4 H. & N. 506-511), "The words 'liquidated damages' or 'penalty' are not conclusive as to the character of the sum stipulated to be paid, for if the whole agreement is such that the court can see that the sum is a penal sum, it must be so treated." Here the sum is clearly penal in its nature, and the respondents ought not to be admitted to prove for that amount, unless they can show special damage to that extent. The case is really governed by what Lord Coleridge, C.J., said in the recent case of *Magee v. Lavell* (30 L. T. Rep. N. S. 169; L. Rep. 9 C. P. 111), that "where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty."*

*De Gez, Q.C. and G. W. Lawrence, for the respondents.—The damages occasioned by the school not being ready by the time specified in the contract cannot be measured, and therefore this is one of those cases in which the sum named must be taken as liquidated damages according to the principle laid down by Parke, B. (Lord Wensleydale) in *Goldsworthy v. Strutt* (1 Ex. 639-666), where he said, "Parties are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay 1000*l.**

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for the breach of any one of the conditions mentioned, and they are such that the damage arising from the violation of any of them cannot be exactly estimated beforehand." And earlier in the judgment he said: "Now, it is perfectly competent to parties to make a stipulation to pay a fixed sum for the breach of a covenant, the damage arising from which it is extremely difficult to ascertain." The same judge in *Atkins v. Kinnier* (4 Ex. 776-784) expressed his opinion that the rule of law laid down in *Kemble v. Farren* was "somewhat stretched," and said, "if a party agrees to pay 1000*l.* on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty." To hold this to be a penalty would be to overrule Lord Wensleydale's words. They also referred to

Green v. Price, 13 M. & W., 695;
8 & 9 Will. 3, c. 11, s. 8.

Without calling for a reply,

JAMES, L.J., said.—I am of opinion that this case is clearly within the cases which have been referred to by Mr. Bagshawe. The authority of *Kemble v. Farren* (6 Bing. 141) is not to be considered in any way nibbled at by those cases before Lord Wensleydale which have been referred to, and which are sought to be confined to a case in which, amongst other stipulations, there was one stipulation for payment of a sum of money. It is not the *ratio decidendi* in *Kemble v. Farren*, in which it was laid down in broad terms that, wherever there is a sum fixed at the end of a contract for damages for non-performance of a great number of things, there it must be treated as a penalty. To my mind, the law is really stated in a very satisfactory way in a case which was referred to in the argument in *Kemble v. Farren*. That was a case in the Common Pleas before Lord Eldon and the other judges, *Ashley v. Weldon* (2 B. & P. 346), and in that case Heath, J., said, "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." And then Chambre, J., gives us an instance: "There is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty. The concluding clause applies equally to all the covenants." Then Lord Eldon says, "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we then to hold that if the defendant happens to offend in a case which has been so provided for by those laws she shall pay only 2*s.* 6*d.* or 5*s.*; but if she offend in a case which has not been provided for she shall pay 200*l.*?" That appears to me to apply exactly to the case before us with regard to the point

which Mr. Do Gex and Mr. Lawrence have pressed upon us, that there are in this agreement provisions in the nature of liquidated damages for specific things. That is to say, "for such and such a breach you shall pay the extra expense occasioned, and for such and such another breach you shall pay the actual costs occasioned, and for another breach you shall pay 10*l.* a week." Those were all covered by the general clause at the end. Is it to be held that, if the defendant happens to offend in any one case which has been provided for by those special stipulations, then he shall pay only the actual damages thereby occasioned; but if he offends in any one case which has not been so provided for, he shall pay 1000*l.* This case is exactly within the very words of Lord Eldon. The fact that there are those special provisions made for special cases, and that at the end there is a lump sum of 1000*l.* put in for any breach, which includes all those breaches, would make the defendant have to pay actual damages in the one case, and in addition to that have to pay 1000*l.* ? It would require a very strong case indeed to oust the application of that doctrine, which was laid down in *Kemble v. Farren*. I am of opinion that the order of the Chief Judge cannot be sustained, and must be discharged.

BAGGALLAY, J.A.—I am of the same opinion. I will only mention this, that the principle upon which the case of *Kemble v. Farren* was decided was commented upon by Lord Westbury in the House of Lords in the case of *Thompson v. Hudson* (L. Rep. 4 E. & L. 1-30) in these terms: "It was an oppressive agreement; the sum named never could have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty. But the penalty and the liquidated damages in that case were not an antecedent debt due upon a contract for valuable consideration, but were a conventional sum put in by the parties, plainly for the purpose of securing the performance of the agreement contained in the engagement between them." If further authority was wanted for the decision which we think we ought to arrive at in this case, I think it would be the case before Lord Coleridge (*Magee v. Lavell*, *ubi sup.*), which has been cited, and the words of which appear to me to be substantially applicable to this case.

BRAMWELL, J.A.—I am entirely of the same opinion. I do not want to quote anything I have said as an authority, and I do not want to repeat it. Therefore, I will simply say, instead of repeating it, that I abide by everything I said in the case of *Betts v. Burch* (4 H. & N. 506). Now it has been argued that the case of *Goldsworthy v. Strutt* (1 Ex. 659), and the other cases referred to by Mr. De Gex show that we have the authority of Lord Wensleydale for holding that this 1000*l.* may be proved against the bankrupt's estate. If it were a question of bare authority independently of principle, I should say we have the rule laid down by Lord Coleridge showing expressly the contrary, that it cannot be proved, for he says in *Magee v. Lavell* (30 L. T. Rep. N. S. 169; L. Rep. 9 C. P. 111, 115) "If we look to the nature of the contract in the present case, it will be seen that it involves several events of various degrees of importance, and, therefore, according to the

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general principle governing such cases, the sum mentioned must be considered as a penalty and not liquidated damages." Therefore, if we had to choose between the case before Lord Wensleydale and Lord Coleridge's opinion, Lord Coleridge's opinion is in my judgment the law, and consistent with the reason and principle of the thing, which I say depends upon the statute of Will. 3 (8 & 9 Will. 3, c. 11). I do not know that it is necessary for us to say that the decision of Lord Wensleydale was an erroneous one. It is certainly a most singular thing that never once in the course of it does he refer to the statute of Will. 3. It seems to me, as I said in the case of *Betts v. Birch* (*ubi sup.*), that by some good fortune the courts have in the majority of these cases gone right without knowing why. I cannot help thinking that what Lord Wensleydale did in *Goldsworthy v. Strutt* (*ubi sup.*) was to look upon it as one thing, namely, that the covenantor or obligator would not carry on the business of an attorney, and the clause that he would not solicit clients was ancillary to what may be said to have been the substantial covenant he entered into, or the explanation or enlargement of it. That may be the consideration that operated in his mind, though I confess he does not give expression to it. I am of opinion that this appeal must be allowed. I may say that I cannot think there can be any difficulty in assessing the damages.

Appeal accordingly allowed with costs.

Solicitors for the appellant, *Pickett and Mylton*.
Solicitors for the respondent, *Lambert, Petch, and Shakepear*.

Thursday, Nov. 16, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, J.J.A.)

Ex parte YALDEN; Re AUSTIN. (a)

Bankruptcy—Change of trustee and solicitor—Solicitor's lien—Bankruptcy Rules 1870, r. 249.

A trustee in bankruptcy was removed from his office and a new trustee appointed. The old trustee's solicitor, on being applied to, gave up all the account books of the estate, but refused to deliver up certain documents and papers on which he had expended labour as solicitor, and upon which he claimed a lien for costs. Thereupon the new trustee applied to the court for an order upon the old trustee and his solicitor to deliver up all documents relating to his office as trustee: Held, that the solicitor was entitled to a lien on the documents which he had retained, and that the old trustee was not bound to discharge that lien by paying the costs out of his own pocket.

This was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

The facts were as follow:

Mr. H. de Brune Austin was adjudicated a bankrupt in 1872, and Mr. Hayward was appointed trustee of his estate.

In April 1876, Mr. Hayward was removed from office by a resolution of the creditors, and Mr. Yalden was appointed trustee in his stead.

The new trustee called upon his predecessor to deliver up to him all the documents relating to his office as trustee under rule 249 of the Bankruptcy Rules 1870, which provides that upon a

trustee being removed from his office, "he shall deliver over to the registrar of the court all books kept by him, and all other books, documents, and accounts in his possession, in any way relating to the office of trustee." Mr. Hayward replied that he was unable to do so, as all the books and papers were in the hands of his solicitor, Mr. Sheffield, who claimed a lien upon them for his costs.

Mr. Sheffield, on being applied to, handed over all account books belonging to the estate, but refused to give up the documents and papers upon which he had expended labour as solicitor, and upon which he claimed a lien for his costs.

An application was thereupon made to the Court of Bankruptcy for an order upon Mr. Hayward, and his solicitor, Mr. Sheffield, to deliver up the documents and papers in question, which comprised briefs in Chancery suits and common law actions, drafts, abstracts, copies of deeds, letters, and other papers upon which Mr. Sheffield had expended much professional labour, for which he had not been paid.

Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy, refused the application, and Mr. Yalden appealed from that refusal.

Hemming, Q.C. and Yate Lee, for the appellant.—The question is whether upon a change of trustees in a bankruptcy, the old trustee can relieve himself from the obligation imposed upon him by rule 249 of the Bankruptcy Rules 1870, on the ground that his solicitor has a lien upon the documents and papers for unpaid costs. The old trustee ought to pay the costs out of his own pocket, to enable him to comply with the directions of rule 249, and he would be allowed out of the estate all costs properly incurred. The solicitor will not be damaged by giving up the papers, for the court will take care that his just claims are satisfied. They cited

Turner v. Lettis, 7 De G. M. & G. 243.

Without calling upon *Roxburgh, Q.C.* and *Anderson*, who appeared for Mr. Sheffield, and *Bent*, who appeared for Mr. Hayward,

JAMES, L.J. said: I am of opinion that the registrar's order in this case was quite right. The application, when we come to understand what its nature is, is really an attempt to change a solicitor in a cause otherwise than upon the usual terms. A man has a right to change his solicitor if he likes, but then the law imposes certain terms in favour of the solicitor, that is to say, that the papers in the suit cannot be taken out of the solicitor's hands without his costs being paid. Mr. Sheffield has never claimed any lien upon those papers which belong to the estate, but the real things upon which he claims a lien are things upon which he has expended his own labour or his own money. Why is he not to have that lien the same as any other workman? He is entitled to retain the thing upon which he has worked until he is paid for it. That seems to me to be his case. With regard to Mr. Hayward, to say that, because he was trustee, he is bound to find money to pay for work done for the estate, and that then he may be made to hand over that work to the new trustee without being paid for it, would be most monstrously unjust towards him as a trustee. If the *cestui que trust* wants anything done, which the trustee cannot pay for, he must find the money himself. In this case it is for the new trustee to go and pay Mr. Sheffield, and get possession of the papers; but we cannot

(a) Reported by H. PRAT, Esq. Barrister-at-Law.

make a person who is a mere trustee find the money out of his own pocket.

BAGGALLAY, J.A.—I am of the same opinion. Having regard to the admitted facts of the case, and to the statements made by Mr. Sheffield in the course of his examination before the registrar, which examination was entered in the order, the registrar appears to me to be the only order he could with propriety have made.

BRAMWELL, J.A.—I am of the same opinion. As the substance of the matter is that the estate employed Mr. Sheffield, this is really an attempt, as the Lord Justice has said, to change a solicitor otherwise than upon the usual terms. The case of *Turner v. Letts* (7 De G. M. & G. 243) is in point, in my opinion. What happened there was that an executrix had incurred certain costs as defendant in an administration suit, and had died. Then Turner, L.J. said: "The plaintiffs in the original suit, instead of applying in that suit for the delivery up of the deeds, passed by the claim of the executrix to be indemnified against the costs of that suit, and, with the intention of defeating that claim, proceeded by a fresh bill in the name of the administratrix *de bonis non*, to recover the deeds. The effect of the decree of the Master of the Rolls is to take away from the executrix, or those who claim under her, the security for her expenses as trustee. If there had been no question as to the solicitor's lien, the residuary legatees could not have taken the deeds out of the hands of the executrix except on the terms of indemnifying her against the costs of the other suit." It was suggested there that the executrix was a debtor to the testator's estate, but, as I understand, it is not suggested here that Mr. Haywood is indebted to this estate. I think, therefore, that that is a very good case in point.

JAMES, L.J.—Mr. Sheffield will have his costs both here and in the court below.

Solicitors for the appellant, *Tilley and Soames*.

Solicitors for the respondents, *Sheffield and Sons*; *R. J. Witty*.

Dec. 6 and 7, 1876.

(Before JAMES L.J., BAGGALLAY and BRETT, J.J.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE FRANCONIA.(a)

Collision—Steamships—Overtaking—Crossing—Slackening speed—Regulations for preventing collisions at sea, Articles 14, 16, 17.

As a general rule wherever two steamships are on converging courses, the one abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, the former, if going at a greater speed than the latter, is to be considered as a vessel overtaking another vessel, within the meaning of Article 17 of the Regulations for Preventing Collisions at Sea, and bound to keep out of the way; and they are not to be treated as crossing vessels under Article 14.

Where one steamship is overtaking another within the meaning of Article 17 of the Regulations, and there is risk of collision, the leading ship is not to be considered as approaching another ship so as to involve risk of collision within the meaning

of Article 16, and is not bound to slack or stop and reverse.

Where two steamships are navigating open seas such as the English Channel, some land, one has no right to assume that will at a given time or place alter and take another course up or down the former must, as the other ship approaches, take such measures as are required by the Regulations in reference to the course upon which other ship actually is.

THIS was an appeal from a judgment of the Court of Justice (Admiralty Division), in actions of collision respectively brought by owners of the British steamship *Strathclyde* and the German steamship *Franconia*, and owners of the *Franconia* against the owners of the *Strathclyde*, to recover damages in respect of a collision between the two steamships occurred off Dover, at about 4 p.m. on 1 Feb. 1876.

The *Strathclyde* was a screw steamship tons register, and 180 horse power nominally manned by a crew of forty-seven hands, and a number of passengers on board, and was upon a voyage from London to Bombay.

The *Franconia* was a screw steamship tons register, and 360 nominal horse power, and a crew of seventy-three hands, and was upon a voyage from Hamburg to Havre thence to the West Indies. The *Franconia* in the course of her voyage called at Calcutta and was proceeding from that port to Havre.

The *Strathclyde* having a Thames pilot on board, stopped about half a mile east of Dover Pier, and landed the pilot.

After some little delay she went ahead at speed, steering a S.W. true course (S.W. by the ship's compass) to get a good offing straightening down on to the usual channel which is W.S.W. At this time the master of the *Strathclyde* sighted the *Franconia*, who was steering a W.S.W. course (W.S.W. $\frac{1}{4}$ S. by compass) down channel, going full speed, then bore about two points on the port bow of the *Strathclyde*, and distant from two miles. The two vessels continued on their respective courses until within a quarter of a mile of one another, when the *Franconia* was overtaken by the *Strathclyde* by about half of her own length. At this time the *Strathclyde* ported half a point, and the two vessels continued their course until the two vessels were about three ships' length from one another. The *Franconia* stopped and reversed her engine, ported her helm, and her master hailed the *Strathclyde* to port. The helm of the *Strathclyde* accordingly ported, and her engines went full speed ahead, but the *Franconia* by her stern struck the *Strathclyde* about six feet from the stern, and damaged her so seriously that she shortly afterwards sank. The relations and speed of the two ships were in dispute between the parties; the *Franconia*'s master alleged that he sighted the *Strathclyde* before she went into the Bay to land her pilot, and had watched her come out again, and they alleged that when she came out again she bore about six points on the starboard bow of the *Franconia*, and the *Strathclyde* must have been going much faster than the *Franconia* to have brought about a collision. The alleged speed of the two

(a) Reported by JAMES P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

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was about the same, viz., about $8\frac{1}{2}$ knots an hour; but while that was the full speed of the *Strathclyde*, the full speed of the *Franconia* was from $10\frac{1}{2}$ to 12 knots an hour, and she had been actually running her full speed up to noon on the day of the collision; it was alleged that the reduction in speed was owing to bad coals; the same had been burnt on board the *Franconia* during the whole time since she left Hamburg. On the other hand, it was alleged by the *Strathclyde* that the positions of the two vessels as she left Dover Bay were as given above in the account of the collision, that the speed of the *Franconia* was greater than that of the *Strathclyde* (these were found to be the facts by the judgment). There was no dispute however as to the courses of the two vessels, and their positions at the time of the final porting before the collision.

After the collision the *Franconia* rendered no assistance to the passengers and crew of the *Strathclyde*, and a great many were drowned in consequence, and the neglect to do so was made a substantive charge against the *Franconia* under the provisions of the Merchant Shipping Act, 1873, sect. 17; the defence, however, was that the *Franconia* was so damaged that her master believed her to be in a sinking condition, and made for the shore to beach her.

The *Franconia* was further charged by the owner of the *Strathclyde* with omitting to keep out of the way of the latter vessel, as it was her duty to do, either under Art. 14 of the Regulations for Preventing Collisions at Sea, which provides that "if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard hand shall keep out of the way of the other;" or under Art. 17, which provides "that every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel."

The owners of the *Franconia* alleged that the *Strathclyde* by her conduct had deceived the officers of the *Franconia*, who had reason to expect that the *Strathclyde*, before approaching so near to the *Franconia* would have got on to her proper channel course, viz.: W.S.W., and have then been parallel to the *Franconia*, and that it was the persistent holding on of the *Strathclyde* upon her S.W. course, which she ought to have changed sooner under the circumstances, that brought about the collision; and they charged the *Strathclyde* with improperly neglecting or omitting to take in due time and keep her proper course down Channel, and with steering her across the hawse of the *Franconia*, and also with neglecting to comply with the provisions of art. 16 of the regulations, which provides that "every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

On April 27, 28, 29, and 30, and May 2 and 3, 1876, the case was heard before Sir R. Phillimore and Trinity Masters.

Butt, Q.C. (Clarkson and Webster with him), for the *Strathclyde*, contended that under the Merchant Shipping Act 1873, s. 16, the master of the *Franconia* was bound to render assistance to the *Strathclyde*, and having neglected to do so the *Franconia* must be held to blame. Moreover whether the vessels were crossing or the *Franconia* were an overtaking ship it was equally her duty to keep out of the way of the *Strathclyde*. The

Strathclyde had kept her course as she was bound to do, and the *Franconia* was alone to blame.

Benjamin, Q.C. (Cohen, Q.C. and W. G. F. Phillimore with him), for the *Franconia*, admitted that the *Franconia* was to blame, but contended that the vessels must be treated as crossing vessels under art. 14, and that they were, therefore, approaching so as to involve risk of collision, and that it was, therefore, the duty of the *Strathclyde* to stop and reverse, which she did not do, and that she must, therefore, be held also to blame. Again, there being a well known channel course, a vessel has a right to expect that such course will be taken in due time by another vessel going down channel, and the former is justified in holding on in the expectation of such course being taken, she being on that course herself, and if the other vessel holds on beyond the place where she ought to take her down channel course, without giving any warning of her intention, she must be responsible for the consequences. The Merchant Shipping Act 1873, s. 16, cannot apply to a foreign ship on the high seas.

Butt, Q.C. in reply.

Sir R. Phillimore.—Since the admission made by the counsel for the *Franconia* that it could not be maintained that that vessel was not to blame, either for not porting at an earlier period or for not starboarding just before the collision, the inquiry has been narrowed to the consideration as to whether the *Strathclyde* be not also to blame. I will presently express my opinion on this point, but I think that, in the painful circumstances of this most unhappy case, I ought not to pass by wholly unnoticed the charge alleged in the pleadings against the master of the *Franconia* of steaming away directly after the collision without rendering assistance to the perishing crew and passengers of the *Strathclyde*. It has been contended the statute 36 & 37 Vict. c. 85, s. 16, under which this charge was brought, does not apply to the case of a foreign ship. It has been answered that, so far as the question of collision is concerned, the statute applies to all vessels, while the punishment for a misdemeanour is confined to officers of British vessels. It really matters very little as to the issue now before me, and after the admission which has been made, whether the statute be applicable or not. I do not think it necessary to pronounce an opinion on this point at the present time. The court, however, before the passing of any statute on the subject, would have deemed it right to comment on the conduct of a captain against whom so serious a charge had been brought. It is, I think, due to the captain of the *Franconia* to observe that it was under the pressing advice of an English pilot on board his vessel—not indeed, actually in command at the period, because the ship was just out of his pilotage waters, but who had been in command a very short time before—it was at his urgent exhortation that the captain took this most unfortunate and reprehensible step. It appears that this pilot, after having been sent by the captain to ascertain the nature of the damage done to the ship, returned and cried out, "For God's sake put the helm a port and run to the shore; I think our ship is going to sink too." This certainly was the consequence of a disgraceful panic on the part of the pilot. The boats, which were put over the side within a few feet of the water, were never lowered into it. The *Franconia* steamed away, and many lives which

might have been saved without any danger at all to her were, it is most horrible to state, unnecessarily lost. It is just to state that the English pilot gave this base advice, which was followed; nevertheless, it must be said that a captain of greater nerve, firmer presence of mind, and, I must add, of more sensitive humanity, would not have heeded this counsel of panic, but would have lowered his boats and helped to save his fellow creatures. I have thought it my duty to make these remarks, and I have now to consider whether, as the *Franconia* contends, the *Strathclyde* was also to blame for this collision. The question as to whether the *Strathclyde* was an approaching vessel, in the sense of the 16th article of the rules of navigation, is one of considerable importance, and it is expedient to carefully consider the proved or admitted facts as regards the navigation of both vessels. The *Franconia* and *Strathclyde* were relatively two or three miles distant when the master of each admits having seen and noticed the other, and the direction in which she was steering. It being daylight, and clear in the channel, there was no uncertainty on the part of the masters as to the movements of either vessel. The *Franconia* was steering a direct course S.W. by S. $\frac{1}{2}$ W. to pass from two to three miles off Dungeness Point. The *Franconia* saw the *Strathclyde* standing out from Dover roads on her starboard bow, and steering so as to cross the *Franconia's* course. The master of the *Franconia* stated that he believed the *Strathclyde* to be bound down channel, and that before she approached too close to the *Franconia* she would haul to the westward. The *Franconia* was kept steady at S.W. by W. $\frac{1}{2}$ W., having the *Strathclyde* on her starboard bow, and approaching her at an angle of three points, steering S.W. by S. The relative courses were steered by the two vessels going at full speed until they came within about three ships' lengths of each other. The *Franconia* had drawn up with the *Strathclyde* until her bow was abreast of the *Strathclyde's* mainmast, the same angle of position being preserved. The master of the *Franconia* ordered her engines to be stopped and reversed full speed. At the same time, though the *Franconia* had still way upon her, stated variously at from two to five or six knots, the master ordered her helm hard a port, and as a natural consequence (looking to the relative positions of the two vessels) ran stem on into the port side of the *Strathclyde* at nearly right angles, and sunk her. The *Strathclyde*, after landing her pilot at Dover, saw the *Franconia* about two miles off her port quarter steering a course down channel. The *Strathclyde* was bound down channel, but her master was desirous of getting to the southward of the track of inward-bound ships during the coming night, he, therefore, steered out S.W. by S. for that purpose. The *Strathclyde* continued to steer S.W. by S. until she approached the *Franconia* within three ships' lengths, and going at full speed. The *Strathclyde* then ported half a point, and her helm was steadied with her head at S.W. $\frac{1}{2}$ S. A few seconds after, observing that the *Franconia's* helm was hard a port, the master of the *Strathclyde* ordered her helm hard a port, also, and kept on full speed, as her only chance of escape; nevertheless, the *Franconia* came stem on into the port quarter of the *Strathclyde*. I may observe here that I am advised that it was a prudent course in the circumstances, as stated on the part of the captain of the *Strathclyde*, to get

a good offing. We do not think that, having regard to this statement of facts, the *Strathclyde* was a vessel approaching the other so as to involve a risk of collision in the sense of the 16th article, and, therefore, bound to slacken her speed, because before the *Franconia* ported there was no reasonable ground of apprehension of collision, or, in other words, the two vessels were not so approaching as to involve the risk of collision in the ordinary meaning of the words. It was only the sudden and wrong manoeuvre or the *Franconia* in porting that involved the risk of collision not previously existing; and after the *Franconia* had ported, the only chance of escaping collision, I am advised, was the execution of the manoeuvre adopted by the *Strathclyde*, namely, going full speed putting her helm hard a port. The vessels were, in our judgment, crossing vessels in the sense of the 14th and not approaching vessels in the sense of the 16th article. Therefore, upon the whole, I have arrived at the conclusion that the *Strathclyde* cannot be said to have contributed to this collision by transgressing the provisions of the 16th article, and I must pronounce the *Franconia* solely to blame.

From this judgment the owners of the *Franconia* appealed.

Benjamin, Q. C. and Phillimore (Cohen, Q. C., with them) contended the *Strathclyde* was bound to take the usual channel course, and to keep it, and that she ought not to deceive other vessels as to her intentions without due warning. There being a proper course, a deviation from it was a default for which she ought to be held to blame.

The Velocity, L. Rep. 3 P. C. 45; 21 L. T. Rep. N. S. 686; 3 Mar. Law Cas. O. S. 308;

The Esk and The Niord, L. Rep. 3 P. C. 496; 24 L. T. Rep. N. S. 667; 1 Asp. Mar. Law Cas. 1.

At least, if the intention of the master of the *Strathclyde* was to do something unusual he should have given due warning.

The Bellerophon, 33 L. T. Rep. N. S. 412; 3 Asp. Mar. Law Cas. 58.

As the two vessels were on courses not parallel, they must be considered as approaching ships, and hence it was the duty of the *Strathclyde* to slacken speed as soon as there was risk of collision. This she neglected to do, and she was, therefore, guilty of a breach of the regulations which, under the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17, renders her liable to be deemed in fault, as there were no circumstances rendering a departure from the rule necessary.

Butt, Q. C., Clarkson, and Webster, for the respondents, were not called upon.

The judgment of the court was delivered by

BRETT, J.A.—In this case the judgment of the Admiralty Court found that the *Franconia* was solely to blame upon these grounds. The judge and the Elder Brethren found that the vessels were crossing vessels; but, although it was said that they were crossing vessels, yet that the *Strathclyde* was not at all to blame for not slackening her speed as the vessels were coming together. Now, I believe we are all of opinion that the judgement of the court below is correct, and that the *Franconia* was solely to blame. But we do not, I think, agree with the reasons which were given by the court below for arriving at that result. We take it, upon the evidence as a whole, to be proved that when the two ships laid their course, the position of the ships was very much what the

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captain of the *Strathclyde* stated it to be, viz., that when the ships had taken the two courses which they resolved to hold for some time, the *Franconia* was about two points on the port quarter of the *Strathclyde*. It is true that the vessels were then laying two courses, which mathematically would at one time or other bring those two courses to cross; but the question is, whether under those circumstances, the ships are crossing ships, or whether one is a ship overtaking another. Now, if the two ships were in that position, and upon those two courses, it seems to me impossible that the *Franconia* could ever reach the *Strathclyde*, unless she was going faster than the *Strathclyde*; and we all think that the evidence is conclusive to show that the *Franconia* was going faster than the *Strathclyde*, and the gentlemen who advise us are, I believe, of the same opinion. It is true that there is evidence as to the pace or the speed of each vessel, and the evidence may look as if the two vessels were going the same, or as nearly as possible the same, speed. But if you once put the two vessels into the position which I have stated, and take the courses which it is admitted on both sides were the courses, it is impossible that the *Franconia* could have touched the *Strathclyde* unless she was going faster than the *Strathclyde*. Therefore I take it that the two ships were in the position as nearly as possible described by the Captain of the *Strathclyde*, and that the *Franconia* was going faster than the *Strathclyde*. But the two ships were going upon courses which, mathematically, would eventually, at some point, cross each other. Now, under those circumstances, the question seems to me to be whether two vessels in those positions can be said, within the meaning of the regulations for preventing collision at sea, to be crossing ships. This case has been argued as if ships cross, and must be crossing, unless they are going in exactly parallel lines, or as nearly as possible parallel lines. I cannot think that in the meaning of these rules. The 13th rule speaks of two ships under steam meeting end on or nearly end on. The 14th rule speaks of two ships under steam crossing; but the 17th rule is, "every vessel overtaking any other vessel." Now, Mr. Benjamin argues that, although ships were crossing they might also be overtaking. I cannot think that that is the true interpretation of these rules. The rule which applies to crossing ships, in using the word "crossing" is, using a sea term, a term of navigation; it is not using a mathematical term, and so in speaking of one vessel overtaking another, the 17th rule uses a sea and not a mathematical term at all. Now the 17th rule of course implies that one ship is going faster than another, for unless one ship is going faster than another it is difficult to say it is overtaking another. Then we come to this, whether we can form a definition of the difference between crossing ships and overtaking ships. Now it would seem to me that this may be a very good definition.—I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case, but I think it is a very good rule—that if the ships are in such positions, and are on such courses and at such distances that if it were night the hinder ship could not see any part of the side lights of the more forward ship, then they cannot be said to be

crossing ships, although their courses may not be exactly parallel to one another; if one ship is so much behind the other, and their courses are such that if it were night the one ship could not see, by reason of the screens, any part of the side lights of the other ship, she must be so far behind her that she could not possibly reach her unless she was going very much faster than that other ship. It would not do, I think, to limit the angle of the crossing too much, but if it is limited to that extent it seems to me that that is a very useful and practical rule. Well if that is so these ships were in the position which I have described. If the *Strathclyde* was a mile or even a quarter of a mile distant from—I do not say sideways, but distant from—the *Franconia*, and had the *Franconia* two points on her quarter, the *Strathclyde* being ahead, it is impossible the *Franconia* could have seen any part of the side lights of the *Strathclyde*, and that, I think, is the opinion of the gentlemen who advise us. That being so the *Strathclyde* and the *Franconia* were not crossing vessels, and as a collision did take place, the *Franconia* must have been going faster than the *Strathclyde*. She was, therefore, an overtaking vessel, and came within the 17th rule. Now it has been argued by Mr. Benjamin that if the vessels were crossing at all, they must have been approaching. I do not think it is absolutely necessary to determine that point, but I confess that my mind goes with him, and the inclination of my opinion certainly is that if two vessels can properly be said, within the meaning of the 14th article or rule, to be crossing vessels, that then, they must be approaching vessels; and if both of them are steamers the 16th rule would apply, and both of them ought to slacken. It seems to me clear that where the position of vessels brings them within the 17th rule, in which the one is overtaking the other, although they are both steamers, you cannot apply the 16th rule at all to the leading vessel. It is impossible by any fair construction of language that the one that is a leading vessel, although a steamship, is approaching the other; she is going away from the other, and it is an abuse of language to say that that vessel is an approaching vessel at all; when one steamship is overtaking another within the meaning of these rules, the first one cannot be said to be approaching the hinder vessel at all, and, therefore, the leading vessel is not within the 16th rule. Now, that being so, the *Franconia* broke almost every rule. She was the vessel overtaking another. Under those circumstances she ought to have kept out of the way. She was a steamship approaching another. She ought to have slackened her speed. She did nothing until the last moment either to get out of the way or to slacken her speed. If what I say is correct, the *Strathclyde* broke no rule, unless it can be said that she broke eventually the 20th rule. Now, when the vessels had come close to each other, it seems to me impossible to suppose that they were, as has been stated, a quarter of a mile apart at the last moment when the *Franconia* ported. There is some evidence that she was only three ship's lengths distance from the *Strathclyde* at that time. If you tie down the evidence to this that she was a quarter of a mile off and overlapping the other vessel, in my opinion, and according to the opinion of the gentlemen who advise

us, the collision could not have taken place as it did. What is the conclusion, then (the collision did take place), but that they were not a quarter of a mile off, but three lengths of a vessel apart at the time the *Franconia* ported? Now, if this be true, the *Strathclyde* up to that time, having broken no rule, can it be suggested that she broke a rule then? On the contrary, it was found in the court below, and it is the opinion of those who advise us here, and it is our opinion that so far from breaking any rule of navigation at the time, the *Strathclyde* did the very best thing she could do, she did yield half a point to the *Franconia*, and afterwards yielded more by putting her helm hard a-port, and it is our opinion and those who advise us, that it is the best thing she could do to avoid the wrong conduct of the *Franconia*. Therefore the *Franconia* broke the rules; the *Strathclyde* broke no written rule. But, then, it has been suggested that the *Strathclyde* misled the *Franconia*. Now, I confess that that seems to me to be an untenable argument. First of all it rests upon an assumption that the *Franconia* had a right to keep on her course, not only as to direction but as to the place in which she was, and that because the *Strathclyde* was coming out of Dover Bay she ought either to have yielded to the *Franconia*, or that she ought to have ported her helm so as to go a course down channel which would keep her on the starboard side of the *Franconia*. That is so, it is said, because the *Franconia* was going down on her usual course; and the case was likened to *The Velocity* (*ubi sup.*), and *The Esk* (*ubi sup.*), and Mr. Phillimore invited us to say that the same rules were applicable to the usual course of the English Channel which are applicable to a river with a winding course. It is the first time such a proposition was put forth. The rules are made for the sea. The reason why, in the cases of *The Velocity* and *The Esk*, it was held that the rules did not apply was, because, as a matter of fact, the rules are held to be inapplicable to vessels meeting each other and sighting lights in a winding river. Their lights are seen overland, and it is impossible that the rules can be made applicable to these circumstances. If that is so, no regulations were ever intended to apply to circumstances where in truth and fact they cannot apply; and therefore in *The Velocity* (*ubi sup.*), and *The Esk* (*ubi sup.*), it was held that these written rules did not apply, but that some other rule did, and that other rule is the customary course of navigation in different rivers, and everyone who has known the Thames has known what the usual course of navigation in that river has been for many years. That does not apply at all to the Channel, and there is no usual course in the Channel in the sense in which it was argued. The ships are in the English Channel as if they were on the sea, and the only sailing rules which are applicable to them under those circumstances as those which have been enacted and are contained in those rules. The case of *The Velocity*, therefore, is not applicable. Therefore, on the whole, taking the position of these ships to have been what we find them to be, and taking their courses to have been what is admitted, we are of opinion that the *Franconia* was a vessel overtaking the *Strathclyde*; that the vessels were not crossing vessels; that the *Strathclyde* was not a vessel which can be said to have been approaching the *Franconia*; that the *Franconia* was an overtaking

and approaching ship, that she broke the rule that she broke them up to the end; that the *Strathclyde* broke no rule either before the collision was imminent or at the moment the collision was inevitable; she broke no rule from beginning to end. We are of opinion, then, that the *Franconia* was an overtaking ship, and that the *Strathclyde* was not a crossing ship. We agree with the Admiralty Court that the *Franconia* was to blame. We cannot, however, with the decision of the Admiralty Court that two ships were crossing ships; and we hold that the *Strathclyde* was not bound to diminish speed.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitors for the appellants, *Stokes, Sanderson and Stokes*.

Solicitors for the respondents, *Gellatly, Selous and Warton*.

SITTINGS AT WESTMINSTER

June 13, 14, and Dec. 1, 1876.

(Before COCKBURN, C.J., MELLISH, and JAMES, and BAGGALLAY, J.A., and ARCHIBALD, J.)

NICHOLLS v. MARSLAND. (a)

Dangerous property—Artificial reservoirs—God—Damage—Owner's liability.

The defendant was the owner of a series of artificial lakes, which had existed for a long time and were causing damage. Upon a most unusual occurrence, the bank at the end of the high water gave way and the water rushing with violence into the lakes below caused their water to give way, and the aggregate volume of water from the lakes rushing down the stream caused damage to certain county bridges down the stream. On the trial of an action by the plaintiff, the surveyor of the county, against the defendant to recover for the damage done to the bridges, the jury found that there had been negligence in the construction or the maintenance of the lakes, but that if the flood had been anticipated, the effect might have been prevented.

Held (affirming the decision of the Exchequer Division below) that the rainfall being so unusual as to amount to "vis major" or the act of God, the defendant was not liable.

THIS was an appeal from a decision of the Exchequer Division making absolute a rule nisi to set aside a verdict for the defendant. The plaintiff was the surveyor of the county of Chester. The defendant, the owner of some artificial lakes, was liable for damage caused to a county bridge by reason of the bank of the defendant's lakes giving way.

At the trial, before Cockburn, C.J., in the Chester Summer Assizes 1874, the learned judge directed a verdict for the plaintiff, reserving to the defendant to move to have the verdict set aside.

A rule nisi was accordingly obtained for the defendant, and on cause being shown was made absolute.

The plaintiff now appealed.

The case in the Exchequer Division below has been fully reported 33 L. T. Rep. N. S. 101.

The facts sufficiently appear in the head note.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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this report, and in the judgment (*post*) of the court.

Otton, Q.C. and McIntyre, Q.C. (with them *Coxon*) for the plaintiff.—It is proposed to argue two points for the plaintiff. First, whether notwithstanding the findings of the jury, the verdict for the plaintiff ought not to stand; secondly, that the findings were against evidence. [*COCKBURN, C.J.*—At the trial I did not intend to convey, as seems to be supposed, that the storm in this case could not amount to “*vis major*,” what I meant to say was that it was a question whether a person, in the position of the defendant storing up water is not liable for the result which ensues if the act of God let the water loose.] That is the point of law which it is proposed to consider first. Conceded that the rainfall was so great as to amount to what is known as the act of God, the defendant is still liable, having stored up for her own pleasure and convenience that which from its nature is a source of danger to others. She is not in the position of a carrier, who is not liable to his employers for loss occasioned by the act of God. She is rather in the position of a person who keeps a dangerous animal, as was the case in *May v. Burdett* (9 Q. B. Rep. 101), and who keeps it at his own peril, and is liable if by any means it escapes and injures a neighbour. Water which is stored up in great quantities is analogous to a dangerous animal, and it was held in *Fletcher v. Rylands* (19 L. T. Rep. N. S. 220; L. Rep. 3 Eng. & Ir. App. 330; 37 L. J. 161, Ex.) that a person stores it up on his land for his own purposes at his peril. [*COCKBURN, C.J.*—There was no *actus dei* in that case.] No, and there is no case precisely in point where the defendant has alleged “*vis major*.” [*JAMES, L.J.*—Supposing rioters or the Queen’s enemies had broken down the bank, your argument must go the length of saying that the plaintiff would be liable.] We do go that length; it is not the letting loose which is the injury complained of, it is the having the water stored up at all. The defendant keeps it so collected at her peril. The distinction contended for is pointed out in two railway cases. *Vaughan v. The Taff Vale Railway Company* (5 H. & N. 679), was an action against the railway company for damage caused by the sparks flying from an engine, and there the defendants were only excused from liability on the ground that an Act of Parliament authorised them to use the engine. In *Jones v. The Festiniog Railway Company* (L. Rep. 3 Q. B. 733) where the injury also was from sparks, it was held that as the defendants had not express power by statute to use locomotive steam engines, they were liable at common law. In the *Madras Railway Company v. Zemindar of Carvelinagarum* (30 L. T. Rep. N. S. 770) it was held that the defendant was excused from liability, on the ground that he was under an obligation to keep and maintain the works (which were large water tanks) for the benefit of the country. This case differs from all those, and is within *Fletcher v. Rylands* (*ubi sup.*). The defendant has made a stream, otherwise innocuous, into a dangerous reservoir; she is legally in fault, and cannot protect herself by setting up “*vis major*.” It is not the natural use of the land to keep a large quantity of water stored up. The proximate cause of the injury to the bridges was not the storm, but the bank which the defendant maintained to dam up the water. The defendant cannot have

the benefit of the act of God when she herself has contributed to the causing of the damage. On the evidence, and the findings of the jury, there is not sufficient to warrant the conclusion that the rainfall, although excessive, amounted to “*vis major*” or the act of God.

Gorst, Q.C. and G. B. Lloyd, for the defendant.—The whole case for the plaintiff depends upon the analogy between water stored up, and a dangerous animal. The analogy fails, because the keeping of a reservoir is not in itself a wrongful act, and a reservoir is not necessarily a dangerous property. There is no property which cannot, under possible circumstances, be a source of danger, a stack of chimneys, or a field of corn for instance. But property may be in its nature so dangerous, that a man keeps it *suo periculo*. Where it is not, he is liable only for negligence in keeping it. The keeping of a dangerous animal is wrongful, and a person can be indicted for it. Water, no doubt, requires to be restrained, but so do the walls of a house, or they would fall outwards. As to the point whether the damage was caused by making of the reservoir, or by the act of God, it must be remembered that water is not an active agent, and has no volition of its own like a dangerous animal has. The proximate cause here was the act of God. There were culverts blown up by the water that night, and it was the rush of the flood in consequence that caused the reservoirs to give way. The defendant could not foresee the influx of this additional water. This case differs from *Fletcher v. Rylands*. Here there is the act of God, and the water was not stored up by the defendant herself as in *Fletcher v. Rylands*. The defendant has been a perfectly innocent person, and cannot be held responsible for what is occasioned by “*vis major*.” They cited

Carstairs v. Taylor, L. Rep. 6 Ex. 217.

Cotton, Q.C. replied.—My argument was intended to apply to property which has a natural tendency to do mischief, when it once gets off the position it is placed in. The water has been kept on the land, and that is the same thing as if the defendant had brought it there.

Cur. adv. sub.

Dec. 1.—The following judgment was delivered by

MELLISH, L.J.—This was an action brought by the county surveyor of the county of Chester against the defendant to recover damages on account of the destruction of a county bridge, which had been carried away by the bursting of some reservoir. At the trial before the Lord Chief Justice it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th June 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed; the dams at their end gave way; and the water out of the lakes carried away a county bridge lower down the stream. The jury found that there was no negligence either in the construction, or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented. Upon this finding the Lord Chief Justice, acting on the decision in *Fletcher v. Rylands* as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The

Exchequer Division have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us. The appellant relied upon the decision of the case of *Fletcher v. Rylands*. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer Chamber, 'We think the true rule of law is that the person who, for his own purposes, brings on his land and collects, and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of "vis major" or the act of God, but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient.' It appears to me that we have two questions to consider; first the question of law which was left undecided in *Fletcher v. Rylands*, can the defendant excuse herself by showing that the escape of the water was owing to "vis major," or as it is termed in the law books, "act of God," and, secondly, if she can, did she in fact make out that the escape was so occasioned? Now, with respect to the first question, the ordinary rule of law is, that when the law creates a duty, and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party, without more, as where a man accumulates water on his own land, but owing to the peculiar nature of the soil the water escapes and does damage to his neighbour, the case of *Fletcher v. Rylands* established that he must be held liable. The accumulation of water in a reservoir is not itself wrongful, but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Fletcher v. Rylands* in this—that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening "vis major" of the water caused by the flood, which superadded to the water in the reservoir, which of itself would have been innocuous, caused the disaster. A person cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it

in conducting some warlike operations, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God. The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated; although, if it had been anticipated, it might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In the late case of *Nugent v. Smith*, we held that a carrier might be protected from liability for loss occasioned by the act of God if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it. It was ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow. On the whole, we are of opinion that the judgment of the Exchequer Division ought to be affirmed.

Judgment below affirmed.

Solicitors for plaintiff, *Philpot and Son*, for *Potts and Roberts*, Chester.

Solicitor for defendant, *E. Byrne*, for *Brocklehurst, Wright, and Muir*, Macclesfield.

June 13 and Dec. 1, 1876.

(Before COCKBURN, C.J., MELLISH and JAMES, L.JJ., BAGGALLAY, J.A. and ARCHIBALD, J.)

BORROWMAN AND OTHERS v. DRAYTON. (a)

"Cargo" of goods—Contract for sale of—Construction—Additional goods placed on board by sellers—Buyer's right to annul contract.

The plaintiffs, acting for principals at New York, contracted to supply the defendant with a cargo of from 2500 to 3000 barrels (seller's option) of petroleum, at 1s. 0½d. per gallon, the shipment to be made at New York, and the vessel to proceed to a port of discharge to be determined (within certain limits) by the defendants.

The plaintiff's principals in New York accordingly chartered a vessel, and agreed to provide her with a full and complete cargo of petroleum. 3000 barrels of petroleum were placed on board the vessel at New York, and a bill of lading signed

(a) Reported by W. APFLETON, Esq., Barrister-at-Law.

making them deliverable to the order of the plaintiffs' principals; but, as the ship would carry a further quantity, 300 additional barrels of petroleum were placed on board, which were marked with a different mark, and a separate bill of lading was signed for them.

The plaintiffs gave notice to the defendant of the shipment of the 3000 barrels, and were ready to order the ship from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3000 barrels, and to take the 300 additional barrels themselves, but the defendant refused to receive the 3000 barrels or any other quantity. The plaintiff sued the defendant to recover damages for such refusal.

Held (affirming the decision of the Exchequer Division), that the plaintiffs were not, at the time of the defendant's so refusing, ready and willing to deliver to him a "cargo" of from 2500 to 3000 barrels, within the terms of their contract, as they were not entitled, without the defendant's consent, to place any additional cargo on board the chartered vessel.

THIS was an appeal from a judgment of the Exchequer Division, discharging a rule to enter the verdict for the plaintiffs.

The facts are fully set out in the judgment of the Court of Appeal (*post*).

Morgan Howard, Q.C. and *Tindal Atkinson*, for the plaintiffs.—The defendant cannot reject the contract because the 300 additional barrels were placed on board. If he could show that he has suffered damage thereby, it is possible he might recover it. He should have protected himself by his contract. Supposing the plaintiffs had placed twenty barrels of sugar on board besides the 3000 barrels of petroleum, can it be supposed that the defendant could reject the whole of the petroleum? The consignees have the entire disposal of the ship, and the vendors here, under the contract, were the consignees, so that there was no question of any lien for freight as against the defendant. The cargo contracted to be sold was kept quite separated from what was put in in addition, and the defendant had entire control over the vessel when she arrived at the port of call; he cannot now reject the contract. In *Kreuger v. Blanck* (23 L. T. Rep. N. S. 128; L. Rep. 5 Ex. 179, which will be relied on for the other side, and upon which the judgment of the court below is founded), the judgment went upon the performance of the contract being essentially different to that which the defendant contracted for. That case, therefore, is distinguishable from this, and the authority of it has been doubted in *Ireland v. Livingstone* (27 L. T. Rep. N. S. 79; L. Rep. 5 H. of L. Cas. Eng. & Ir. App. 395; 41 L. J. 201, Q.B.). You cannot give an absolute and technical meaning to the word "cargo." By the contract the time for shipment was limited; the parties, therefore, in view of the difficulty attending it, could not have intended that a ship of exactly the proper size to carry 3000 barrels should be obtained. They also referred to

Sargent v. Reed, 2 Str. 1228.

Benjamin, Q.C. and *English Harrison*, for the defendant.—The contract expressly provides for payment of freight by the defendant. The shipowner has a lien on all freight. Therefore, on the ship's arrival at the port of call, the defendant's 8000 barrels would be liable for the freight on the extra 300 barrels. Two things are stipulated for

by the contract. First, that the vendors should send a "cargo;" secondly, that that cargo should consist of from 2500 to 3000 barrels. They have done neither. If the plaintiffs' view is correct, the contract would have been for a "shipment" not a "cargo" of from 2500 to 3000 barrels. It is a part of a cargo, not a cargo, which has been tendered to us. No equivalent performance of the contract will do. The shipper, by placing on board an extra quantity of goods, can bring them into competition with the defendant's goods, and so reduce the price in the market. The quantity of goods which the defendant agreed to buy was between the limits of 2500 and 3000 barrels, "at the seller's option." Can it be contended that the plaintiffs could have delivered 1500 barrels to the defendant, and reserved 800 barrels for themselves? Many questions might arise in relation to the rights of the different owners of the goods on board, which the defendant could not have intended should be raised.

Tindal Atkinson replied.

(*Cur. adv. vult.*)

Dec. 1.—The judgment of the court was delivered as follows by

MELLISH, L.J.—This was an appeal from a judgment of the Exchequer Division discharging a rule to enter a verdict for the plaintiffs. This action was brought by the plaintiffs against the defendant on account of the defendant having refused to accept 3000 barrels of petroleum, which he had agreed to purchase from the plaintiffs, and the question to be determined is, whether according to the true construction of the contract between the parties, the defendant was entitled to refuse to buy those 3000 barrels on the ground that 300 other barrels of petroleum formed part of the cargo of the *Lindesneas* so that the 3000 barrels did not constitute the entire cargo. The contract between the plaintiffs and defendant was made on the 13th Dec. 1873, and was as follows: "Sold this day for Borrowman, Phillips, and Co. to John B. Drayton and Co. a cargo of from 2500 to 3000 barrels (sellers' option) United States American refined petroleum, crown, diamond, and brand of good merchantable quality without any guarantee as to test, but having American certificate Standard white burning test, not under 120° Fahr.: at shilling and three farthings per gallon, weighed 8lbs. delivered; to be shipped from New York during the last half of February next, and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive (buyers' option). In case of vessel being ordered to the continent buyers are to pay the extra freight including insurance. On arrival of vessel at port of discharge the oil is to be landed at a public wharf and weighed on landing and tared for average, real average tare to be arrived at by taring one in every twenty barrels as they come from the ship. Buyers agree to pay landing and all other charges, including fire insurance, for which they are to be allowed five shillings per ton on the gross weight. In event of vessel coming to United Kingdom payment to be made at landing weight in fourteen days from last day of landing by cash, less 2½ per cent. discount, or cash against delivery order if required, allowing interest at five per cent. per annum, or bank rate if over, for unpaid portion of prompt, if to the continent three-fourths of gross amount of invoice to be paid

in exchange for shipping documents on arrival of vessel at port of call less interest at five per cent. per annum or bank rate, if over, for unexpired portion of prompt, and remaining fourth to be paid on the prompt, say fourteen days from last day of landing, by cash less $2\frac{1}{2}$ per cent. discount. Should any dispute arise out of this contract the same to be settled by arbitration in London in the usual way. Particulars of shipment to be declared so soon as ascertained. Should vessel be lost contract to be void, as also for any portion that may not arrive. Destination to be given within forty-eight hours after ship's arrival at port of call.—Rose and Wilson, brokers." On the 11th Feb. 1874, the plaintiffs' principals, Sawyer, Wallace, and Co., of New York, chartered the *Lindesneas* to convey the petroleum to the port of call, and agreed to provide the said vessel a full and complete cargo of refined petroleum in customary sized barrels. 3000 barrels of petroleum were placed on board the *Lindesneas* at New York, and a bill of lading signed making them deliverable to the order of Sawyer, Wallace, and Co., but, as this generally did not constitute a full cargo, 300 additional barrels of petroleum were placed on board, they were marked with a different mark and a separate bill of lading was signed for them. The plaintiffs gave notice to the defendant of the shipment of the 3000 barrels, and were ready to order the ship from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3000 barrels, and to take the 300 additional barrels themselves, or to deliver to the defendant at any such port a quantity of 2700 barrels. But the defendant refused to receive either the 3000 barrels, or any other quantity. The question is, were the plaintiffs, under those circumstances, ready and willing to deliver to the defendant a cargo of from 2500 to 3000 barrels of petroleum within the contract, and we are of opinion that they were not. The whole cargo of the *Lindesneas* consisted of 3300 barrels, and therefore was in excess of the quantity ordered, and the plaintiffs cannot succeed unless the defendant was bound to accept a part of a cargo. We, however, are of opinion that an agreement to sell a cargo is, according to the plain and natural meaning of the words, an agreement to sell the entire quantity of goods loaded on board a vessel, or freight, for a particular voyage. By the terms of the contract the seller engages to deliver to the buyer a cargo of petroleum of from 2500 to 3000 barrels at sellers' option. We think that effect must be given to the term "cargo," as distinguished from the specified quantity; as, if the parties had intended otherwise it would have been enough to specify the quantity without introducing the term "cargo" at all. Now, generally speaking the term "cargo," unless there is something in the context to give it a different signification, means the entire load of the ship which carried it, and it may fairly be assumed that when one man undertakes to sell, and another to buy, a cargo, the subject matter of the contract is to be the entire load of the ship. And that such must have been the sense in which the term cargo is used in this contract is materially strengthened by the agreement that the vessel shall proceed to a port of discharge to be determined within certain limits by the buyer, showing plainly that what was contemplated was that the vessel and its entire cargo were to be at his disposal. There are various

reasons why a purchaser may wish to have the whole quantity of goods loaded on board a particular vessel. Such a contract gives him complete control of the vessel. It enables him to select the port of discharge, to appoint the place, to be free from the inconvenience of persons' goods being unloaded at the same place with his own, and from the competition from other persons' goods being ready for the same place, and at the same time with it may be said that in this particular case the plaintiffs were ready to give the defendant the same advantages, or nearly the same advantage as the 3000 barrels had formed the entire cargo. We think, however, that though the refusal to receive the petroleum, looking to the offers made by the plaintiffs, may, under these circumstances, be an unhandsome proceeding on the part of the defendant, the latter in point of law, was not bound to accept it, nor can we enter into whether the plaintiffs offered was or was not a fair equivalent for what they contracted to do, or whether the defendant would or would not have suffered any substantial damage from not getting the entire cargo. It may be that the real reason why the defendant refused to receive the 3000 barrels was that the price of petroleum had fallen. Still we think the defendant was entitled in point of law to say, "The goods which you offered me was not the thing I agreed to buy, and therefore I will not take it." The defendant argued that even though an agreement to deliver a cargo of a particular named ship should be taken to be an agreement to buy the whole cargo, yet an agreement to buy a cargo of from 2500 to 3000 barrels of petroleum, no particular ship named, would be satisfied by sending a cargo of from 2500 to 3000 barrels in any one ship, although the ship might be filled up with goods. We do not agree with this. We think that the reason why the precise quantity of petroleum to be sent is not fixed, and the seller's margin of 500 barrels is, that he may have difficulty in chartering a ship of the requisite size, and that he was not entitled without the defendant's consent to place any additional cargo on board the ship.

Judgment for defendant. Judgment affirmed.

Solicitors for the plaintiffs, Mercer and M
Solicitors for the defendant, Johnson, Upton
Budd.

HIGH COURT OF JUSTICE

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Saturday Dec. 16.

Re THE COAL CONSUMERS' ASSOCIATION
(LIMITED.) (a)

Company—Winding-up—Distress—Rent due prior to winding-up—Judicature Act 1875, sect. 10—Rule in bankruptcy.

The Judicature Act 1875, sect. 10, gives no right to a landlord to levy a distress on the goods of a tenant, an insolvent company, after the commencement of the winding-up for rent due prior thereto.

(a) Reported by JAMES E. HOBBS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re THE COAL CONSUMERS' ASSOCIATION (LIMITED).

[CHAN. DIV.]

ADJOURNED SUMMONS.

This was an application by Mr. Hughes for liberty to distrain upon the goods and chattels upon the land belonging to the above named company for 100l. (less income tax), being one year's arrear of dead rent due the 30th June 1876, and for 6l. 13s. 10d., being one year's rent for the occupation of land, due on the 1st Nov. 1875.

On the 11th Feb. 1876, a petition was presented to wind-up the abovenamed company, on which a winding-up order was shortly afterwards made.

At the date of the presentation of the petition, the company were the assignees of a lease of certain coal mines lying under lands belonging to Mr. Hughes. Under the terms of this lease a dead rent of 100l. a year was payable to Mr. Hughes by two equal half yearly payments on the 30th June and the 31st Dec. in each year; and an occupation rent "at the rate of 4l. per acre" was also payable for the surface of the land occupied for the year preceding the 1st Nov. in each year.

The company had duly paid to Mr. Hughes the dead rent, down to and including the dead rent which accrued due for the half year ending the 30th June 1875.

The Judicature Act 1875, sect. 10, provides that, "In the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies' Acts 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons, who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

In Oct. 1876, Mr. Hughes took out the above summons for leave to distrain. The main question was, whether the Judicature Act 1875, sect. 10, gave the landlord a right to distrain, after the winding-up, for one year's rent accrued due prior to the commencement of the winding-up.

It was admitted that the company was an insolvent company, within the meaning of the Judicature Act 1875, sect. 10; and that the landlord could have proved for his debt in the winding-up.

Macnaghten, in support of the summons.—This is an insolvent company within the meaning of the Judicature Act 1875, sect. 10: and by that section the same rules are to be observed as to the rights of creditors "as may be in force for the time being under the law of bankruptcy." The Bankruptcy Act 1869, sect. 34, gives the landlord an express right to distrain, after the commencement of the bankruptcy, for one year's rent accrued due prior thereto; and Mr. Hughes has now the same right to distrain for one year's rent accrued due prior to

the commencement of the winding-up. I admit that Mr. Hughes could have proved for his debt in the winding-up. Assuming that the Judicature Act 1875 does not give the landlord an express right to distrain, the court, in the exercise of its discretion, will allow the distress to proceed. Sect. 163 of the Companies' Act 1862, which provides that any "distress put in force against the effects of the company after the commencement of the winding-up shall be void to all intents," is qualified by sect. 87. The former section only avoids distresses, when leave to put them in force has not been given under sect. 87: (*Re the Exhall Coal Mining Company*, 4 D. J. & S. 377.) Sect. 163 was not intended to take away the landlord's right to distrain, but is only intended to apply to the proceedings of a creditor of the company against the company: (*Re Lundy Granite Company*, 24 L. T. Rep. N. S. 922; L. Rep. 6 Ch. 462.) He also referred to

Re Xeres Wine Shipping Company, 18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. 769;

Re Universal Disinfecting Company, L. Rep. 30 Eq. 162;

Robson on Bankruptcy, p. 257.

Higgins, Q.C. and *Everitt*, for the official Liquidator.—Sect. 10 of the Judicature Act 1875 does not apply to the present case. It is quite clear that a landlord is not a "secured creditor" within the definition given by the Bankruptcy Act 1869, sect. 16, sub-sect. 5. Sect. 10 of the Judicature Act 1875 was only intended to apply the rule in bankruptcy to the specific cases there mentioned, not to all cases; it was intended to deal with the point decided in *Re Xeres Wine Shipping Company*, and to assimilate the mode of proof by a secured creditor in bankruptcy and in a winding-up. Both in *Exhall Mining Company* and in *Re Lundy Granite Company*, the landlord was a stranger to the company, and had no right to prove as a creditor of the company. Assuming that the Judicature Act does not apply, the court will never exercise its discretion in favour of a landlord where, as here, he can come in and prove in the winding-up. The court will only exercise its discretion in favour of a landlord where he is not a creditor of the company, and, consequently, has no right to prove for his debt in the winding-up: (*Ex parte North Staffordshire Railway Company*, 31 L. T. Rep. N. S. 716; L. Rep. 19 Eq. 60.) They also referred to

Re Progress Assurance Company, 22 L. T. Rep. N. S. 707; L. Rep. 9 Eq. 370;

Re West Hartlepool Iron Company, 34 L. T. Rep. N. S. 568.

Macnaghten, in reply.

Malins, V.C.—The question is one of great importance; it depends upon the proper construction of sect. 10 of the Judicature Act 1875. The mines are now in the possession of the company; some rent accrued due prior to the commencement of the winding-up, and some afterwards. So far as the question depends upon the winding-up of the company, the rights of the parties are settled by sects. 87 and 163 of the Companies' Act 1862. Sect. 163 provides that "where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." That is absolute in its terms; but it has been held repeatedly to be controlled by sect. 87, which provides that "when an order has

been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose." The two sections, taken together, show that no distress can be levied by the landlord after the commencement of the winding-up, except with the leave of the court. Now a distinction appears to have been drawn by the cases, where a landlord cannot come in and prove in the winding-up, and where he can; where he cannot come in and prove under the winding-up he has the ordinary rights of a landlord; but where he can come in and prove—as it is admitted he can do in this case—he cannot be allowed to distrain. That being so, I am now called upon to decide on the effect of sect. 10 of the Judicature Act 1875. The decisions before that Act were, to my mind, somewhat unreasonable. In bankruptcy the rule was thoroughly settled that where a creditor held a security, he was bound to realise or give credit for the value of his security and prove for the difference. In *Re Xeres Wine Shipping Company*, I considered that (with regard to a creditor holding security), a winding-up was a *quasi* bankruptcy, and that the same rules ought to be applied to the bankruptcy of a company as to the bankruptcy of an individual. Lord Romilly, then the Master of the Rolls, had decided the other way. The two cases came on to be heard together. The Court of Appeal came to the conclusion that I was wrong, and that the rule in bankruptcy did not apply to the case of a winding-up. All doubt upon that subject has now been removed by the Judicature Act 1875, sect. 10, which provides that "in the winding-up of any company under the Companies' Acts 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up"—that is admitted to be the case here—"the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." The result is that, in the winding-up of a company all creditors having security must realise or give credit for the value of their security, and come in and prove for the difference. Now, does that section apply to a landlord with a right of distress? I have been referred to sect. 16 of the Bankruptcy Act 1869, sub-sect. 5 of which provides that a secured creditor "shall in this Act mean any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as a security for a debt due to him." I think it clear that a landlord with a right of distress does not come within that definition; he has a right to resort to the land demised and the chattels thereon; but he has not a charge or lien or any security whatever on the property of the company. Then, does sect. 10 of the Judicature Act 1875 do more than apply to secured creditors in the winding-up of a company, the rule applicable in bankruptcy? I think it was directed to that object only. A trustee in bankruptcy has many privileges. For instance, he can surrender a lease and so get rid of his liability; as far as I know, there is no provision of that kind in the Winding-up Acts applicable to an

official liquidator. Now, if it were the case that the section to assimilate the rules in a winding-up and in bankruptcy, in all respects, I must come to the conclusion that an official liquidator must have the same power to surrender a lease as a trustee in bankruptcy. I do not see why that power should not be extended to the case of a winding-up, but the Legislature has not yet thought to do so. Therefore, I cannot look upon this as a provision extending to a landlord, in the case of a winding-up, all the rights, as between landlord and tenant, he would have in the case of a bankruptcy of an individual. Upon the whole, I come to the conclusion that it was not the intention of the Legislature to interfere with the rights of landlord and tenant, as they existed before the Act. I, therefore, come to the conclusion that the section does not apply to give the landlord a right of distress—a right which he would have if it had been the bankruptcy of an individual. He can recover one year's rent; but he must come in and prove in the winding-up. With regard to costs accrued due since the commencement of the winding-up, if the parties cannot come to an arrangement, the matter must be mentioned to the court. The applicant will have no costs; the liquidator will have his costs out of the estate.

Solicitors, *Meredith, Roberts, and Millarson, Beal, and Harrison.*

Tuesday, Dec. 19, 1876.

UNSWORTH v. SPEAKMAN. (a)

Will—Construction—Life interest—Child deceased daughter.

A testator bequeathed his residuary estate to be in trust for all his children, who, being sons, should attain the age of twenty-one years, or daughters, should attain that age, or be married, in equal shares, the share of each of his sons for his own absolute use and benefit. And the share of each of his daughters in the said estate, the same should be held by his trustees in trust to pay her the income during her life after her death, in trust for her children.

Held, that the children of a daughter who died before the date of the will, but before the testator died, were entitled to the share their mother would have had for life.

DEMURRED.

John Speakman, the testator, by his will of the 16th March 1872, appointed the defendants the executors and trustees of his will; and said testator devised and bequeathed unto the trustees all his real and personal estate in trust to sell and convert into money all such part of his real and personal estate as should consist of money. The will then proceeded as follows: I direct and declare that (subject to the charges thereon as herein mentioned) the trustees shall stand possessed of my said real estate, and the moneys, proceeds, and income therefrom in trust for all my children who are or shall be, or my sons, have attained or shall attain the age of twenty-one years, or, being a daughter, have attained that age or been married, or shall attain that age or be married, in equal shares, the share of each of my sons (other than my son David) to be for his own absolute use and benefit.

(a) Reported by JAMES E. HORN, Esq., Barrister-at-Law.

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The will, after dealing with the share of the testator's son David, proceeded as follows: "And as to the share of each of my daughters of and in my said trust estate, the same shall be held by my said trustees, in trust to pay her the annual income thereof during her life for her separate use free from marital control, debts, and engagements, and without power of alienation or anticipation, and on her receipts alone; and, after her decease, in trust for her child, if only one, or for all her children, if more than one, who either before or after her decease shall, being a son, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, in equal shares; and in case any of my said daughters shall die without having any child who shall acquire a vested interest in their respective shares under this my will, then the shares of each such daughter, including any share or shares accruing under this present cross limitation shall go to and be held in trust for such of my other children as, being a son or sons, have attained or shall attain the age of twenty-one years, or, being a daughter or daughters, have attained that age or been married, or shall attain that age or be married, in equal shares; the share of each son (other than my said son David) to be for his own use and benefit absolutely, and the share of my said son David, and the share of each of my daughters to be held upon the same trusts, and subject to the same directions and limitations over as are hereinbefore declared concerning his or her original share." Provided always, and the testator thereby declared that if any son of his should die in his lifetime leaving a child or children, the child or children of the son or of each son so dying as aforesaid, who, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry, should take, and, if more than one, equally amongst them the share to which his, her, or their parents or respective parents would have been entitled of and in the said residuary trust estate and moneys if such parent had survived the testator, and attained the age of twenty-one years, including any share or shares which would have accrued to such parents under the trusts and provisions in that behalf thereinbefore or thereafter contained.

The testator died on the 31st March 1873, leaving several children him surviving.

Alice, one of the daughters of the testator, died on the 16th Aug. 1872, after the date of the will, and in the lifetime of her father.

Some time prior to the date of the will the testator's daughter Alice had married the defendant William Unsworth.

The plaintiffs, the eldest of whom had attained twenty-one, were the three children of Alice Unsworth; and they now brought this action against the defendants, as trustees of the will, claiming a declaration that they were entitled, under the trusts of the will, to share in the testator's real and personal estate.

The defendants demurred.

The question raised by the demurrer was, whether the plaintiffs took any interest under the will.

J. Pearson, Q.C. and *Grosvenor Woods*, in support of the demurrer.—The will begins with a gift to the children as a class. If the will had stopped there, each daughter who survived the testator would have taken absolutely; and Mrs. Unsworth, who died in his lifetime, would have taken nothing.

The only interest the plaintiffs, the children of Mrs. Unsworth, can take, is in the "share" of their mother; and she, having predeceased the testator, took no share: (*Olney v. Bates*, 3 Drew. 319) [*MALINS, V.C.*—In that case there was a substitutionary gift to the children, in an event which did not happen.] Here there is no substitutionary gift to the children. In *Stewart v. Jones* (3 De G. & J. 532) there was an absolute gift, in the first instance, to daughters who should attain twenty-one; followed by a declaration that the share to which each of his daughters should become entitled on attaining twenty-one should be held by the trustees in trust for such daughter for her life, and afterwards for her children; and it was held that the children of a daughter who died after the date of the will, in the lifetime of the testator, did not take any interest. *Stewart v. Jones* is undistinguishable from the present case.

Glassey, Q.C. and *Rigby*, for the plaintiffs.—In *Stewart v. Jones* the words were, "the share to which each of my daughters shall become entitled." In *Re Potter's Trusts* (20 L. T. Rep. N. S. 649; L. Rep. 8 Eq. 60) your Lordship disapproved of the decision in *Stewart v. Jones*. In *Habergham v. Ridehalgh* (L. Rep. 9 Eq. 395), where there was a gift to a class in the first instance, it was held that children of members of the class, who died between the date of the will and the death of the testator, were entitled to share. They also referred to

Varley v. Winn, 2 K. & J. 700;

Re Holchkiess's Trusts, L. Rep. 8 Eq. 643;

Walker v. Main, 1 Jac. & W. 1.

J. Pearson, Q.C. in reply.—In *Habergham v. Ridehalgh*, *Stewart v. Jones* was not cited.

MALINS, V.C., after reading the clauses in the will set out above, continued.—So that, after giving his property absolutely to his sons who attained twenty-one, foreseeing the possibility of some of them dying in his lifetime leaving children, the testator says, "If they do so, their issue are to take the share the parent would have taken." He makes no such provision with regard to daughters, as I think, for a very plain reason—because he was fully aware that he intended by his will to make his daughters tenants for life only, with remainder to their children; and that, consequently, if a daughter died in his lifetime leaving a child, the only effect would be to let the child into possession immediately, instead of after the death of the mother. Alice, one of the daughters, died in the lifetime of her father, leaving a family, one of whom is now of age. The will is dated in 1872; and, therefore, that child must have been of considerable age when the will was made. Now, with regard to the construction of wills, I can only repeat again what I have had occasion to repeat very frequently, that the proper mode of construing a will, according to my view, is, first of all to satisfy yourself what the intention of the testator was, and, when you have satisfied yourself what the intention was, to see if you can find words to carry that intention into effect. Now, with regard to the intention of this testator, no one has suggested the shadow of a doubt. Beyond all doubt the testator intended every daughter to be simply tenant for life; and, therefore, if a daughter died in his lifetime, the simple effect would be to accelerate the entering into possession of the remaindermen. It would be an extraordinary

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thing to say that this testator meant that, if a son died in his lifetime, his children should be substituted for him; but that if a daughter died in his lifetime her children should be wholly excluded. I am perfectly satisfied that this testator intended to make his daughter simply tenant for life of a share of his property. He calls it her "share;" and it is her share for the purpose of division, for the purpose of ascertaining into how many shares the property is to be divided, and for no other purpose. The intention is clear beyond all doubt; and I can see no difficulty in carrying that intention into effect. The case, to my mind, is so perfectly clear that, but for the case of *Stewart v. Jones*, I should have overruled the demurrer at once. Now I find that, in the year 1869, in giving judgment in *Re Potter's Trust*, I expressed myself thus with reference to that case: "The only other case is *Stewart v. Jones*, where I am astonished to find that the present Lord Chancellor (then Vice-Chancellor Wood) held that the children of a parent who died between the date of the will and the testator's death were not entitled to take; on appeal, Lord Chelmsford affirmed the decision, stating that he entertained no doubt upon the case. There the language of the will was different from this; but that case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present I should have decided the other way, in order that it might have been reconsidered." I adhere now to the intention which I then expressed. I intend to decide the other way now, in order that my decision may, if necessary, be reconsidered. I am clearly of opinion that the words of the will are abundantly sufficient to enable me to carry the manifest intention of the testator into effect. I entirely subscribe to the observations of Vice-Chancellor James in *Habergham v. Ridehalgh* as to the principle which ought to guide the court—which, indeed, is the principle always acted upon in construing wills; that is to say, not by having recourse to technical and absurd rules of construction, to defeat the intention of the testator; but rather, by a free and liberal and common-sense interpretation of the language used, to carry the manifest intention of the testator into effect. On these grounds I am of opinion that the mother was tenant for life only, with remainder to her children; and that, consequently, the children have an interest in the property. The demurrer will, therefore, be overruled.

Solicitors: *Field, Roscoe, and Co.*; *Milne, Riddle, and Mellor.*

(Before Vice-Chancellor BACON.)

Thursday, Nov. 23, 1876.

LONDON AND ST. KATHARINE DOCKS COMPANY v. METROPOLITAN RAILWAY COMPANY. (a)

Practice—Pleading—Reply—General traverse—New assignment—Order XXIV., rule 2—Order XIX., rr. 2, 18, 21.

A railway company were defendants to an action which raised the question whether or no a piece of land was included in an agreement, the plaintiffs asserting that it was not included and that the agreement conferred no title on the defendants

to take it, and that the defendants had given no statutory notice of their intention to take it. The defendants pleaded that the piece of land was comprised in and shown on the plans deposited with their railway bill, of which the plaintiffs had full knowledge; that they were empowered to take compulsorily the piece of land and to enter upon it for the purposes of the agreement, and denied that the agreement conferred no title on them to take it. The plaintiffs by their reply joined issue generally on the statement of defence, and then pleaded fresh matter.

Held, on the motion of the defendants, that the plaintiffs had no right to introduce fresh matter into their reply, and that the same was irrelevant to the issue, and must be struck out.

MOTION.

This was an application by the defendants to strike out certain paragraphs of the plaintiffs' reply to the defendants' statement of defence.

Prior to July 1864, the St. Katharine Dock Company was seised of freehold premises, many acres in extent, and principally consisting of or occupied as lofty and capacious ranges of warehouses, and known as the "Cutler-street Warehouses."

In June 1864, the defendant company promoted a bill for the extension of their railway. This was opposed by the St. Katharine Dock Company on the ground that the proposed extension would injure and damage the Cutler-street Warehouses.

On the 2nd July 1864, an agreement was entered into by which the defendant company, in consideration of the St. Katharine Dock Company withdrawing its opposition to the bill, covenanted (*inter alia*) that they would so construct their line of railway as not to prejudice the safety of the Cutler-street Warehouses, and would under-set the walls thereof so as to prevent any subsidence, and would so construct their works under a plot of land marked A on the plan and adjoining the Cutler-street Warehouses as that the St. Katharine Dock Company could build and use safely warehouses thereon, and would grant them the right of building on the plot A.

By the London and St. Katharine Docks Act 1864, the St. Katharine Dock Company amalgamated with the London Dock Company, and became the plaintiff company.

The plot of land marked A was contiguous to but was wholly without the Cutler-street Warehouses, properly so-called, and no part of the warehouses were erected on it.

Disputes subsequently arose as to whether a small "triangular piece of land" did or did not form part of plot A, and on the 10th May 1876, the plaintiff company commenced an action against the defendant company, alleging (paragraph 14), that the agreement did not confer on or vest any estate, right, or title, on the defendant company to take or use any portion of the Cutler-street Warehouses, but only conferred a qualified right to enter upon and take A subject to the conditions of the agreement; (paragraph 16) that plot A had well defined limits and abutments wholly without the Cutler-street Warehouses, and that no portion of the warehouses were erected on it; (paragraph 20) that the triangular piece of land was no portion of A, but formed part of the Cutler-street Warehouses; (paragraph 22) that no statutory notice had been served on the plaintiff company of the intention of the defendant company to enter and take possession of any part of the

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Cutler-street Warehouses; and claiming a declaration that by the terms of the agreement the defendant company were not entitled to any land of the plaintiff company except plot A, and an injunction to restrain the defendant company from taking possession of the triangular piece of land.

The defendant company by their statement of defence asserted that copies of the plans and schedules of the lands proposed to be taken for the purposes of their bill were in the hands of the plaintiff company before the agreement was come to, and that plot A and the triangular piece of land were shown on such plans; (paragraph 3) that the defendant company were empowered to take compulsorily plot A and the triangular piece of land, but were not empowered to take part of the Cutler-street Warehouses; (paragraph 5) that the agreement conferred on them the right of constructing their railway under the triangular piece of land and of entering thereon subject to the term of the agreement, and denied the statements contained in 14; (paragraph 8) that the plaintiff company, with a letter of the 19th Aug. 1875, handed to the defendant company a plan showing the structure for which they required the defendant company to provide in the construction of their tunnel adequate support in conformity with the said agreement, and that such plan comprised the triangular piece of land; (paragraph 9) that the triangular piece of land did not form part of the Cutler-street Warehouses, and that no statutory notice had been given.

The plaintiff company by their reply joined issue on the several paragraphs of the statement of defence, except so much of paragraph 3 as stated that the defendant company were not empowered to take part of the Cutler-street Warehouses, and proceeded as follows:

2. The plaintiff company, in reply to the third paragraph of the statement of defence, say that the period within which the defendant company were bound to exercise their statutory powers expired on the 1st Aug. 1875, and that they had given no such statutory notice.

3. In reply to the fifth paragraph of statement of defence, the plaintiff company say that the only land of the plaintiff company which extended along the Cutler-street Warehouses was the plot of land A.

4. In reply to the eighth paragraph of the statement of defence, the plaintiff company say that the plan therein referred to includes buildings proposed to be erected within the Cutler-street Warehouses. That such part of the structure as by the said plan was shown to be erected over the triangular piece of land was, in fact, a portion of the new premises proposed to be constructed within the Cutler-street Warehouses as part of and so as to be in conformity with the buildings to be constructed on plot A.

The defendant company now moved to strike out of the reply paragraphs 2, 3, and 4, on the ground that the same were either totally irrelevant to the issue, or, in fact, a confession and avoidance which ought to be pleaded by way of amendment in the statement of claim.

Kay, Q.C. and *Fellows*, for the motion.—The 2nd, 3rd, and 4th paragraphs of the reply are either totally irrelevant or amount to a confession and avoidance. The 2nd paragraph denies that we have any statutory right to take the triangular piece of land; the 3rd alleges that we had a certain time for exercising our statutory right to take

it, and the 3rd asserts that we have not exercised that right. These allegations are inconsistent with each other and with the statement of claim, by which the plaintiffs do not allege that we claim this piece of land by virtue of our statutory powers, but as included in the agreement. *Earp v. Henderson* (L. Rep. 2 Ch. D. 254; 34 L. T. Rep. N. S. 844) decides that a reply must, except under very special circumstances, be confined to a simple joinder of issue. If the plaintiff finds it necessary to allege new matter by way of confession and avoidance, he must do so by amending his statement of claim. (Wilson's Judicature Act, and Orders, p. 348). So far, therefore, as this reply is a confession and avoidance, it is wrong in point of pleading, and so far as it is not a confession and avoidance it is totally irrelevant and unnecessary, and should be struck out.

Sir H. M. Jackson, Q.C. and *Crossley*, for the plaintiffs.—These paragraphs inserted in the reply are right in point of form and unobjectionable in point of pleading, and are in accordance with the rules and the practice of the courts. The defendants could, with leave of the court, have put in a rejoinder to our reply (Order XXIV. r. 2), and we offered to consent to this if they felt embarrassed by our reply. This is in fact merely a motion for costs. The sole issue is whether or no the agreement includes the triangular piece of land. We say it does not. As to the second paragraph of the reply, it simply says we admit you had power to take this triangular piece of land, but your time to take it expired before the dispute arose, and therefore your statutory right is gone. That is a perfectly legitimate reply, and no confession and avoidance. Then paragraph 3 says we admit you could take the land extending along the Cutler-street Warehouses, but that land is plot A, and the triangular piece does not extend along the warehouses, but is part of them. That is a clear statement in reply, and puts the other party to proof of the fact denied. Lastly, we say that the plan mentioned referred to buildings and not to land. That is unobjectionable, and is no confession and avoidance. This reply is founded on and is clearly within Form 6 in the Schedule to the Rules, which shows that fresh matter may be introduced by way of reply, and this also appears from the Order XIX. rr. 2, 18, 21, and Wilson's Judicature Acts and Orders, p. 354. We submit that the proper course for the defendants to have adopted was to join issue by way of rejoinder on the fresh matter in our reply.

BACON, V.C.—The only question in this case is, what is the meaning and construction of the agreement? In my opinion the plaintiffs have no right to introduce new matter into their reply which has nothing to do with that agreement. By their reply the plaintiffs first join issue generally on the statement of defence, except as to the third paragraph thereof. They then go on to plead that the defendants were bound to exercise their statutory power within a certain time, and had not done so. That is a matter of law which appears on the pleadings, and requires no fresh reply. Then the fifth paragraph is an assertion that arises on the construction of the agreement itself. The last paragraph of the reply is, in my opinion, wholly irrelevant and out of place in these pleadings. The Act is being cavilled at, and forms of pleading are introduced

worse than those from which we have escaped. The Forms in the Schedule to the Act are useful as precedents, but are by no means binding in all cases. In my opinion, the paragraphs of the reply objected to are vicious, and ought to be struck out, but as the application is frivolous and unnecessary, I will make the order without giving any costs.

Solicitors for the plaintiffs, *Hacon and Turner*.
Solicitors for the defendants, *Burchells*.

Thursday, Nov. 30, 1876.

HALL v. EVE (a).

Practice—Pleading—Reply, form of—Allegations in defence specifically dealt with—Orders XIX., rr 14, 18, 19; XXIV., r. 2; XXVI., r. 3; XXXVII., r. 5.

To an action to enforce the specific performance of an agreement to grant a lease the defendants pleaded that the plaintiff had forfeited his right to a lease by reason of breaches of certain covenants and conditions in the agreement, and that they had accordingly determined the agreement. The plaintiff, in his reply, after admitting certain paragraphs of the statement of defence, proceeded to deal *seriatim* with those allegations in the defence which he did not admit, and in particular the allegations as to the alleged breaches and determination of the agreement, introducing new matter of law and of fact on which he relied to displace such allegations, and concluded his reply by joining issue generally on "such of the allegations in the statement of defence as had not been therein before admitted."

On motion by the defendant to strike out the reply as erroneous in form and in point of pleading,

Held (following *Earp v. Henderson*, L. Rep. 2 Ch. D. 254; 34 L. T. Rep. N. S. 844), that the reply was erroneous and must be struck out, but with liberty to the plaintiff to amend his statement of claim.

THIS was an application which raised the question whether the plaintiff's reply was right in form and in point of pleading.

The statement of claim asked for the specific performance of an agreement dated 5th March 1875, and that the defendants should be ordered to execute a proper conveyance of the premises therein comprised to the plaintiff or as he should direct.

The agreement was made between the defendants, W. Eve and G. Whiffen (the liquidators of a company), of the one part, and the defendant, Thomas Lane, of the other part, whereby Thomas Lane covenanted with the liquidators that he would within the first twelve months of the term thereby agreed to be granted, build on the piece of land thereby agreed to be demised not less than five and not more than seven houses with shops. And the liquidators agreed that they would at the time therein mentioned grant a lease unto Thomas Lane, or unto such person or persons as he should for that purpose nominate, a lease of the piece of land with the houses and shops to be erected and built thereon for the term of ninety years, from the 25th Dec. 1874, at the

yearly rent of 36l., payable half yearly. And the same agreement provided that Thomas Lane and his assigns should have the option of purchasing the freehold of the whole of the piece of land for 650l., subject to such option being exercised before the 25th Dec. 1875, and before any lease should have been granted.

Subsequently Thomas Lane, for valuable consideration, transferred the benefit of the agreement to the plaintiff by an agreement dated the 24th April 1875, which provided that immediately after the signing of the last mentioned agreement Thomas Lane should give notice to the liquidators of his desire to exercise the option of purchase, and that the benefit of such option belonged to the plaintiff, and that from the signing of the last-mentioned agreement and until the completion of the purchase, the piece of land should be considered to belong equitably to the plaintiff, and that he and his agents should have full right to enter upon the same at all times.

Due notice of this second agreement and of the determination of Thomas Lane to exercise the option to purchase was given to the liquidators. An abstract of the title was furnished, and a draft conveyance to the plaintiff prepared and forwarded to the liquidators, but they refused to complete: thereupon the plaintiff commenced this action.

The liquidators, in their statement of defence, only admitted the agreement of the 5th March 1875, as it should appear when produced to the court at the hearing, alleging that it contained other and material covenants and provisions than those referred to in the statement of claim, and in particular covenants by T. Lane until the lease should be granted to pay the rent thereby agreed to be reserved and all rates and taxes, and a proviso that if the rent reserved or any part thereof should be in arrear for twenty-one days, or if T. Lane, his executors, administrators, or assigns "shall not duly observe and perform all and singular the covenants, conditions, and articles of agreement hereinbefore contained, and on his or their part to be observed and performed," then it should be lawful for the liquidator to determine the agreement and to re-enter and repossess the premises, and also a proviso that "every embankment, viaduct, building, or fence made at any time on the land agreed to be hereby demised within 50ft. of the Victoria-road or of the Circus thereof, shall be formed, planted, built, or constructed in such manner and according to designs to be previously approved by the Battersea Park Commissioners," and that any lease to be granted under the agreement should contain covenants to that effect. They also alleged that Thomas Lane, prior to the 24th of April, commenced building upon parts of the land within 50ft. of the Victoria-road, without the required prior sanction and approval of designs by the Battersea Park Commissioners, and that both the plaintiff and T. Lane had, prior to 5th April 1875, made default in building and insuring the houses and otherwise in observing and performing the covenants in the agreement, and had neglected and refused to pay any rent, and that they accordingly, on 5th April 1875, determined the agreement of the 5th March 1875, and on the commencement of this action brought an action for the purpose of ejecting T. Lane, who was still in possession of the land, and that the action of ejectment was still

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pending, and they then proceeded to state more particularly their case.

The plaintiff by his reply, after admitting certain paragraphs in the defence, proceeded to deal specifically with each allegation in the defence which he did not admit, and asserted in particular that even if (which he did not admit, but denied) any default in the observance of or any breach of any of the covenants or conditions in the agreement of the 5th March 1875 contained were made or committed by T. Lane or himself, such defaults or breaches were waived by the acts of the liquidators, and also that the liquidators were not entitled by reason of the alleged breaches to determine the agreement, for that Thomas Lane, to the knowledge of the liquidators, entered into the agreement for the purpose of building houses with shops upon the land comprised in the agreement, and that the liquidators well knew such land was subject to and bound by certain restrictive covenants, whereby T. Lane was liable to be prevented from building shops thereon, and that the liquidators concealed this fact from him; and that, as to the rent, the option to purchase was exercised before any rent accrued due, and that immediately upon notice of such option being given he became in equity the owner of the fee simple, and so on. And, lastly, the plaintiff joined issue with the defendants upon their statement of defence, except as to such of the allegations therein as were not admitted.

This reply was delivered to the defendants on the 20th Nov., together with a notice of trial.

The liquidators thereupon applied under Order LIX. to set aside the reply as irregular and erroneous in form and point of pleading, and that the notice of trial at the same time delivered might also be set aside as irregular, with costs.

Kay, Q.C. and Horton Smith, for the motion.—This raises again the question which was decided in *Earp v. Henderson* (L. Rep. 2 Ch. D. 254: 34 L. T. Rep. N. S. 844). It is another attempt to introduce new facts and a new defence by reply to which there can be no pleading in answer, and we say that the new facts and defence ought to be introduced into the statement of claim by amendment. There are three several separate inconsistent defences. First, the defendant denies that he has committed any breach; secondly, he says that suppose a breach has been committed, the liquidators have waived it; and, thirdly, if they have not waived the breach, they have committed something like fraud upon him because they concealed from him that it was a breach. We submit that this is a totally improper reply. If the plaintiff wants to make an alternative case he must do it by amending his claim: (*London and St. Katharine Docks Company v. Metropolitan Railway, ante* 733.)

[Order XIX., rr. 14, 19; Order XXIV., rr. 1, 2; Order XXXVI., r. 3; Order XXVII., r. 5 were also referred to.]

Sir H. M. Jackson and C. Browne, for the plaintiff.—This case is not at all within *Earp v. Henderson*. In that case there was first a general traverse and then a new statement. Here the first thing we do is not to give a general issue at all, but we go *seriatim* through the statement of defence, and that we submit is a perfectly legitimate mode of reply, and that we were entitled to set up by way of defence new matter which could not be set up until the defence had been ascertained, and

which is necessary to displace the allegations in the defence which we do not admit. It is quite obvious from the schedule of forms that it was not intended to do away with special replications because there are numerous examples given of special replication, for example, the 6th, 9th, 10th, 12th, and 21st forms. We submit, therefore, that upon these pleadings the orders have been most strictly and regularly complied with.

BACON, V.C.—My opinion on this Act of Parliament is, that it was the intention of the Legislature to simplify the proceedings, and so far as rules and precedents could go to make it incumbent upon the parties to have their issues pointed and distinct. In the case before me the plaintiff filed a claim to have the specific performance of an agreement. By his reply he says, "even if it is true I have forfeited my right to have the agreement specifically performed for some reasons, then I have an equitable right to have that objection removed because this, that, and the other happened." That ought to have been in his statement of claim. That is not the proper subject of a reply in my view of this Act of Parliament, and the forms of proceedings which are contained in the schedule. In my opinion it would introduce all the evils which once prevailed in the courts of common law, which have been gradually removed and now wholly abolished, if I were to encourage this, or to say that this was a correct mode of pleading in the case before me. I have no doubt that it is erroneous. If any doubt is entertained upon that subject the sooner that doubt is removed the better; but it must be by some tribunal more authoritative than this that such a precedent of a special replication as is now before me can be endured. There is no reason why the plaintiff, if the facts stated in his replication are true, should not have stated them as equitable ground for his being relieved from the strict letter of the agreement, or any of the consequences of the agreement. In my opinion the motion is rightly conceived, and, without saying any more about it, I say that the pleading is erroneous, and that it ought to be struck out. The order will be to strike out the reply with leave to the plaintiff to amend his statement of claim. The costs on both sides to be reserved.

Solicitor for the plaintiff, *Theodore Barker*.

Solicitors for the defendants, *Crook and Smith*.

(Before Vice-Chancellor HALL.)

Wednesday, Nov. 27, 1876.

CONINGTON v. GILLIAT. (a)

Equity to a settlement—Children by a former marriage—Whole fund settled.

A married woman, a lady living apart from her husband, became entitled to a fund of about 3000l. The income of this fund, added to her present income, would make up her total income to about 300l. a year. Her husband was unable to contribute anything towards her maintenance. Held, that she was entitled, as against her husband and his incumbrancers, to have the whole fund settled.

She had two children by a former marriage, but none by her present marriage. The two children

(a) Rep. cited by H. C. DANKS, Esq., Barrister-at-Law.

were of age and well provided for, independently of their mother.

Held, that they must be included in the settlement, and that the court could not enter upon any inquiry as to their means.

This was a suit by a wife seeking to establish her equity to a settlement.

Under the will of the plaintiff's uncle she was entitled to a sum of about 3000*l.*, subject to the life interest therein of her mother, who died in June 1875.

The bill, which was filed in July following, stated that the plaintiff was formerly the widow of one W. H. Gilliat, by whom she had two children. In 1859 she married her present husband, H. F. Conington, by whom she had had no issue and from whom she was living apart. Conington was adjudicated a bankrupt in 1873, and had not for several years past contributed anything to the plaintiff's maintenance. No settlement was made upon the plaintiff's first marriage. On her second marriage a settlement was made of some furniture and plate then belonging to her.

The bill stated that two sums of 1000*l.* and 250*l.*, less the cost incurred in establishing the plaintiff's right to them, had been already ordered, in previous suits, to be settled upon her and her children; but that, excepting the income derived from these funds, she had no provision for her maintenance. And it alleged that such income was greatly insufficient for her maintenance in the manner in which she had been accustomed to live before her marriage, and that the income which she would derive from a settlement of the 3000*l.* coming to her under her uncle's will, together with the income of the other funds, would not exceed a suitable and proper income for her maintenance. The plaintiff, therefore, claimed to have a settlement upon herself and her children of the whole of the 3000*l.*

The defendants to the bill were the trustees of her uncle's will, her husband and his trustee in bankruptcy, and S. R. Lewin, T. E. Lewin, and W. Daubeny, who claimed to be incumbrancers on the fund, by virtue of charges on it created in their favour by Conington.

When the cause was heard in January, 1876, the Vice-Chancellor decided that the case was one in which a settlement of some kind ought to be made upon the wife and children; it being, as his Lordship considered, proved that the husband was not in a position to maintain his wife; but he directed further inquiries to be made in chambers, in order to ascertain the precise amount of the wife's income.

The chief clerk accordingly made his certificate of the result of these inquiries. It appeared thereby that, besides the funds mentioned in the bill, the plaintiff was entitled, for her separate use, to a life interest in one-fourth of the net residue of the estate of a deceased aunt, such one-fourth being of the estimated value of about 3800*l.*, to contingent life interests in two moieties of other fourths of the same estate, and to a fourth share in a legacy of trifling value. She was also entitled, under the will of another aunt, to some furniture and books worth altogether about 50*l.* About 3000*l.* of her's, not her separate property, had been received by Conington.

The case now came on again upon motion for judgment founded on the chief clerk's certificate.

Hastings, Q.C. and Hadley, for the plaintiff.—

The questions now to be decided are: First, Whether the wife is entitled to have the whole fund settled; and secondly, Whether her children by her first husband are to be included in the settlement. As to the first question, *Re Suggitt's Trusts* (L. Rep. 3 Ch. 215) shows that inability by the husband to maintain the wife is tantamount to insolvency, and such cases as

Tidd v. Lister, 10 Ha. 140;

Francis v. Brooking, 19 Beav. 347; and

Duncombe v. Greenacre, 29 Beav. 578.

show that the court is accustomed to settle the whole fund, where it is proved that the husband is in such a state of insolvency or inability. As to the second question, *Grosvenor v. Lane* (2 Atk. 179), is an express authority for including, in such a settlement as this, the wife's children by a former marriage. In *Croxtan v. May* (27 L. T. Rep. N. S. 59; L. Rep. 9 Eq. 404), the fund was, as appears by the minutes, ordered to be settled upon the wife for life, and after her death upon her children by her then marriage, or any future marriage; and there can be no distinction in principle between children by a past, and children by a future, marriage. They cited also

Walsh v. Wason, 28 L. T. Rep. N. S. 457; L. Rep. 8 Ch. 482;

Re Cordwell, L. Rep. 20 Eq. 644;

Scott v. Spashett, 3 M. & G. 599.

W. Pearson, Q.C. and Lewin, for the husband's mortgagees.—These mortgages were given whilst Mr. and Mrs. Conington were living together. Consequently the presumption is that the wife has already obtained a benefit from the fund sought to be settled, to the extent of the mortgage money; and, as a matter of fact, the money advanced by the first mortgagee is more than the whole security is worth. This is not a case of a wife who has been deserted by her husband. They separated by mutual consent, and the wife has refused to return to her husband, although he wished her to do so. There is no evidence that he cannot maintain her, and she has only herself to maintain, her children being of age, and well off. Moreover, she has already had settled upon her by the court some 1400*l.*, which her husband would otherwise have received. Assuming even that a settlement ought to be made, we submit that it should not comprise more than half of the fund in question. That is the proper amount, excepting under very special circumstances. Neither ought the settlement to interfere with the husband's marital rights further than is necessary to provide for the wife's maintenance. In *Spirett v. Willows* (*ubi sup.*), where the husband was bankrupt, the whole fund was not settled, and the ultimate limitation in default of children was to the husband's assignee. In *Re Suggitt's Trust* (*ubi sup.*) the court laid down the rule that the whole fund ought not to be settled unless the husband is insolvent, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion, and that the court will not interfere with the husband's ultimate right to the settled fund, in default of children, in case of his surviving his wife. In none of these cases was it ever suggested by the court that the wife's equity to a settlement would extend to her children by a former marriage. They also referred to

Bagshaw v. Winter, 5 De G. & Sm. 466.

A reply was not called for.

HALL, V.C.—The first question to be decided

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in this case is, how much ought to be settled. The general rule is that only half of the fund is to be settled, excepting under special circumstances. It has been argued that here there are no special circumstances, or at all events none which will cause the court in the exercise of its discretion, to settle the whole fund. Now *Spirett v. Willows* has been referred to on that point. It is important to observe that, in that case, the wife was originally entitled to a sum of 4000*l.* Half of that fund was, on her marriage, settled on her for life, with remainder to her children. A settlement of the other moiety having been declared void, that moiety belonged to the husband, subject to the wife's equity to settlement. And of this second moiety three-fourths were settled, so that of the whole original fund the husband got one-eighth only. That being so the general rule may be taken from what was laid down in *Re Suggitt's Trusts*: It is unnecessary to go back to earlier authorities. Lord Cairns, L.J., in his judgment in that case said, "It is clear that in modern times . . . as regards the shares in which the fund should be divided, considerable latitude has been assumed by the court, not such latitude, indeed, as to allow the court to do what it likes in the division of the fund, but so as to admit of the discretion of the court being exercised in each individual case." And then he applied that rule to the case before him. Now, that case differs from this, because there the husband was not insolvent, whilst, on the other hand, no settlement had, at any time, been made on the wife. But here, putting all the wife's property together, it comes to about 11,000*l.* Of this the husband appears to have received about 3000*l.*, say a quarter of the whole fund, or twice as much as the husband was allowed to receive in *Spirett v. Willows*. Then, consider what the wife's position is. She is a lady born and brought up, having lived as a lady during both her marriages. The amount of her present expenditure was commented on, and it was said that her income, if the whole fund should be settled, will be more than she requires. Now, taking it that the whole fund is settled, and reckoning that she can get 4*l.* per cent. interest on it—a liberal reckoning, considering what are the investments sanctioned by the court—her total annual income would be barely over 300*l.* It was also pointed out that her children are already provided for. But even so, 300*l.* a year will not be an over liberal allowance for this lady. Therefore, under all the circumstances, I hold this to be a proper case for settling the whole fund. It was argued that the children by Mrs. Conington's former marriage ought not to be included in the settlement. But I know of no authority for the exclusion of any of a wife's children. It was said that the children here are well off. But the court, so far as I know, has never gone into any inquiry on that subject. It may be that these children are well provided for, independently of their mother. That, however, is not a question for the court to go into. Whenever the husband's marital right is excluded, that which he is not to have goes to the children, the wife being supposed to claim on their behalf, as well as on her own. It would be extremely embarrassing to have to enter upon inquiries of that kind, in addition to the difficulty which already exists, of exercising a proper discretion as to the amount of the settlement. There might be

one child, out of two or three, well provided for. In short, the inquiry would be interminable. Nor is it necessary to consider whether the wife's children are the children of one marriage or of another. The fund goes to them as a consequence of the wife's right to have it settled. To decide otherwise, would be to introduce a new rule, which I certainly am not prepared to do. There will, therefore, be the ordinary settlement, with a limitation to the wife's children generally. This will practically exclude the husband's assignees, because the children are already of an age to take vested interests.

Solicitors for the plaintiff, *Norris, Allens, and Carter*.

Solicitors for the defendants, *Lewin and Co.; S. A. Rice; D. Howell*.

QUEEN'S BENCH DIVISION.

June 27 and 28, 1876.

REG. v. ASPINALL AND OTHERS. (a)

Conspiracy to obtain quotation on Stock Exchange—Terms of indictment.

It is an indictable offence to conspire to induce the committee of the Stock Exchange to allow a quotation of the shares of a joint-stock company, whereby to persuade persons who should buy and sell shares of the company, that the company has been duly constituted, and has so complied with the rules of the Stock Exchange as to entitle the company to have its shares quoted in the official list of the Stock Exchange.

THE defendants, being six in number, had been tried at the London Hilary Sittings 1875, before Cockburn, C.J., and a special jury, on an indictment for conspiracy to defraud. The indictment contained twelve counts, the defendants being found guilty on the first and second counts only.

The first count set out at great length the establishment, constitution of the committee of the London Stock Exchange, and that the said committee had formed certain rules and regulations for the management of the Stock Exchange, and had power to expel any member of the Stock Exchange who should break such rules; that two of the defendants had been directors, and one of them secretary, of a new joint-stock company called the Eupion Fuel and Gas Company, Limited, and three of them had aided in the establishment of such company; that all persons dealing in the shares of a new company, required, according to the rules of the Stock Exchange, that a "special settling day" should be fixed by the said committee for delivery of and payment in respect of all shares in such new company theretofore bought and sold; that the defendants applied for a special settling day; that it thereupon became necessary that the company should comply with the following rules of the Stock Exchange committee:

127. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery, and that no impediment exists to the settlement of the account.

128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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in the shares of a new company, previously to such application being submitted to the committee, and shall require the production of the following documents, viz. :—

The prospectus, the Act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost book system, under the stannary laws.

The original applications for shares, the allotment book, signed by the chairman and secretary to the company, and a certificate verified by the statutory declaration of the chairman and the secretary, stating the number of shares applied for and unconditionally allotted to the public, the amount of deposits paid thereon, and that such deposits are absolutely free from any lien.

The banker's pass-book, and a certificate from the bankers, stating the amount of deposits received.

That the defendants had conspired to induce certain members of the committee of the Stock Exchange, contrary to the true intent and meaning of the rules above set forth, to grant a special settling-day; and that the defendants falsely pretended to the said members of the said committee (*inter alia*), that the number of shares of the said company applied for by the public was 34,365, whereas the number of shares applied for by the public was not 34,365, nor any number whatsoever.

The second count stated that the defendants were directors, &c., of the said company, and that application had been made on behalf of the company to the committee of the Stock Exchange, to order the quotation of the new company in the official list of the Stock Exchange, in pursuance of the following rule of the Stock Exchange:

129. The committee will order the quotation of a new company in the official list, provided that the company is of *bond fide* character, and of sufficient magnitude and importance; that the requirements of Rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the Act of Parliament, or the articles of association, and in the case of limited companies contains the memorandum of association; that it provides for the issue of not less than one-half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed, and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid, or to be paid, in money or otherwise to concessionaires, owners of property, or others on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted;

That two-thirds of the whole nominal capital proposed to be issued have been applied for and unconditionally allotted to the public (shares reserved or granted in lieu of money payments to concessionaires, owners of property or others, not being considered to form part of such public allotment), that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorised by the company to give full information as to the formation of the undertaking, and be able to furnish the committee with all particulars they may require.

That the defendants had authorised Sir Robert Carden and others, being a firm of stockbrokers, and members of the Stock Exchange, to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange; and that the defendants conspired to deceive the members of the said committee, and to induce them, contrary to the intent of the three rules above set forth, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to persuade divers liege subjects who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied

with the said three rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange.

At the trial it appeared that the defendants were connected with the company as alleged in the indictment, and it was also proved that none of the shares of the company had been unconditionally allotted to the public, and that the Committee of the Stock Exchange had granted a special settling day and a quotation, under the belief that all the provisions of the three rules above set forth had been complied with. The manner in which the false representations charged were made by the defendants sufficiently appears from the judgments below. The defendants having been convicted, a rule was obtained on their behalf for arrest of judgment, or to enter the verdict for the defendants, or for a new trial on the ground that the facts proved did not amount to a conspiracy.

The Solicitor-General (Sir H. Giffard, Q.C.) (*Poland and Besley* with him), now showed cause, and cited

British American Telegraph Company v. Albion Bank, L. Rep. 7 Ex. 119; 26 L. T. Rep. N. S. 257; *Reg. v. De Berenger*, 3 M. & S. 67.

Ballantine, Serjt., and W. Ballantine, Pope, Q.C., and Metcalfe, Q.C., and A. Collins and Hodson, for the defendants, severally supported the rule.

COCKBURN, C.J.—I have entertained considerable doubts as to the sufficiency of the counts upon which the defendants have been found guilty, and am still of opinion that the first count is insufficient. It alleges that the defendants entered into a conspiracy by means of false and fraudulent representations to induce the Committee of the Stock Exchange to grant a "settling day" and a "quotation" on the Stock Exchange. If it had gone on to allege that the object was to defraud the public, it would have been sufficient, but it does not in terms allege that. Even as to the second count, I confess that it is not without much hesitation and doubt I have come to the conclusion that it is sufficient. That count states, in substance, that the defendants entered into a conspiracy in order to obtain a quotation of the shares, in order to induce persons who should thereafter buy and sell the shares to believe that the company was duly formed, and that it had duly complied with the rules of the Stock Exchange, so as to get the shares quoted in the official lists. If it had gone on to state that the purpose for which this was done was to injure those in whose minds this belief was produced by inducing them to buy the shares, believing them to be of more value than they really were, then I should have had no hesitation in holding that the count was sufficient according to law, though, if the object was to induce them thus to believe without inducing them to purchase the shares under that belief, it would be otherwise. But looking at the words used, "Intending to induce those who should thereafter buy the shares" to believe that they were what they were represented to be, on the whole I think it is sufficient; for it is difficult to see how that belief could be engendered in the minds of persons buying and selling the shares without inducing them to buy and sell under such belief; so that a conspiracy to induce them to entertain that belief must be taken to be a conspiracy to induce them to deal in the shares under that belief, as they would not otherwise have done. On the whole, therefore, though

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not without considerable doubt, I have come to the conclusion that the charge in this count is sufficiently stated. That it was proved in fact I can entertain no doubt at all. I cannot accede to the proposition that the facts as proved were not sufficient to constitute the offence. The facts undoubtedly were that persons were induced to apply for and appear to take shares they never meant to take, which shares were at once handed over to the defendant Aspinall—that the allotment of shares was fictitious, and that the funds of the company were fictitious, a small sum being obtained by way of advance from the Midland Bank, which was manipulated so as to represent the capital of the company as paid up, when, in point of fact, the whole thing was a fiction from beginning to end. This was done for the purpose of obtaining a settling day and a quotation on the Stock Exchange. That there was a fraud and a very serious fraud on the Stock Exchange committee no one can doubt. Then the question is, as the company had nothing but its shares and had no real capital at all, and the only object one can conceive in getting the shares quoted on the Stock Exchange was that they should be dealt in, whether such a conspiracy sustains the charge on which the defendants have been found guilty, and I think there can be no doubt that it does.

BLACKBURN, J.—I also am clearly of opinion that on the evidence an indictable offence was amply proved, supposing it sufficiently stated in the indictment. Ever since *R. v. De Berenger* it has been established that where parties conspire together by false representations and pretences—in short, by telling lies—to raise the price of any vendible commodity—for though it was a case of dealing in the funds, the doctrine laid down extends to all vendible commodity—and with the intent to produce the belief in the minds of men that they may give a higher price for the commodity than they otherwise would do, such a conspiracy is an injury to the public, and is an indictable offence. Here it was proved beyond all doubt that there was a conspiracy to procure a settling day and a quotation of the shares on the Stock Exchange, to induce those who should deal on the Exchange, and should see the quotation, to believe that the company had been formed to the satisfaction of the Stock Exchange, and was a real or *bona fide* company, and, in consequence of that belief, to think the company better than it really was, the company, in fact, not being real, the shares not having really been allotted, and the deposits not having really been paid, and the company altogether being one which, if its nature had been known, would not have been allowed to be introduced on the Stock Exchange at all. All this was done in order that, the quotation of the shares being thus obtained, persons dealing on the Stock Exchange might be induced to believe that the shares were of greater value than they really were, and that they should thus be influenced in the prices they should pay for them. I cannot doubt that, all this being clearly proved, there was a criminal and indictable conspiracy on the part of the defendants. Then, was it properly stated and charged? Now, as to the first count, I will not say whether it is good or bad; but the second goes further and is clearer than the other, and I cannot understand how it should not be sufficient. After alleging that a quotation of shares upon the Stock Exchange

imports a representation that the Stock Exchange committee has authorised them to be so quoted, and, therefore, has been satisfied that the company was duly formed, it proceeds to state that the defendants combined together, by false pretences and artful and subtle devices, to deceive the committee of the Stock Exchange, to induce them to allow a quotation of the shares, and thereby to induce and persuade those who should thereafter buy or sell the shares—that is, future dealers in the shares—to believe that it was duly formed and constituted, and had in all respects complied with the rules. If it had gone on to state, “and consequently, believing that it was better than it was, to induce persons to buy at higher prices than they otherwise would have given,” the charge would have been identical in its terms with that in *R. v. De Berenger*. These words, however, are not inserted, and the question is whether the effect is not in substance the same, and whether it does not really mean that the defendants represented the shares to be of greater value than they really were, and thus induced other persons to give higher prices for them than they otherwise would have done. Now, as Lord Ellenborough said, in *R. v. De Berenger*, “It is an universal principle that when a man is charged with an act of which the natural and probable consequence is a certain injury, the intention is an inference of law.” We should be carrying critical nicety to a greater extent than ever before known, and wresting words from their plain and natural meaning, if we were to say that the intention to obtain a quotation of the shares in order to induce persons who may buy or sell shares to believe that the company is a real and good company, whereas it is not so, is not doing that, the necessary consequence of which is not injurious to those buying and selling the shares. It must be taken, therefore, that the offence—which was proved—is stated sufficiently, and is in substance the same as that in *Reg. v. De Berenger*. It was argued that the question of the intent ought to have been put specifically to the jury. But if that were necessary, few verdicts in such cases could stand good. When everything is beyond doubt except a certain question, and that is put to the jury and they find it distinctly, then they really find a verdict including and implying all the rest. Here the intention expressly found by the jury—that is, the intention to obtain the quotation of the shares by false pretences—necessarily involves the intention to defraud, and it would be monstrous to say that we must grant a new trial because the formal question whether the quotation would have the effect suggested and would affect the price of the shares was not in terms put to the jury. I am, therefore, clearly of opinion that the second count is sufficient to support a judgment, and that the verdict upon that count ought not to be disturbed.

FIELD, J.—I also am of opinion that there ought to be judgment for the Crown. After the doubt the Lord Chief Justice has expressed, it would be presumptuous in me, perhaps, to say that I am clearly of opinion—but I certainly am of opinion—that the second count is good. As to the first count, it is based on the allegation that the frauds undoubtedly committed were committed for the purpose of inducing the committee of the Stock Exchange to appoint a special settling day. It appears that in all cases of new companies, the Stock Exchange committee, before they appoint a

settling day, require certain vouchers to be laid before them as to the position of the new company; and, among other things, they require that they should be satisfied that the proper amount of capital was subscribed, and that the shares have been *bonâ fide* applied for and allotted, and the deposits upon them actually paid; and they are not satisfied with the mere statements of the parties, but require vouchers to be produced, as the banker's book, to prove the payments made; and the result is that not only are the committee satisfied that the new company is good, but the public, on seeing the quotation of its shares in the official lists, believe that the proper authorities have been thus satisfied of it. In the first count, the fraud alleged is that, by means of false pretences, the Stock Exchange committee were induced to appoint a settling day—that is, a day in which all transactions in shares would be settled, and the amounts due paid or secured. Now, as to put a company on the market without the sanction of the Stock Exchange would be difficult, I think that count contains all the elements of a grave offence, for thereby the public would naturally suppose that as the committee of the Stock Exchange had fixed a settling day, all the requirements had been complied with, and the brokers and others might safely deal in the shares. And as to the second count, it is alleged that the object was to obtain a quotation of the shares in the Stock Exchange lists, and there can be no doubt that the public resort to those lists for the purpose of knowing where they may safely put their money. Then the count alleges that this was done for the purpose of inducing those who should thereafter deal in the shares to believe that the company was duly formed and constituted and had complied with the rules of the Stock Exchange. It does not, indeed, in terms allege that it was with intent to induce people to buy and sell the shares. But the question is, whether it is not fairly to be inferred that such is the meaning; and to me it seems that it is so, and that it would be a mere barren fraud if it was not done with a view to induce people to buy or sell the shares on the Stock Exchange. That being so, I think that meaning ought to be put upon it, and, therefore, that our judgment ought to be for the Crown.

NOTE.—On a subsequent day two of the defendants were sentenced to twelve months and two of them to two months' imprisonment, in each case without hard labour. And the judgment of the court was during the present (Hilary) sittings affirmed by the Court of Appeal. As to the jurisdiction of that court to hear the appeal, see sect. 47 of the Judicature Act of 1873.

Judgment for the Crown.

Solicitors for the prosecution, *Abrahams and Roffey*.

Solicitors for the defendants, *Goldring; Wontner and Co.; Huscham*.

MARATON.—In the case of *Radley v. London and North-Western Railway Company*, p. 635, col. 2, lines 38 and 39 from top, transpose the references "27 L. J. 532, C. P." and "10 M. & W. 543."

Judicial Committee of the Privy Council.

Nov. 15, 16, 17, and 18, 1876.

(Present: The Right Hons. Lord SELBORNE, Sir BARNES PEACOCK, Sir ROBERT COLLIER, and Sir JAMES HANNEN).

HAMEL AND OTHERS v. PANET. (a.)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Lower Canada—Notarial act—Effect of married woman's consent to hypothecation of property in community—Clause of reprise—Interlineation in deed—Place of passing contract—Misdescription.

By the law of Lower Canada a married woman cannot become surety for the debts of her husband, but this does not prevent her from consenting to the hypothecation of immoveable property brought into community, nor from renouncing in favour of such creditors all claims which she might otherwise have been competent to make to their prejudice by virtue of a "clause of reprise" in the marriage contract. David v. Gagnon (14 L. C. Rep. 110) approved.

Though part of a deed is in different handwriting, and appears to have been written at a different time from the remainder, it is not to be considered as an interlineation requiring the notary's initials or certificate, if the sense is not complete, and the deed not coherent, without it.

If a notarial act be passed according to the usual practice of notaries it will not be held to have lost its authentic character, though the words of the ordinances as to the passing of Acts may be susceptible of a different construction.

If the description of the face of an Act is shown to be incorrect, the consequence is not nullity, but the actual place of passing must be proved to be within the jurisdiction of the notary.

Judgment of the court below reversed.

THIS action was brought, by the respondent against the appellants, to set aside a notarial deed by which certain lands were mortgaged to the appellants.

The deed was dated 26th Jan. 1855, and was made for the purpose of securing a debt of 939l. 1s. 9d., due from Joseph Falardeau, jun., to the appellants. Joseph Falardeau, sen., and his wife, the father and mother of the principal debtor, became parties to the deed as sureties, and mortgaged the property in question as a further security. In April 1857, Madame Falardeau, sen., renounced her matrimonial community of property, in conformity with a "clause of reprise" contained in her marriage contract; and in June 1863, she conveyed the property in question to the respondent. She died in 1869. Her husband, Falardeau, sen., died in 1864, and Falardeau, jun., the principal debtor, died insolvent in 1857.

The respondent commenced this suit in 1869, and impugned the deed on the grounds of fraud and forgery, of improper execution, and as insufficient in point of law to bind the property of the wife as surety.

The case was heard in the Superior Court before Meredith, C.J., in 1872, and he gave judgment in favour of the defendants, the present appellants.

(a) Reported by C. M. MALDEN, Esq., Barrister-at-Law.

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HAMEL AND OTHERS v. PANET.

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On appeal to the Court of Queen's Bench, this judgment was reversed by Dorion, C.J., Monk and Ramsay, JJ., Sanborn and M'Cord, JJ., dissenting.

From this judgment the present appeal was brought.

Benjamin, Q.C. and *Bompas*, appeared for the appellants.

Wills, Q.C. and *Westlake*, Q.C., for the respondent.

The arguments urged appear sufficiently in the judgment.

The judgment of their Lordships was delivered by

LORD SELBORNE.—This is a suit instituted in 1869 to set aside a notarial act, which purports to have been passed on the 26th Jan. 1855. The Judges in Canada have been very much divided in opinion upon the case; three of them in the whole, counting the Chief Justice who sat in the Superior Court which decided for the present appellants, being against the suit, and three of them, constituting a majority in the Court of Appeal, in favour of the plaintiff. The original judgment, therefore, which was against the plaintiff, was reversed, and the appeal is from that judgment of reversal. The nature of the notarial act and the parties to it are as follows:—It appears that a person of the name of Joseph Falardeau the younger, was, and had been for some years before in business at or near Quebec. Both his parents were living; his father was of the same name, and he was himself married. He had property, as it would appear, in community, and so had his parents, immoveable property, in the province of Lower Canada. He owed at that time a sum of 939*l.* odd to the appellants, who are a firm carrying on business in the colony, and I suppose we may infer that, being pressed for payment, he offered them the security which is contained in this notarial act; that is to say, he offered the security which that notarial act was intended to perfect. On the face of the act, he and his wife, his father and mother, are all parties to it. Its operation, as far as the son, the debtor, and his wife, are concerned, is not now in question. It is an obligation for the payment of the debt, accompanied; by an hypothecation of certain immoveable property belonging to the son, in community, as their Lordships infer. So far as the parents are concerned, it purports to create suretyship on their part for the debt of the son, and its interest, and to hypothecate for that purpose certain specified items of immoveable property which were in community as between the parents; and it further contains an express consent by the mother to the hypothecation of that immoveable property by her husband in the appellant's favour, and an express renunciation of any rights, whether of property or hypothec, which she might have had, which could in any way come into competition with the security so created, whether by her own or her husband's act.

That is the nature of the instrument. It was passed, or purports to have been passed, in the afternoon of the 26th Jan. 1855, by a notary named Petitolerc, in the parish of St. Ambroise, and, as it is expressed, at the house of the son; the parish of St. Ambroise being, as it is stated in the papers, about eight miles from Quebec. It is countersigned by another notary, Gamache, who seems to have been connected in business with

Petitolerc, and early on the morning of the third day afterwards, the 29th Jan. it was duly registered in the proper office of registry, where it has since remained on record.

As has been stated, the suit was instituted in 1869, fourteen years afterwards. It was instituted by a notary named Louis Panet, a stranger to the transaction, claiming under a subsequent act of donation from the mother. At the time when the suit was instituted, nearly everybody who ever knew anything about the transaction was dead; both the notaries Petitolerc and Gamache were dead; both the parents, Joseph Falardeau and his wife, were dead; Joseph Falardeau the son, the principal debtor, was also dead; and the only survivors were Hermine Laveau, the wife of the debtor Joseph Falardeau the son, and the appellants, who were the secured creditors.

By the law of Lower Canada, a notarial act, *prima facie* at all events, is probative; that is, proves itself; or, in the language of that law, is "authentic;" and, to support it, no external testimony is necessary; the burden of proof for impeaching such an act rests upon the person impeaching it. The present respondent, therefore, M. Panet, has to satisfy the court that there is sufficient ground for setting aside this act. He alleges that he has done so in one or other of three ways. In the first place, in his original pleading, he impeached it as substantially fraudulent, alleging that neither Joseph Falardeau the father nor his wife ever appeared before the notary or acknowledged the act, or were parties to it in any sense, or had it read over to them. Not in his original pleading, but in a later stage of the cause, he superadded to that graver allegation, of actual fraud and fabrication, a suggestion that, even if that were not so, there were informalities appearing on the face of the instrument, with reference to the manner in which it was prepared and expressed and passed, which would deprive it of its probative character, and throw upon the mortgagee the burden of making out that it is a good deed by affirmative evidence of his own, which in this case he has not attempted to do. And, thirdly, it was suggested that, failing both these means of attack upon the deed, still, in point of law, it did not bind that title of the wife to the immoveable property in question, which M^r. Panet had derived from her act of donation.

Their Lordships will consider those objections in the order in which they have been stated. First of all, is there any ground made out for impeaching the *bona fides* of the deed, reserving, of course, the questions of form and the questions of law. Their Lordships are most clearly of opinion that there is no ground whatever for doing so. [His Lordship went through the evidence as to fraud, and continued:] That brings them to the question of form; and the first point of form is connected immediately with this last topic, as to the condition of the deed and the two pages 7 and 8 which are supposed—and for this purpose their Lordships assume that the grounds are sufficient for so supposing—to have been written after the writing of all or part of what is on pages 9 and 10. Is there any law which deprives the act of its authentic and probative character because those pages are not initialled? Their Lordships are unable to discover any such law. The French law contained in the Ordinance of Francis I., of Oct. 1535, to which Mr. Westlake referred *say*,

that in instruments, which their Lordships assume to include such an instrument as this, there shall be no blank left; everything shall be in writing *d'un datille*. The learned counsel have asked us to infer that that means the same thing as the expression *d'une seule contexte* which occurs in a recent French law; but their Lordships are not satisfied that the commentaries on the recent French law, or the text of that law, were intended to be interpretative of the word "datille" in the Ordinance of Francis I.; and unfortunately neither the counsel nor any dictionaries which their Lordships have been able to refer to have supplied the required information on that point. Well, at all events, it says it is to be written *d'un datille* without making any *apostille* in the margin or the text, or any interlineation, or leaving any blank; and if there be any such thing as that which ought not to be, that is to say, an *apostille*, interlineation, or blank, it must be repaired and set right at the end of the note; in fact, it should be initialled or verified by some form of certificate on the part of the notary. Well, as far as that law is concerned, if we inquire whether there is anything here to which it requires the notary's initials or certificate to be applied, their Lordships say they find no *apostille* in the margin or in the text, and no interlineation; for they cannot regard the addition of a particular page or sheet containing words occurring in their proper order and manner in the context of the deed, without interrupting any order which existed before, and without changing the effect of any prior coherent and rational context,—they cannot regard that as an interlineation either in the letter or in the spirit, or as an *apostille* in the margin of the text, whatever be the proper and exact meaning of that word. (a) Then comes the Canadian law, the Arrêt of the Council of State of 1733, which says that the notaries shall be bound to put their signatures, amongst other things, to approve and initial all *renvois* (it is admitted this is not a *renvoi*) and erasures by the parties, and so on. The letter of that law does not strike this case, nor does the spirit, as their Lordships think. The principle of these laws is the same with that which we are very familiar with in the case of wills; where that which appears to have been added, or altered, by way of erasure or interlineation, requires authentication, and otherwise would be presumed to have been subsequent to the execution of the instrument, the instrument without it being sensible and coherent. And their Lordships find that this is indeed the test laid down by some of the authorities cited on both sides; particularly in the case of *Savère v. Savère*, cited from Dalloz of 1851; where, upon the present French law, conceived in terms somewhat similar and the same in principle, it was made the very essence of the question whether the context was complete without the addition of the words in controversy. It appears to their Lordships that such a test applied to this case supports the instrument and not the reverse; because the sense is not complete, the deed is not coherent, without the pages which are objected to, and is so with them. This objection, therefore, as an objection of form, appears to their Lordships also entirely to fail. Then we come to the other objection of form, with respect to the place stated upon the face of the

deed as the place of passing the instrument. It is stated on the face of the deed that it was passed in the parish of Saint Ambroise, in the house of the son. Upon the subject of the place, the law relied upon is the Ordinance of Blois, Article 167,—“Notaries shall also be bound to state in their contracts the quality, abode, and parish of the parties, and the witnesses named in them; the house where the contracts were passed,” and so on. Now, if their Lordships had to determine, as a mere question of construction, the effect of those words, “the house where the contract shall have been passed,” they would be obliged to say, that the terms of that law do not expressly refer to a case where the acknowledgment or signature of some of the parties has been taken at one house, and the acknowledgment and signature of other parties at another house, and where the notary signs and passes the act, as far as his signature is the mode of passing it, after the last acknowledgment or signature. If their Lordships were obliged to express an opinion on those words, they are by no means prepared to say that they are not susceptible of the construction, that the proper place to be certified as the house where the contracts are passed is that in which the notary completes the contract by affixing his own signature, which in this case was done; and, if it were sufficient, it would remove the objection. Furthermore, the case cited by Mr. Bompas, of *Evanturel v. Evanturel* (L. Rep. 2 P. C. 462; 21 L. T. Rep. N.S. 4) before this tribunal, is in point as to the principle. There is clear and full evidence that what was done in this case was in accordance with the customary practice of notaries of Lower Canada, at all events at Quebec. Seven witnesses, notaries, were examined on the part of the appellants; all of them proved that this, or something similar, was their own practice and the practice to which they were accustomed; one of them proved that, according to his experience, it was the general practice of those with whom he had done business. No evidence was offered to the contrary, which is the more remarkable, because the next witness to those upon the record is the respondent himself, a notary at Quebec; and the first passage in his evidence is to the effect that the practice of notaries of Quebec is not to require the presence of the second notary when the act is passed. Their Lordships, under those circumstances, entertain no doubt that credit may be given to the witnesses who show in what sense this law has been practically understood and acted upon by the notaries of Quebec; and they are not at all prepared to say that a notarial act passed according to that practice therefore loses its authentic character. But beyond that, the passage cited by Chief Justice Dorion from Toullier (Vol. VIII. p. 140) is to this effect, that if upon the face of the Act there is a description which is shown to be incorrect, the consequence is not nullity, nor that the Act loses its notarial and probative character; but only that it must be proved that the place where it actually was passed was within the jurisdiction of the notary. The very same *media* of proof by which the respondent here attempts to show that what appears on the face of this act is inapplicable to the place where the sureties (using that expression for convenience and brevity only) assented,—that very same evidence shows that if they did assent, the place where they did so was within the jurisdiction of the notary. It may well be, that

(a) From the judgment of Ramsay J., in the Court below, it appears that *apostille* means a “marginal note.”

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according to Canadian law the appellants cannot use in their own favour the testimony which was extracted from them, or rather from Abraham Hamel, by the respondent; but the respondent has chosen to use it. He cannot use it to show that the act was not acknowledged by the parents at the house of the son, and exclude the context, which shows that it was acknowledged, according to that statement, elsewhere within the notary's jurisdiction; so that, in truth, the means relied upon by the respondent to discredit the deed on this point of form supply the deficiency, and show all that, according to the authority of Toullier, it was necessary to show. There is no other objection of form. Their Lordships are thus brought to the only remaining point: was or was not this instrument, which must now be taken as well executed, authentic and probative,—sufficient in law to bind the title which the respondent claims through the donation of the mother? Their Lordships think that, having regard to the terms of the law and the decisions upon it, they ought to hold that it was sufficient for that purpose. The matter stands thus. In 1808 Joseph Falardeau, the father, married his wife, and two instruments were then contemporaneously executed. By one of them, the immoveable property in question, with other things, was conveyed by way of donation by the wife's mother to the future husband and wife, that is, to Falardeau, and Josephite Savard. By the other, which was a marriage contract, Falardeau and his wife agreed, *inter se*, that they would live in community; that all immoveable as well as other property belonging to either of them at the date of the marriage should be brought into community; that it should, for the purposes of the community, be deemed moveable; and then there was a clause, called the clause of *reprise*, at the end, to the effect that when the community was dissolved by death or otherwise, the wife might, at her option, reclaim or resume all property brought in on her part clear and free from the debts and charges of the community; but with this qualification, that in any case in which she had bound herself, or *parlé* (which their Lordships understand to mean assented in any manner verbally or personally to a particular debt or charge), or had a judgment pronounced by some competent court against her; in those cases she was to rely upon and to have the benefit of the liability of her husband's estate, to supply what evidently that clause supposed she would lose; and should have, as from the date of the marriage, a hypothec upon her husband's estate for the fulfilment of that contingent obligation. The community still subsisted as to this immoveable property when the deed now in question was passed in 1855. Three years afterwards the wife elected to dissolve the community, and to take the benefit of this clause of *reprise*. The question is whether, having previously assented to this notarial act passed in favour of the appellants, she is or is not bound by the hypothec contained in that act. By the law of Lower Canada (it is not necessary to refer to the text) it is provided that a married woman shall not become surety for the debts of her husband; and it has been decided upon that law, in the case of *Jodoin v. Dufresne*, (3 L. C. Rep. 189) that all engagements, though with third parties and not creditors immediately of the husband, which the wife enters into concurrently with the husband, are to be treated con-

structively as his liabilities; that is to say, that the contract, whether it be of suretyship for somebody else or of any other kind, is to be treated as primarily his contract, and the wife as brought in by him to secure the liability which he is going to contract. Their Lordships wish it to be distinctly understood that they express no opinion upon the question whether that case of *Jodoin v. Dufresne* was well decided or not. It is not, in their opinion, now necessary to say a word which will detract from its authority, whatever that may be; but they also desire to say nothing which can be deemed to add to its authority. But, taking this to be good law, still the question remains, what the effect of that doctrine is upon this particular transaction? Now this transaction consists, as far as the appellants and the debtor are concerned, really of three parts. In the first part it is expressed that they pledge themselves as sureties for the payment of the son's debt. The law, as interpreted in that case, clearly and beyond controversy renders that null and ineffectual as far as the mother is concerned, but leaves it perfectly effectual and valid as far as the father is concerned. Next they purport, as such sureties, to hypothecate the immoveable property in question which was then in the community as moveable. The law again, their Lordships assume, would strike at that which they purport to do as sureties by way of hypothecation, so far as the wife is concerned, and would leave that part of the deed as only the husband's deed; but it would be, as far as his power over this property in community extended, a perfectly good deed, and valid and effectual, subject to what might follow from the clause of *reprise* in the marriage contract. There is a third part of the deed, which is not connected in like manner with the first or with the obligation of suretyship so far as the wife is concerned. On the contrary, it is expressed in words which show that the framers of it were well aware that it was necessary to deal there with a distinct matter, which might or might not be effectual, apart from the preceding context. In that portion of the deed the wife expresses her consent to the hypothecation of the immoveable property in question by her husband in favour of the creditors, and renounces in their favour all claims, whether by way of property or of hypothec, which she might otherwise have been competent to make to their prejudice. Does that consent and that renunciation fail because she could not make herself a surety, and because she could not hypothecate in the character of surety? Their Lordships see no reason for holding that it does fail. In that opinion they are fortified, as appears to them, both by reason and by authority. By reason, because the wife could only claim to disturb the husband's hypothecation by virtue of the clause of *reprise*, on which she acted two or three years afterwards, in the marriage contract. But that clause of *reprise*, if you look to its terms, does not enable her to resume or reclaim anything as against a creditor in whose favour she has consented to the act of her husband during the community; and their Lordships think there is no reason or authority for holding that the law, which was passed long after that contract, to prevent married women making themselves sureties for their husbands, could enlarge the effect of the clause of *reprise* or make it operative in the wife's favour as against the husband's power over the

community, in a case in which, according to the qualification expressed in its terms, it would not be so operative. It has been expressly so decided in Lower Canada in the case of *David v. Gagnon*; (14 L. C. Rep. 110), and although that appears to be the decision of a single judge, their Lordships see no reason to doubt that it was well decided, and they have no reason to suppose that it has ever since been called in question. The other authorities also go to the effect that, although there may be in a deed an ineffectual attempt to bind a married woman by words of obligation, yet a renunciation of this kind in the same deed is perfectly good. Two decisions of the Courts of Lower Canada—no doubt by a majority of judges in each case, and I think one Judge changed his mind, (Chief Justice Duval)—are referred to in the Record (*Boudria v. Mc Lean*, 6 L. C. Jurist; and *La Gorgendière v. Thilandeau* not reported, decided in March 1871), both of which determined that the renunciation and the consent of the wife to her husband's act, as against such rights as she might have under a marriage contract, whether of hypothec or of *reprise*, may be good, although she could not bind herself by a direct contract, which she had attempted to do in the same deed. Their Lordships see no reason to differ from those decisions. It, therefore, is unnecessary to go into the further consideration of the question whether a clause of *reprise* may or may not be so conceived as to destroy the husband's power over mobilised immovables of the wife *durante communauté*. Pothier (*Communauté*, No. 410) evidently thought the better opinion was that no clause of *reprise* would do so, for that the effect of mobilisation and the effect of community taken together required that, while the community subsisted, the husband should be able to deal with the immovables as moveables; but at the same time, recognising some difference of opinion among jurists on the subject, he suggested that clauses should be worded so as to remove that doubt; and this clause, in fact, has been so worded. The other authority, Rénusson (*Traité des Propres*, sect. 8, No. 26), relied upon by the respondent, most distinctly recognises the general power of the husband, during the community, not only to sell, but to hypothecate the wife's immovables under such circumstances; and all that can be said to the contrary, as far as he is concerned, is that he saves, and does not determine the question what the effect of a clause of *reprise* might be, supposing it were expressed in terms which clearly were intended to give the wife a right paramount to any hypothecation or alienation by her husband. The authorities, as far as they go, upon this subject, appear to their Lordships to be entirely one way, and that is against the respondent. On the whole case, they are of opinion that the present appeal must be allowed, and with the usual consequences as to costs. Their Lordships will therefore humbly recommend Her Majesty to reverse the judgment of the Court of Queen's Bench for the Province of Quebec, with costs, and to affirm, with costs, the judgment of the Superior Court.

Solicitors for the appellants, *Bischoff, Bompas, and Bischoff*.

Solicitors for the respondent, *Ashurst, Morris, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Dec. 13 and 14, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRETT, J.J.A.)

BOUCICAULT v. CHATTERTON. (a)

Drama—International copyright—First representation in America—Publication—Injunction—3 & 4 Will. 4, c. 15, s. 1; 5 & 6 Vict. c. 45, s. 20; 7 & 8 Vict. c. 12, s. 19.

The plaintiff, a naturalised American, was the author of a drama which had been first represented in America, and subsequently, with the plaintiff's consent, at the defendant's theatre in England. The drama had not been printed for publication. The defendant afterwards having proposed to represent the play again in London, without the consent of the plaintiff, the plaintiff brought an action against him to restrain him from so doing.

Held (affirming the decision of Malins, V.C.) on the authority of Boucicault v. Delafield (9 L. T. Rep. N. S. 709; 1 Hem. & Mill. 597) that the drama had, within the meaning of 7 & 8 Vict. c. 12, s. 19, been first published out of Her Majesty's dominions, and that the plaintiff had, therefore, no exclusive right of representing it in England. A dramatic piece is published by being publicly represented.

THIS was an appeal by the plaintiff from a decision of Malins, V.C., refusing an injunction to restrain the defendant from representing, or causing or permitting to be represented, at the Adelphi Theatre, or elsewhere, without the previous consent of the plaintiff, a dramatic work called "The Shaughraun."

The proceedings in the court below are fully reported, *ante* p. 541.

Glasse, Q.C. and Romer for the appellant.

Higgins, Q.C., Terrell, and Poulter for the defendant.

The following cases were cited:

Boucicault v. Delafield, 9 L. T. Rep. N. S. 709; 1 Hem. & Mill. 597;

Macklin's case, Amb. 694;

D'Almaine v. Boosey, 1 Ex. Ch. 299;

Low v. Routledge, 13 L. T. Rep. N. S. 420; L. Rep. 1, Ch. App. 42;

Jefferys v. Boosey, 4 H. of L. Cas. 815.

JAMES, L.J.—Now that the matter has been fully argued out, I am of opinion that it is impossible for us to arrive at any other conclusion than that which was arrived at in 1862 by Wood, V.C., and also arrived at by Malins, V.C., who felt he was bound by the decision of Wood, V.C., and expressed his concurrence in it. Now take sect. 19 by itself. I think nobody could have any doubt whatever about that section. It is, that "neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, or designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid which shall, after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein exclusively or any

(a) R. printed by E. S. ROOME, Esq., Barrister-at-Law.

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exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act." Mr. Glasse has pressed us very much, first of all on this general proposition, that it cannot be implied that the Legislature meant to repeal the statute of Will. 4 which has been so carefully preserved by the statute 5 & 6 of the Queen. There is no repeal of the statute of Will. 4. That statute remains, and the statute of Victoria remains, except so far as it is interfered with in a particular case for a particular purpose; and the particular purpose of this section, beyond all doubt, is, in my view, to compel foreign countries to give English authors and dramatic authors, for pieces first published in England, rights similar to the rights given to their own people. They say, if you give rights to our people we will give rights to your people; but if not, your people shall not have any rights whatever under our Copyright Acts, or Acts of the nature of copyright Acts; and, for the purpose of securing that, they treat the author of a book, or the author or composer of a dramatic piece or musical composition, and so on, first published abroad, as being a person making himself, for that purpose at all events, whether he was naturalised there or not, a foreign author or foreign composer, or foreign sculptor, as the case may be. Therefore, there is no repeal of the Act, nor are we impressed by any notion that this clause implied the repeal of the statute which it was not really intended to repeal. It has a limited purpose only, which limited purpose is expressed in words which must *prima facie* give us the meaning of the word "published," which is to be that sort of thing which you can predicate of a book, or of a dramatic piece, or of a musical composition, and which you may predicate of a print or article of sculpture, or any other work of art, that is to say, make public by those means which are appropriate to the particular article or the particular thing. A book is published by being printed; a dramatic piece or musical composition is published by being publicly represented; a print or article of sculpture is published, for the purposes of this Act, by being made the subject of copy in casts or prints; and I should say with regard to sculpture and other works of art being multiplied by casts or other copies, it would depend in each case upon that which applies to the particular thing if it be for sale or public use. That would be, as it appears to me, the natural meaning of the words of that section, and that is the meaning which is attributed to it by the Vice-Chancellor. Mr. Glasse's main argument is that the word "published" has obtained, with respect to dramatic representation, a particular meaning affixed to it by previous decision, and so affixed to it that we should introduce into the section those additional words: "Provided always that with respect to any dramatic performance this section shall not apply unless it shall have been first printed and published out of Her Majesty's dominions," which would be very difficult indeed to do. He said there are a series of decisions, with which decisions I quite agree, but when we look at them there really is no decision whatever upon the meaning of the word "published" as used in what Mr. Glasse has called "this code of laws." The cases relied upon are cases in which the word "published" was used in the sense Crompton, J., referred to in the

House of Lords in the case of *Jeffery v. Boosey*, "first published in the sense of being made *publici juris*," that is to say, being made common property of everybody, so that the author has lost all property in it in this country. The cases, beginning with *Macklin's* case, and going down to the case before Lord Lyndhurst, do not, in my view of the matter, afford any such interpretation of the word "published" in the series of laws relating to copyright, as would enable us, or entitle us, in any way to apply to this section any other than the natural literal meaning of the words as they would be understood by an ordinary Englishman reading the section, or an ordinary foreigner who could speak English and could understand it, reading it for the purpose of ascertaining which rights he would acquire under it. I am of opinion we are bound by it, and that the decision of the Vice-Chancellor is right.

BAGGALLAY, J.A.—Having entertained considerable doubt during a great portion of this case as to the correct view to be taken of it, I propose to add a few words, now that I have come to the same conclusion as the Lord Justice, as to the reasons which influenced me. The plaintiff insists that, being admittedly the author of the play in question, the protection claimed by him in the bill in this suit is secured to him by the Act of 3 & 4 Will. 4, c. 15; and those remedies to which he is so entitled are not in any way affected by the statute of 5 & 6 Vict., or 7 & 8 Vict. c. 12. The defendant, on the other hand, insists that whatever might have been the rights and remedies of the plaintiff, had the 7 & 8 Vict. not been passed, the provisions of that statute are imperative and apply to the case, and negative any such rights as the one claimed by the plaintiff in his bill. Now the words of the 19th section are very clear and distinct if taken by themselves. [His Lordship then read the section, and continued.] The preamble of that Act states that under the then existing Acts, particularly the International Copyright Act, Her Majesty has no power "to confer any exclusive right of representing or performing dramatic pieces or musical compositions first published in foreign countries, upon the authors." Then it proceeds to make certain provisions which, if complied with, would entitle the authors of a dramatic piece to the exclusive performance of it, although it had been previously published. It is not suggested in this case that any of those provisions have been complied with, and we have therefore to consider the question what is meant by the words "first published out of Her Majesty's dominions." I do not think the difficulty is removed by going back to the statute 3 & 4 Will. 4, because all we find provided there is that "from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatever, the pieces so composed." There, again, we have the same difficulty. Now we have no indication of what the meaning of the word "published," as used in that Act of Parliament is. We find in the passage which I have just cited, the words, "published, printed, and

represented," sometimes used with the conjunction and sometimes not. Therefore we are left to arrive at the best conclusion we can upon the arguments and reasons which can be had recourse to, as to what is the meaning of the word "published" in that statute. Some authorities have been referred to by Mr. Glasse—*Macklin's* case, and the subsequent case of *Boosey v. D'Almaine*—for the purpose of showing that the mere representation on the stage was not a publication. Both of those cases were decided before the passing of the Act of Will. 4, and therefore they can give us no insight into the precise sense in which the word may have been used in that statute. Now, failing on that statute, there comes the intermediate statute, the 5 & 6 Vict., and it was on the contents of the 20th section of that Act of Parliament that I, for some time, had doubts as to the proper way of dealing with this case. The 20th section follows upon a previous section which had conferred on the authors of books an extended term within which they were to have the copyright, and that extended term was to date from the period of the first publication of the book. Sect. 20 provides that the author of a dramatic piece shall have protection for a corresponding period. When it is said that the author of a dramatic piece shall have protection for the same term as that which the author of a book shall have, it becomes necessary to say what is to be deemed the first publication of a dramatic piece, corresponding or equivalent to the first publication of a book. It was there provided that the first public representation or performance of a dramatic piece should be deemed equivalent in the construction of this Act to the first publication of any book. At first it struck me that the words "construction of this Act," instead of "for the purposes of this Act," were in favour of the plaintiff; but further consideration has led me to think the contrary. If the words, "for the purposes of this Act," had been used, there would have been an implied meaning that it was for that Act only; but using the words "in the construction of this Act," it merely was introducing a definition of what was to be considered the first publication of a dramatic piece when it was necessary to ascertain the term during which the dramatic right was to continue. As it now appears to me, there is certainly no inference to be drawn that it was to be limited to the construction of that Act for the purposes of that Act; but, on the other hand, it does throw considerable light on my mind now, as to what was the meaning of the Legislature in using the words "first publication." It gives as regards the meaning of the words "first publication" that definition which would ordinarily and usually be recognised as the meaning of it. It appears to me, therefore, having regard to the consideration which I have just now mentioned, that the 7 & 8 Vict. is imperative, and that it deprives the plaintiff of any right, if he had any right under the other statutes.

BRETT, J.A.—After the arguments we have heard it cannot be said by anyone that the interpretation of this statute is easy; but it seems to me to be admitted—at all events it cannot be denied—that if the word "published" has to be read in its ordinary sense as a thing made public, that then the plaintiff is directly within the 19th section. Therefore the question must be whether the word "published" in the 19th section is to be

construed according to its ordinary comprehensive meaning, or whether the word in that statute is to have a limitation placed upon it. The limitation which must be put upon it, as I apprehend, in order to carry through the argument which has been addressed to us on behalf of the plaintiff, must be a somewhat extensive one, or it must be limited to this extent that with regard to English authors or composers of any dramatic piece or musical composition, the word "published," although they act their play in a country abroad, shall, as to them, not be interpreted according to its ordinary sense, but according to the limited sense of published by printing. Now, in order to come to a conclusion, it seems to me always necessary to consider the subject matter with which one is dealing. The subject matter with which we are dealing here is a dramatic composition. A dramatic composition is different from many compositions, inasmuch as it can be made use of by the owner or anybody else by publishing it in the sense of printing it and distributing it as a written composition or a book. It may also be used by its author or anybody else by means of having it acted on the stage of a theatre. If the author be an Englishman no doubt he has certain rights given to him by the statute of William, but a foreign author has no rights at all under the statute of William. Therefore if a foreign author's play was acted abroad and afterwards it came to be acted here, he could claim no protection in England at all by acting it abroad. It is admitted that the foreign author had, so far, made his play *publici juris* in England, and therefore anybody in England might act it here. It is said that an English author, although he allowed his compositions to be acted abroad, did not come under the same difficulty, because he was protected by the statute of William. That may be, and although I have some doubts about whether the limitation which has been contended for does apply to the statute of William, I will for a moment, assume that it does. In the case of an Englishman, although his piece was first acted abroad, I will assume he might have the protection here given by the statute of William, but a foreigner had certainly not that protection. Then if that be the state of things before the statute of 7 & 8 Vict. c. 12, you have two sets of people to deal with in regard to these dramatic compositions: that is, foreign authors who had no protection in England, and English authors who might first of all publish their pieces or have them acted abroad, or who, for the purposes of the moment, we will say, would have protection under the statute of William. The statute of Victoria begins by giving the Queen power to give protection to foreign authors and dramatic composers; and that is done under sect. 5, which has regard to their protection against performances. With regard to their protection against publication by printing, I apprehend that that protection is given to them, or the power to the Queen is given under other sections, and not under sect. 5. There the power given is that where the authors of dramatic pieces have first publicly represented or performed them in any foreign country, the Queen shall have the power of giving them sole liberty of representation or performing the same in any part of her Majesty's dominions. You are dealing with a statute, therefore, which is dealing with several kinds of things to be protected which may

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be published in different ways; and you are dealing with different persons—with foreigners and with Englishmen. Then we come to the 19th section, and we find the words are perfectly general, "And be it enacted that the author of no dramatic piece, or musical composition, which shall, after the passing of this Act, be first published out of her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act." Now, it is said that the construction of the word "published" ought to be restricted to the meaning which is said to have been affixed to the statute of William. If so, the word "published," when applied to English authors, must have one meaning, and another when applied to foreign authors under precisely similar circumstances, except that they are foreign and not English. It seems to me to be contrary to the common canon of the construction of statutes, to introduce into this statute such a limited construction as that contended for, namely, that in the case of English authors "publication out of Her Majesty's dominions shall not mean by representation." That is to introduce words which we have no right to introduce unless there be something in the nature of the case which makes it obvious that such must have been the object of the Legislature. That object is sought to be found by saying it is unjust to take away the right of an English author. I see nothing contrary to public right and justice to say that if an English author will go abroad and represent, or allow to be represented, his composition for the first time abroad, that he should be put in the same position as a foreigner who has done the same thing. I see nothing unreasonable or unjust in that. If that be so, these words must have their natural construction in this section, and they must apply to Englishmen as well as to foreigners. Then the ordinary meaning of the word "published" is "being made public," and when you apply that to a dramatic composition, that dramatic composition is made public the moment it is represented or acted. This is made common both to Englishmen and to foreigners, where Englishmen will have their plays first represented abroad. If it is first represented in England, they will not be under this statute at all, but they will be under the statute of Will. 4 and the other statute whatever may be the meaning of it.

Appeal dismissed with costs.

Solicitors for the plaintiff, *Lewis and Lewis.*

Solicitor for the defendant, *Horace W. Chatterton.*

Jan. 11, 12, and 13.

(Before JAMES, L.J., and BAGGALLAY and
BRAMWELL, J.J.A.)

WARNER v. MURDOCK; MURDOCK v. WARNER. (a)

Practice—Trial by jury—Action in Chancery Division—Judicature Act 1873, ss. 29, 30, 37—Rules of Court 1875, Order XXXVI., rr. 1, 4, 8, 16, 29—Rules of Court, Dec. 1876, r. 4.

Under the new practice a judge of the Chancery Division cannot try a case with a jury, but when an action in the Chancery Division has been

ordered to be tried before a judge with a jury, it must be set down in the general list to be tried before a judge of one of the common law divisions, at the London or Middlesex sittings for trials by jury, or at the assizes.

Decision of Jessel, M.R., affirmed.

THIS was an appeal from a decision of Jessel, M.R.

The first of the above actions was brought by the trustees of the United Kingdom Temperance and General Provident Institution against the executors of John Turner, deceased, praying that a policy of insurance which had been effected upon the life of their testator might be declared void and be delivered up to be cancelled on the ground that it had been obtained by misrepresentations.

The second action was brought by the executors against the trustees of the institution to recover the amount secured by the policy and interest thereon.

The two actions were consolidated, and the Master of the Rolls ordered that the consolidated actions should be tried before a special jury.

Application was then made to his Lordship for an order that the actions should be tried before himself with a jury, but he followed the decision of Hall, V.C. in *Clarke v. Cookson* (34 L. T. Rep. N. S. 646; L. Rep. 2 Ch. D. 746) that a judge of the Chancery Division cannot try a case with a jury, and refused the application.

From this decision the plaintiffs in the first action appealed.

Chitty, Q.C. and Kekewich, for the appellants.—The jurisdiction which the old Court of Chancery possessed under Lord Cairns' Act and Sir John Rolt's Act to try causes itself with a jury has not been taken away by the Judicature Acts, but has been transferred to the Chancery Division of the High Court. The Judicature Acts intended the jurisdiction of the judges of all the divisions to be in all respects equal, and the rules of court make no distinction between the modes of procedure in the different divisions, with the special exception of the Probate and Admiralty Division. The rules of court of 1875 show that it was intended that judges of the Chancery Division should try their own actions with a jury. Rule 1 of Order XXXIX., and rules 5 and 6 of Dec. 1876, prescribe the mode in which applications are to be made for new trials only with regard to actions in the three common law divisions, therefore, it was clearly intended that trials by jury in actions in the Chancery Division should take place before the judges of that division, no provision being made for such applications in actions in the Chancery Division. If it be true that all actions, to whatever division they belong, are, if tried by jury, to be tried at the assizes, or at the London or Middlesex sittings, what right has the Probate Division to try questions of fact itself with a jury as it frequently does? Rule 4 of Dec. 1876 is strongly in our favour. It provides that "where in any action in the Chancery Division the action, or any question at issue in the action, is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division." The necessary inference

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rence is that the judges of the Chancery Division can try their own actions with a jury. They cited:

Clarke v. Cookson, 34 L. T. Rep. N. S. 646; L. Rep. 2 Ch. D. 746;

Cannot v. Morgan, 33 L. T. Rep. N. S. 402; L. Rep. 1 Ch. D. 3;

Judicature Act 1873, ss. 16, 22, 29, 30, 33, 37;

Rules of Court 1875, Order XXXIX., r. 1;

Rules of Court Dec, 1876, rr. 4, 5, 6.

Sladen, for the respondents, was not called upon.

JAMES, L.J.—I am of opinion that the order of the Master of the Rolls cannot be disturbed. This is really not a question of jurisdiction at all. Whatever jurisdiction was formerly possessed by the Court of Chancery is now vested in the High Court of Justice. The only question before us is one of procedure, and no one has any vested right in any particular kind of procedure. A suitor has no more right now to require that his case should be tried by a judge of the Chancery Division than he formerly had to require it to be tried by a particular judge of the Court of Chancery, or to prevent its being transferred from one judge to another. The question where it is to be tried depends upon what is the best mode of dealing with the matter. Under the present practice all kinds of actions may be brought in the Chancery Division. A plaintiff may begin his action in the Chancery Division, but until the pleadings are complete and the action is ready for hearing, the judge has nothing whatever to do with it. When a case is ready for hearing it is wholly immaterial by what officer of the High Court it was entered for trial; that has nothing to do with the question where it is to be heard. Order XXXVI., rule 1, provides that there shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the place where he proposes the action shall be tried, and that where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. It seems to me that exactly the same course is to be pursued in all the divisions of the High Court. If the case is a country case, it should be tried at the assizes; if a London case, it should be tried at the London sittings; if a Middlesex case, at the Middlesex sittings. All the actions for trial should be set down in one general list, without regard to the division in which they have been commenced, and each action should be tried by that particular judge to whom the duty may be allotted of trying actions upon the day on which it comes on in its turn for trial. That appears to me to be the plain construction of the Act and the rules, and I think there is no difficulty whatever in carrying it out. The whole fallacy of the argument urged on behalf of the appellants is in supposing that a plaintiff in the Chancery Division has a right to choose his mode of trial, a right which no other plaintiff has.

BAGGALLAY, J.A.—I am of the same opinion. The Master of the Rolls was of opinion that this was a proper case to be tried by a jury, and the question now to be determined is, whether, on the construction of the Judicature Acts and Rules, it ought to be tried before the Master of the Rolls or to go into the general list of actions for trial at the London or Middlesex sittings. I think that if the sections of the Acts be considered in con-

nection with the Rules, it becomes clear that it was the intention of the Legislature that all actions which are to be tried by jury, and which are not to be tried at the assizes, should be set down in one list for trial in London or Middlesex. [Having referred to ss. 16, 22, 23, 29, and 30 of the Judicature Act 1873, his Lordship continued:] The 30th section, providing for sittings for trial by jury in London and Middlesex, is perfectly general in its nature, and makes no distinction between actions arising in the Chancery Division and actions arising in other divisions. Indeed, up to that section the Act contains no provision for the separation of the High Court into divisions. That is done by the 31st section, which provides that there shall be in the High Court five divisions, consisting of the judges thereafter named. Then the 37th section provides that, subject to any arrangements which may be from time to time made by mutual agreement between the judges of the High Court, the sittings for trials by jury in London and Middlesex and the sittings of judges of the High Court, under Commissions of Assize, shall be held before judges of the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court; but that it shall be lawful for Her Majesty to include in any such commission any ordinary judge of the Court of Appeal, or any judge of the Chancery Division to be appointed after the commencement of the Act. The 37th section must apply to all the trials by jury which had been previously provided for. This view seems to me to be confirmed by the provisions of Order XXXVI., rule 1 of which has been already referred to. Rule 8 provides that "notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is entered for trial," and rule 16 provides that "the lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial, without reference to the Division of the High Court to which such actions may be attached." That rule contains no distinction; it applies to the Chancery Division equally with the other divisions. I think, therefore, upon the construction of the Act and the Rules that the intention was that a trial by jury should be held before a judge of one of the common law divisions, from whatever division the action might come, and the inconvenience of a trial of a Chancery action before a judge of a common law division would be no greater than that of a trial of a Queen's Bench action before a judge of the Exchequer or Common Pleas Division. It was urged that the Rules contained no provisions for the making of applications for new trials in actions attached to the Chancery Division, and that this showed that the other provisions were not intended to apply to actions in that division. But that was because the old practice of the Court of Chancery was intended to remain in that respect, the application for a new trial being made to the judge to whose court the action is attached, or to the Court of Appeal. I think the view taken by the Master of the Rolls is not only consistent with the Act and the Rules, but also that it would most promote the public convenience that all trials of actions should be heard in one place.

BRANWELL, J.A.—I am of the same opinion. I

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only wish to make two observations. It has been argued on behalf of the appellants that the provision of sect. 37, that trials by jury shall be held before judges of the three Common Law Divisions shows that it was intended to apply only to actions commenced in those divisions. If that were so, one could hardly see why there need have been a provision that the cases should be tried by judges of those divisions only; the provision seems to imply that they would have to try cases coming from the Chancery Division also. The other observation is this: The new rule 4 of December 1876, provides that "where in any action in the Chancery Division, the action, or any question at issue in the action, is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division." It does not follow that this rule assumed that there were to be jury sittings in the Chancery Division in London or Middlesex, for there were sittings of that division for the trial of actions without juries. That rule does not apply to a case where no order is made for the trial of the action, but where it goes, so to speak, of its own accord to be tried at the Middlesex sittings by reason of there being no local venue. The rule only applies when the action is ordered to be tried, as under Rules 6 and 29 of Order XXXVI. In those cases the judge is to state a reason for making the order. But that does not apply when the case goes to be tried of its own accord. I am of opinion, therefore, that the order of the Master of the Rolls must be affirmed.

Appeal accordingly dismissed with costs.

Solicitor for the appellants, *C. Gatliff*.

Solicitor for the respondents, *Ottaway*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, Nov. 20, 1876.

(Before the MASTER of the ROLLS.)

HILLIARD v. FULFORD. (a)

Administration suit—Partial distribution of estate—Executors' mistake—Costs.

A testator by his will gave his residuary estate to his executors upon trust to divide the same equally among his grandchildren on their respectively attaining twenty-one. There were six grandchildren, but the executors mistakenly supposing one grandchild not to be entitled under the will, divided the residue into five shares, paid to four of the grandchildren their shares, and retained one share for the fifth grandchild, the plaintiff, who, on attaining twenty-one, filed a bill for the administration of the testator's estate. A decree was made declaring that the sixth grandchild was entitled to a share of the residue, and on taking the accounts it was found that the executors had applied part of the residue in the repair of houses specifically devised, and that a larger sum was due from them than they had

admitted, and that the four grandchildren who had received their shares had been overpaid.

Held, that the costs of the administration suit ought to be paid out of the whole estate, as if no distribution had taken place, so as to charge the executors with the share of costs attributable to the distributed shares.

THIS was a suit for the administration of the estate of Thomas Prewitt, who died on the 22nd June 1857, and the cause now came on for further consideration.

The testator by his will, dated the 11th Dec. 1855, gave his residuary real and personal estate to his executors upon trust to sell and convert the same, and to divide the proceeds equally amongst his grandchildren on their respectively attaining twenty-one. There were six grandchildren; but the executors mistakenly considering one of them, Harold Hilliard, a posthumous child, not to be entitled under the will, divided the net residue, amounting to 3750*l.* into five shares, amounting to 750*l.* each, and paid the four adult legatees their shares (who thereupon executed a release to the trustees), and retained the remaining 750*l.* as the share of the infant grandchild, Clement Hilliard, which had since been paid into court. The bill was filed by Clement Hilliard against the executors and Harold Hilliard, and at the hearing of the cause a decree was made declaring that Harold Hilliard was entitled equally with the other grandchildren, and the usual accounts and inquiries were directed.

On taking the accounts the executors were charged with a sum of 1095*l.*, which they had expended out of the general personal estate on the repair of houses which had been specifically devised by the testator.

The question now arose whether the costs were to be thrown upon the two remaining shares, or whether they were to be paid as if no distribution had taken place.

Chitty, Q.C. and *Nalder*, for the plaintiff, contended that the executors ought to pay the costs of the suit, and they referred to

Mackenzie v. Taylor, 7 Beav. 467; and
Thompson v. Clive, 11 Beav. 475.

Waller, Q.C. and *Dauney*, for the executors.

Street, for Harold Hilliard.

JESSEL, M.R.—The case is one of some novelty, and though I think it must have previously occurred, I am not aware of it. The question is, what is the proper rule as to costs where the executors have *bond fide* divided the residuary personal estate, but only partially—partially in this sense, that some of the legatees having attained their specified ages were entitled to call for their shares, and the executors upon being asked for them, made up their accounts and paid them? The facts, so far as it is necessary to state them, are few and simple. There were six residuary legatees. The executors made a mistake as to the construction of the will, and thought there were five only, and they made up their accounts on that footing. When four of them attained the age of twenty-one—the fifth being still an infant—they divided the estate and paid over what they thought was four-fifths of the residue, and retained the infant's share. Afterwards, the infant, being still an infant, filed a bill to have the accounts taken and made this other

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

child, who was supposed not to be entitled, a defendant. The cause came to a hearing before Lord Selborne, sitting for the Master of the Rolls, and he decided that the executors were wrong in their construction of the will, and that all the six children were entitled to participate. So that that was error No. 1. They certainly divided the estate upon a wrong footing. No order was made as to costs. The accounts were taken in chambers, and it was found that they were wrong also in their discharge. They had claimed about 1000*l.* in their discharge for money which it turned out had really been laid out by them, but through some mistake had been laid out in repairing houses on real estate which belonged not to the residuary legatees, but to specific devisees. The mistake was set right in chambers, and they were charged with the sum of 1000*l.*, so that on taking the accounts the result was that their accounts were substantially wrong, and they were also wrong as regards figures; but there was no imputation of dishonesty or intentional impropriety of conduct upon the part of the executors. The suit now comes on for hearing on further consideration, and it seems that after paying all the costs of the suit, the result will be that they have paid probably more than their shares to the adult residuary legatees who received their shares; so that if the estate were now to be distributed they would not get so much as 750*l.* The question is, who is to make good the difference? That is really what it comes to. It appears to me that, under such circumstances, the right rule is that the executor who made this mistake in the distribution of the fund, cannot be allowed to say that the accounts are substantially correct, that they have made a fair distribution, and that the plaintiff should pay the costs of the suit. It is clearly a case in which the suit has been properly instituted. I quite agree that where executors have made up their accounts carefully and in a proper manner, and have kept vouchers so as to have them always ready to be seen, and have divided the residue partially—that is, given the shares to those who are adult without suit, it would be unreasonable to make them pay a proportion of the costs of a suit subsequently instituted by some of the other residuary legatees, for the result would be that no executor would ever divide an estate without instituting a suit. They would say, if there are ten residuary legatees, nine of whom are of age and one is an infant (and it might be that one was a married woman, with a settlement or anything of that kind), and if at any subsequent period somebody may institute a suit, and say all the costs are to be thrown upon the estate in the same manner as if no distribution had taken place—the executors would say, we shall have to make good out of our own pockets the share of costs attributable to each residuary legatee. It is obvious that such a rule would be in the highest degree inconvenient. To use a common phrase, it would throw every estate in the kingdom into Chancery, which no one would desire, least of all the judges of the Chancery Division. Now that being so, I think the rule must be in such case, that where the executors have properly distributed the estate, and are ready to show the accounts to the remaining legatees, and also proper vouchers, or to the guardians of an infant, if there are any infants, and a suit is then instituted and it turns out that the accounts are substantially

correct, the costs of that administration suit ought to be borne by the shares of the parties who institute and take the benefit of the litigation; that is, the remaining shares. And as I read the authorities, namely, the cases of *Mackenzie v. Taylor* (*sup.*) and *Thompson v. Olive* (*sup.*) both of which were before Lord Langdale, that was the view he took of the law, although it is not so clearly stated as it would be desirable in order to show what the rule is. But where, as in this case, the accounts are substantially incorrect, and where the executors have made two most serious mistakes, one by choosing to take upon themselves the office of the court in construing an obscure will, and construing it wrongly, and another in laying out as much as 1000*l.* in repairing freehold houses which did not belong to their *cestuis que trust*, I think the executors cannot be allowed to say that the distribution is a proper distribution, and that it ought to avail them when the accounts come to be subsequently taken. I think they must stand in the same position as if there had been no distribution at all. Therefore, I think the right order is that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the plaintiff and the other defendant who have received nothing, will be entitled to exactly the same shares out of the residuary estate as if no distribution had taken place, and the other residuary legatees had been made defendants. Of course you cannot make the latter pay back anything. There is no pretence for saying that they can be compelled to come in and contribute. Therefore the difference, which I think from what I have heard will not be large, will, in substance, have to be made good by the executors who wrongly distributed the estate. Those who have made the error will have to pay for it. In this way I think justice will be done. The simplest mode of carrying it out will be to order the defendants, the executors, to pay the costs of the plaintiff and the infant defendant, and to make good the amount which will be necessary, after allowing their own costs, charges, and expenses to be taxed in the usual way. The residue will then be ascertained, and they will make the amount of the two-sixths good by payment into court of the balance found due. When that is ascertained it can be inserted in the order without going to Chambers. The interest will be at the rate of 4*l.* per cent. from the time of distribution giving credit for any interest the executors have paid.

Solicitors: E. Woodard; Austin De Gea and Harding.

Thursday, Nov. 2, 1876.

Ex parte ADAMS. (a)

Articled clerk—Services under articles—Interruption of service—Completion of term after expiration of articles—6 & 7 Vict. c. 73, s. 3.

In Sept. 1870, a clerk was articled to his father, a solicitor, for five years, and served under those articles up to Oct. 1873, when his father assigned his services to D. for fifteen months, and, having served D. for that period, the clerk returned to his father and served under the original articles until Sept. 1875. The Court of Queen's Bench having held that the service with D. could not be

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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reckoned as part of the period of five years' service required by the statute, the clerk served his father for fifteen months further, but without fresh articles.

Held that the clerk had not duly served under a contract in writing as required by 6 & 7 Vict. c. 73, s. 3, and that he must enter into fresh articles for fifteen months, and complete such service, before he could be admitted, but that, under the circumstances, he might be allowed to go in for the final examination.

THIS was an application on behalf of Henry Alfred Adams, an articled clerk, that he might be admitted by the Incorporated Law Society to the final examination preparatory to his being admitted as a solicitor, under the following circumstances:

On the 6th Sept. 1870, Mr. Adams was articled to his father, Henry Cranston Adams, a solicitor, for the statutory period of five years, and he served continuously under these articles up to the 2nd Oct. 1873, when by an indenture of assignment, Mr. H. C. Adams, at the request of the applicant, assigned all the right, title, interest, duty, service, and demand, which he had in or to the applicant, to Mr. T. M. Dalton, a solicitor, for fifteen months from that date. The applicant served Mr. Dalton during that period and then returned to the service of his father, and continued to serve him under the original articles until the expiration of the five years. The applicant then applied to the Court of Queen's Bench for a rule that his service during the fifteen months with Mr. Dalton should reckon as part of the period of five years' service required by the statute in order to entitle him to be admitted as a solicitor, but the court refused the application, and held that he had not, to the extent of the fifteen months, fulfilled the conditions of the statute (*Ex parte Adams*, 32 L. T. Rep. N.S. 454; L. Rep. 10 Q.B. 227).

The applicant then returned to his father's office and served his father for fifteen months further, but without fresh articles, and he now applied to be admitted to examination.

C. H. Turner for the applicant contended that the service for the further fifteen months ought to be considered to have been under the original articles. He referred to:

Ex parte Moses, 29 L. T. Rep. N.S. 420; L. Rep. 9 Q. B. 1.

JESSEL, M.R.—The 3rd section of the statute (6 & 7 Vict., c. 73), prohibits the admission of any person unless he shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years. Here although he has served during the required term, yet for the last fifteen months, the service has not been under a written contract. I think the applicant may, however, be examined, subject to the Incorporated Law Society not objecting, but he must enter into fresh articles for fifteen months, and complete such service before he can be admitted.

Solicitors, *Whitakers and Woolbert*.

Thursday, Jan. 11.

(Before Vice-Chancellor MALINS.)

THE REPUBLIC OF COSTA RICA v. ERLANGER. (a)

Contempt of court—Violence and abusive language—Motion to commit—Cons. Ord. XLII. r. 2.

Whenever in the process of litigation any of the parties to or conducting it are guilty of conduct which renders it impossible for the litigation properly, fairly and moderately to be carried on, that is a contempt of the court in which that litigation is taking place.

THIS was a motion that Mr. G. M. Clements, the solicitor for Messrs. Knowles and Foster, two of the defendants in the suit, might stand committed to prison for contempt of court for using violence and abusive language to Mr. A. C. Edwards, the solicitor for the plaintiffs, during the execution of his duty as a solicitor and officer of the court in the conduct of the proceedings in the suit.

The circumstances under which the assault, the subject of the motion, arose were as follows: By an order in the cause dated the 5th June 1874, it was ordered that Messrs. Knowles and Foster should produce certain documents at the office of Mr. G. M. Clements for inspection by the plaintiffs, and in pursuance of such order, Mr. Edwards from time to time attended for the purpose of such inspection. Before, however, the inspection was completed, by an order dated the 19th July 1876, made by the Court of Appeal, it was ordered that the plaintiffs should give security for the costs of Messrs. Knowles and Foster, by bond in the amount of 500*l.*, or should pay such amount into court, and in the meantime the plaintiffs were not as against the defendants, Messrs. Knowles and Foster, to take any further proceedings in the cause except to amend their bill.

On the 23rd Oct. 1876, Mr. Edwards wrote to Mr. Clements, as follows:—

23rd Oct. 1876.

Dear Sir,—Will you accept a banker's letter as security for costs instead of a bond?—Yours truly, A. C. EDWARDS.

To which Mr. Clements replied as follows:

23rd Oct. 1876.

Sir,—In answer to your note of to-day, I should wish to be informed of the names of the proposed bankers before answering the inquiry which you make.—I am, Sir, your obedient servant, G. M. CLEMENTS.

The bankers proposed by Mr. Edwards were the Metropolitan Bank, Cornhill; and on the 24th Nov. 1876, Mr. Edwards left at the office of Mr. Clements for perusal by him, on behalf of Messrs. Knowles and Foster, a fair copy of a bond which he had prepared for execution by the bank as security for the costs of the defendant Erlanger (who had also obtained an order for security for his costs), saying, that if Mr. Clements should accept the security of the bank, the bond to be given in favour of Messrs. Knowles and Foster would be in similar terms. What further took place appeared from the affidavit of Mr. Edwards, as follows:

13. On the 26th Nov. 1876, I wrote to the said Mr. Clements stating that I should attend at his office upon the next day, the 29th Nov., to continue the inspection of the said documents. I had not at that time received any intimation from the said Mr. Clements whether he would or would not accept the Metropolitan Bank as such security as aforesaid.

14. Upon the morning of the 29th Nov. I received a letter from the said Mr. Clements declining to accept the bond of the said Metropolitan Bank as security.

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

15. On the same day, at about 11 o'clock in the morning, I attended at the office of the said Mr. Clements to inspect the said documents in pursuance of the said notice. The said Mr. Clements absolutely refused to allow me to inspect the documents, alleging as his reason that I had not given him sufficient notice of my intention of attending to inspect, and, farther, that the said plaintiffs had not given such security as directed by the said order of the 19th July, 1876, and I left the said office.

16. Immediately after I left the said office I recollected that I was going on to the office of Messrs. Bischoff, Bompas, and Co., the solicitors for the defendant, Emile Erlanger, and that they had requested me to send them a copy of the bond proposed to be given as security for the costs of such defendant, and I accordingly returned to the office of the said Mr. Clements to ask for the return of the copy of the bond as security for the costs of the said defendant, Emile Erlanger, which I had left with a clerk of the said Mr. Clements on the 23rd Nov. as aforesaid.

17. The clerk of the said Mr. Clements told me that he did not know where it was, and I thereupon requested him to ask Mr. Clements if he knew where it was. The said clerk left the room, and upon his return asked me to see Mr. Clements, and I followed him into Mr. Clements's room, and Mr. Clements thereupon declined to return me the said document I had so left with him as aforesaid, and stated that as it was a draft of the security proposed to be given to his clients, and had been left with him for his perusal, he should not return it, but said he would make a copy and send such copy to me.

18. As I was desirous of having the document in order to carry the same with me to Messrs. Bischoff and Co., I proceeded to explain to him that it was not a draft of the bond to be given as security for the costs of his clients, that it was a copy of the bond proposed to be given on behalf of the defendant Emile Erlanger, when the said Mr. Clements peremptorily ordered me to leave the room. I tried, however, to explain to him the reasons why I considered that he ought to return the document, when he jumped up off his chair, called me a scoundrel, seized me round the waist, called to his clerk—"Open the door whilst I put this scoundrel out." The said clerk opened the door, when the said Mr. Clements forced me against the said door, which was thereby closed, I being still in the room. The said Mr. Clements used great force and violence, and I feared that I should have sustained great personal injury, and I say that I verily believe that if my foot had slipped I might have been thrown against a heavy iron case in such a manner and with such force that there would have been the greatest possible danger of my back or some of my ribs having been broken.

19. I say that I used no force or resistance other than so much as was absolutely necessary to guard myself from the dangers of bodily injury, which I saw might happen from the position of the said iron case and the great violence of the attack made upon me.

20. The said Mr. Clements repeatedly during his attack upon me called me a scoundrel, shouted at me, and used great personal violence towards me. I am suffering now from a severe bruise upon each of my arms caused by his violence.

21. I say that it is absolutely necessary, for the purposes of justice that I should continue the inspection of the said documents, but I say that it is impossible, after what has taken place, as above stated, that I can continue the inspection of the said documents at the office of the said Mr. Clements, and unless I can have the inspection of the said documents at some place where I can feel free from the danger of the repetition of any such violence, I cannot do my duty to my clients, the above-named plaintiffs, as a solicitor of this honourable court.

On the 7th Dec. 1876, a motion was brought before the court on behalf of the plaintiffs that, notwithstanding the order of the 5th June 1874, certain documents might be deposited by the defendants, Knowles and others, at the office of the record and writ clerk for inspection by the plaintiff, when, on hearing the affidavit of Mr. Edwards, above set out.

His Lordship said as follows: Mr. Glasse, as a matter of principle on which I proceed, it having been brought to my attention that in the

course of the ordinary discharge of his duties, a solicitor of this court engaged in this cause, according to the evidence before me at present, has been assaulted by the opposing solicitor, I desire that the matter shall be brought properly before the court, and the solicitor who is charged with being guilty of that conduct, shall meet it by affidavit. I give you leave to amend the notice of motion as you may desire. If you like you may turn it into a motion to commit.

The notice having accordingly been amended by adding to it the notice of motion to commit, the motion was now brought on. This report is confined to that part of the motion relating to the committal.

Mr. Clements had filed an affidavit in answer by which he did not deny the assault, or the use by him once of the word "scoundrel," for the use of which word he expressed his regret, and unhesitatingly withdrew it, but in substance the affidavit alleged that the account as given by Mr. Edwards in his affidavit was overstated. The order for committal was not asked for at the Bar, and an offer was made during the argument on the part of Mr. Edwards to accept costs out of pocket, but was declined on the part of Mr. Clements.

Glasse, Q.C., Higgins, Q.C., and Locock Webb, Q.C., for the motion.—The case comes within the second rule laid down by Lord Hardwicke in *Boach v. Hall* (2 Atk. 469), where he says (p. 471): "There may be likewise a contempt of this court, in abusing the parties who are concerned in causes here." They cited also *Price v. Hutchison* (L. Rep. 9 Eq. 534).

The *Solicitor-General* (Sir H. Giffard), *Davey Q.C.*, and *Whitehorne*, for Mr. Clements.—Assuming the facts, we submit there is in law no contempt of court. Lord Hardwicke's statement refers to the parties to the cause themselves, not to all concerned in conducting the cause. Moreover, it cannot be said that at the time of the assault Mr. Edwards was engaged in the conduct of the cause. It is true Mr. Edwards was engaged in his client's business, but not at that time in the conduct of the cause. The Consolidated Order XLII., rule 2, applies to anyone "who uses violence or abusive language to a person serving the process or orders of the court." Mr. Edwards was not at the time of the assault engaged in serving any process or order of the court. The interview with reference to the inspection of documents was, we admit, in the conduct of the cause, but it had come to an end, and Mr. Edwards had left the office of Mr. Clements, and it was not until his return to speak on a different matter, viz., to ask that the draft bond should be returned to him, that the occurrence complained of took place. Mr. Clements had requested Mr. Edwards to leave the room; after that Mr. Edwards was a trespasser, and Mr. Clements had a right to remove him. With respect to the retention by Mr. Clements of the draft bond, Mr. Edwards's remedy was by action. We cannot defend the use of the word "scoundrel," but we submit the court has no jurisdiction to make the order for committal, nor, therefore, to order Mr. Clements to pay the costs of the motion. They cited *Witt v. Corcoran* (34 L. T. Rep. N. S. 550; L. Rep. 2 Ch. Div. 69).

Webb, Q.C., in reply.—This was a step in the cause, inasmuch as the bond was delivered to Mr. Clements under an order of the court. Mr.

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Edwards was acting in pursuance of an order of the court, when he left the bond with Mr. Clements, and the second interview, when the assault took place, was only for the purpose of getting it back again. He cited:

Nichborne v. Mostyn, L. Rep. 7 Eq. 53 (note);
The Cheltenham and Swansea Railway Carriage and Waggon Company, 20 L. T. Rep. N.S. 169; L. Rep. 8 Eq. 580;

Ex parte Jones, 13 Ves. 23;

Felkin v. Herbert, 9 L. T. Rep. N. S. 635; 12 W. R. 241;

Little v. Thomson, 2 Beav. 129.

were also referred to.

MALINS, V.C. (after fully detailing the facts).—Now I am happy to say that the learned and distinguished counsel who appeared for Mr. Clements did not attempt to palliate his conduct. There is nothing to be said for it. All that can be said is that it was an ebullition of temper, which, in the conduct of professional business, I cannot too emphatically condemn. I hope it will be a lesson to Mr. Clements that the business of life, and particularly that most important business which relates to the conduct of litigation in these courts, is not to be conducted in such a manner as this. I am very sorry that, having done that which he has done, Mr. Clements has thought it necessary to call for the judgment of the court on that conduct. This case ought to have been settled hours ago by an ample apology from Mr. Clements, and by his accepting that offer which I suggested should be made to him, namely, that Mr. Edwards should accept a payment of costs out of pocket only. However, his learned counsel in the exercise of their discretion have not thought fit to adopt that course, but being unable to find any excuse for his conduct, their argument has turned upon this, that this is not a contempt of court; that I have no jurisdiction to interfere in the matter; that it was not a serving of a process of the court, and therefore, that it does not fall within Order XLII. rule 2 of the Consolidated orders, and that indeed it does not fall within any decisions that have taken place in this court. Now Mr. Locock Webb has been quite right in drawing my attention to the fact that the rules acted upon by this court with regard to contempt go far beyond that second rule. I think it may be stated thus, that whenever the court finds that in the conduct of litigation any of the parties to it are guilty of conduct which renders it impossible for the litigation properly, fairly, and moderately to be carried on, that is a contempt of the court in which that litigation is taking place. Now if one solicitor is at liberty, when another solicitor, in the ordinary course of business goes to his office, to call him a scoundrel, to order him out of his room, and to call in a clerk to open the door that he may turn the scoundrel—the opposing solicitor—out of his office, how is business to be conducted? Is this decent, respectable conduct of solicitors? Is not that a contempt of court? Does it not render it impossible that the business of litigation can be respectably, properly, and moderately carried on? In my opinion it does, and if so it is in my opinion a contempt of court. But it is said that he was not there in the conduct of the cause. Now what took him there first? The inspection of the documents; and accordingly the learned counsel have admitted that if the assault had taken place on the first visit, that would have been an assault

and a use of abusive language in the conduct of the cause and therefore a contempt of court. But it is said that when he went away the business of the conduct of the cause had ended, and that when he went back for the document, which was the draft of the security for costs, and the existence of which draft took him back, he went for something which was not part of the proceedings in the case. Now, I want to know, was not that part of the conduct of the cause? Would he have been there but for that? Would that draft have been prepared but for that order? And not having been prepared it would not have been in Mr. Clements's custody. Was it not therefore part of the business? The negotiations for giving the security for costs were that which led to this just as much as the first visit was caused by Mr. Edwards going to inspect the documents. I am therefore clearly of opinion that the first and second visits were both in the prosecution of the business of this cause; and "Anyone who uses violence or abusive language to a person serving the process or orders of the court, or uses scandalous or contemptuous words against the court or the process thereof" is guilty of contempt. It may not strictly or literally fall within the meaning of those words, but I am of opinion that it falls within the spirit of them. I am, further, of opinion that it falls distinctly within the rules laid down by Lord Hardwicke, which are always referred to in these cases. He says that there are three different sorts of contempt: "One kind of contempt is, scandalising the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here." No doubt that may be read as "parties to the cause," but I am of opinion that that is not the intention or meaning of Lord Hardwicke. I think he meant to use the language in a much more extended sense than that. He says "persons who are concerned in causes." Now, the persons who are concerned in causes are the counsel and solicitors. I am, therefore, of opinion that this conduct of Mr. Clements falls strictly within the rule laid down by Lord Hardwicke in abusing a party concerned in a cause—that is, the solicitor; and I am, therefore, on the whole, of opinion that it is a contempt of court, and that upon that ground the motion to commit Mr. Clements would be sustained. However, that is not asked. I am very glad that it is not asked, and, of course, it would be a singular thing to do, and if it had been asked, I should not have acceded to it under the circumstances of this case. But I can substitute for the order to commit an order for payment of the costs. There is another ground in my opinion, irrespective of the question of contempt of court, on which I think Mr. Clements is bound to pay the costs of this motion. It is this, that if, at all events, it is not a contempt of court, yet it is such gross misconduct on the part of an officer of this court in the conduct of proceedings pending before the court, that I think any solicitor who experiences such conduct as this from another solicitor would be guilty of a gross dereliction of his duty if he did not bring such conduct before the court in order that the solicitor who is guilty of it may receive a warning from the court, and be dealt with in such a manner as would not only prevent a recurrence of such misconduct on his part, but also be a warning to all other solicitors engaged in other cases against taking

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the same course. I think Mr. Edwards was bound to bring this to the notice of the court. I think he would not have been right or justified, under the circumstances, in taking proceedings in a police court or otherwise. This having arisen in the conduct of a suit in this court, I think it was the duty of Mr. Edwards to bring the matter before the court as affecting the conduct of the officer of the court conducting a litigation against him. On all these grounds I think I have jurisdiction, and on all these grounds (again expressing my regret that Mr. Clements did not at an early hour of the day accede to the reasonable proposal that he should apologise and pay the costs out of pocket and thus end the matter) my order will be, not to commit him, which is not desired, but that he do pay the costs of the motion.

Solicitors in person.

Friday, Nov. 24, 1876.

(Before Vice-Chancellor BACON.)

BARRETT v. VERNON. (a)

Patent—Same result attained by different means—Colourable imitation—Infringement—Injunction.

The plaintiffs were patentees of an invention for "stopping bottles containing aerated or gaseous liquids by means of a cylinder or plug of hard wood, having a greater specific gravity than water, such as lignum vite, or other suitable material." Subsequently the defendant obtained letters patent for "an improved means for effecting the closing or stopping of aerated liquid bottles," having internal stoppers of less specific gravity than the liquid contained in the bottles, the stopping being effected by means of "a weight or closing device arranged to be temporarily applied to the stopper," so that the weight of the stopper, and closing device combined, exceeded the specific gravity of the liquid contained in the bottles.

Held, that the defendant's invention was a colourable imitation and an infringement of the plaintiffs' patent, and an injunction granted accordingly.

MOTION.

This was an interlocutory application for an injunction to restrain the alleged infringement of a patent.

On the 2nd Sept. 1868, John Adams and the plaintiff Henry Barrett obtained a grant of letters patent for "an improved stopper for bottles containing aerated or gaseous liquids."

On the 2nd March 1869, they filed a specification describing their invention as follows:

"This invention consists of an improved stopper for bottles containing aerated or gaseous liquids, such as lemonade, ginger beer, and soda water. . . This improved stopper is constructed of a cylinder or plug of hard wood, having a greater specific gravity than water, such as lignum vite or other suitable material. This cylinder or plug is of a diameter slightly less than that of the opening of the neck of the bottle, and of a length exceeding the height of the neck of the bottle. Near the lower end of the cylinder or plug, and around it, is a groove in which is fixed an india rubber washer, and the cylinder or plug at a short distance above this groove is hollowed out to allow of space for the washer to be forced in in order to pass through the neck of the bottle. To apply this stopper the washer end is inserted in the neck of the bottle, by which the washer is flattened down until it

reaches the part of the bottle below its neck, when the washer expands and recovers its normal position. . . Having now described our invention, what we claim is, the peculiar construction of stopper for bottles for containing aerated or gaseous liquids."

By deed, dated 1st July 1871, John Adams assigned his share and interest in the patent to the plaintiff Charles Elers.

In Feb. 1872, the plaintiffs filed a disclaimer and memorandum of alteration, and thereby altered their specification, stating, "we do not claim generally the construction of stoppers having spindles or cylinders with india rubber washers, or any construction of a stopper such as herein described otherwise than in connection with a spindle, or cylinder, or plug, of greater specific gravity than water."

On the 8th Jan. 1874, the defendants obtained a grant of letters patent for "improved means for effecting the closing or stopping of aerated liquid bottles having internal stoppers." In their specification they stated, "This invention has for its object to facilitate the closing or stoppering of aerated liquid bottles having light internal stoppers, for example, stoppers consisting of a vulcanised india rubber washer fixed on a light spindle, stem, or cylinder, the specific gravity of the entire stopper not exceeding the specific gravity of the liquid in the bottles. Such bottles, whilst being charged with aerated liquid in a bottling machine, are for this purpose usually inverted or turned with their necks downward, but their stoppers being comparatively light do not, when the bottles have been charged, sink or fall into their proper positions for closing the same. Now this invention consists in effecting the closing or stopping of such inverted bottles as aforesaid, by attaching or connecting to the stopper, before placing the bottle in the filling or charging machine, a device of such specific gravity that the weight of the stopper and closing device combined shall exceed the specific gravity of the liquid contained in the bottle, thereby causing the stopper to descend and, guided within the orifice of the bottle's neck by the spindle and closing device thereto attached, to assume the proper position for closing the orifice in the bottle, in which position the stopper will be retained by the pressure of the gases within the bottle. The weight or device may then be removed from the spindle, stem, or cylinder of the stopper, and applied to the stem or stopper of another empty bottle, and so on. . . The weight or closing device is in the form of a metal spring clip loaded at one end sufficiently to pull down the stopper when the bottle is in an inverted position and filled with aerated liquid. . . The diameter of the weight or closing device, at its largest part, when expanded over the spindle of the stopper, being less than the diameter of the passage in the bottle's neck, the stopper, with my improved weight or closing device attached to it, can be readily passed in to the neck of the bottle for the purposes of filling." And the defendant claimed, as novel and original, "the use or employment for closing or stoppering inverted bottles, having stoppers of a less specific gravity than the liquid they contain, of a weight or closing device arranged to be temporarily applied to the stopper, and to operate substantially as above described."

In Dec. 1874, the plaintiffs filed their bill against the defendant, alleging that the defendant's in-

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

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vention was in substance and all material respects identical with their invention, or only colourably differing therefrom, and was an infringement of their patent rights, and prayed for an injunction, and account of profits and damages.

Aston Q.C. and Everitt, for the plaintiffs.—The question is, can a man take a patented invention, and, by merely colourably altering it in a certain particular, practically attain the same result? We say he cannot. We assert, first, that if the defendant temporarily attaches anything to his stoppers, by means of which he makes their specific gravity for the time being greater than water, then that is clearly within the specification of the plaintiffs; and, secondly, that even if we do not succeed on that point, so soon as the stoppers of the defendant, by repeated immersion, acquire a specific gravity greater than water, then that is a colourable evasion and infringement of the plaintiffs' patent, and that they are entitled to an injunction to prevent the continued use of such stoppers. They cited

Hills v. The Liverpool Gas Company, 9 Jur. N. S. 140;

Monks v. Foster, 2 Web. Pat. Ca. 92, 96;

Betts v. De Vitre, 11 L. T. Rep. N. S. 445.

Kay, Q.C. and Kekewich for the defendant.—There are two points in this case. First, does the defendant's stopper, as originally constructed, infringe the plaintiffs' patent; and, secondly, if it does not, then does it become an infringement by something that happens afterwards. The plaintiffs' case rests on their disclaimer (*Clark v. Kenrick*, 12 M. and W. 219). They do not claim the method or process of filling bottles. They disclaim everything in fact but a plug of wood of greater specific gravity than water. Therefore, to make a cylinder or plug of metal, india rubber, or any other material, would be no infringement of their patent. Also to make a plug of wood of lighter specific gravity than water, and to add a temporary weight to it, is no infringement. If it were, then to make the entire plug of metal would be an infringement; but the plaintiffs do not claim all stoppers that will sink in water, but only such wooden stoppers as will sink in water. The defendant's patent is for an entirely different invention to that of the plaintiffs. The weight or clip attached to the stopper is no integral part of it, but is removable, and can be used for filling any number of bottles. It is in effect an entirely different means of obtaining the same result, and this is no infringement (*Curtis v. Platt*, 11 L. T. Rep. N. S. 245). Secondly, all the defendant's stoppers are in the first instance of less specific gravity than water. This is admitted, and the charge that they subsequently acquire a specific gravity greater than water is not proved. But even supposing that the defendant's stoppers afterwards become of greater specific gravity than water, the words "specific gravity" in the specification must be taken to intend the original weight of the stopper, and not that which it subsequently attains by any other means.

Aston, Q.C., in reply.—The plaintiff's claim is not merely confined to wood. They claim a plug of wood, "or other suitable material," of greater specific gravity than water, and the words "such as lignum vitæ" are added merely by way of illustration.

Bacon, V.C.—This case is somewhat nice, no doubt. The argument has principally turned

upon the terms of the disclaimer, and the terms of the plaintiffs' specification containing the disclaimer which, as has been fairly said, is their patent at present. In order to construe it properly it is necessary to have regard to the real nature of the subject which is under discussion. It is desirable that there should be a means of stopping bottles which are to be charged with aerated waters. The plaintiffs invent a spindle or stopper the effect of which is that when the water is introduced into the bottle the spindle falls down and seals or stops the bottle. The defendant does the same thing precisely, but by different means. The plaintiffs are, no doubt, confined to the terms in which they have claimed their invention, namely, an improved stopper for bottles, which "is constructed of a cylinder or plug of hard wood, having a greater specific gravity than water, such as lignum vitæ, or other suitable material." Now I think I must take the fair construction to be, that the claim is for a stopper which is constructed of a cylinder or plug of suitable material, of which hard wood, such as lignum vitæ, is an instance. I think that is the fair way to consider it, because in the disclaimer it is stated that they are desirous of restricting the claim to stoppers "wherein the spindle or cylinder or plug is of greater specific gravity than that of water, as in the specification expressly stated." That lets in the whole of that which follows. The plaintiffs' invention, it is not disputed, is useful. The effect of introducing the water into the bottle, in which the stopper is already, would be to make a stopper, lighter than that which the plaintiffs describe, float upon the water. It would not descend; the bottle would not be stoppered; and what the defendant has done is to make a stopper which, in its origin, he says, is of less specific gravity than the water; and, in order to stop the bottle effectually, he applies to it what is called a clip by which, as if he had a forceps or string, he pulls the light plug down into the neck of the bottle where it remains to be soaked until it becomes of greater specific gravity than the water contained in the bottle. The question is, first, as to the use of the clip, whether or not it is a contrivance to make a spindle of less specific gravity than water stay in the place until it becomes of greater specific gravity. It is patent and apparent to my mind, that the use of the clip is for that purpose only. Without the clip I must assume on the evidence before me that the spindle made by the defendant would float in the water introduced into the bottle. It is only prevented from floating by the use of the clip. That in my opinion is, as far as that part of the case goes, an invasion of the plaintiffs' patent. And then it is an invasion of the plaintiffs' patent also, as I think, if he uses a light material, and places it so that it should become heavy by means of the water. It has been suggested that he might make it of any other material. Would it be within his right to make it of sponge or any other material and line it with lead? I apprehend clearly not. The whole spindle must be considered, and the clip I take to be a part of the defendant's invention and a part of the stopper which is the subject of the patent he has taken out. The cases which have been referred to do not, in my opinion, affect this particular question very much. The case of the bog ochre (*Hills v. Liverpool Gas Company*) is perhaps nearest to it, because there the decision was ultimately that

inasmuch as the bog ochre underwent a change it thereupon ceased to be bog ochre, and became the hydrated oxide protected by the patent. That bears a greater affinity to the case before me than any of the others that have been cited. But it is not upon any decided cases that I must decide this. I have to consider what is the meaning and intent of the patent. It was to overcome an existing difficulty. It was to stop a bottle by means of a certain heavy suitable material, and to stop it so that when the water is introduced into the bottle the plug would sink into the neck of it. The defendant has made a plug which performs identically the same office, first, by dint of the plug, by which he squeezes it into the bottle, the collar or india rubber washer being flexible; and then, by means of a clip or a contrivance of some sort, he holds it down in such a position as that it can perform the office of the plaintiff's invention. The facts of the case remain undisputed, and the evidence of the witnesses it is unnecessary to refer to. In my judgment there has been a clear invasion of the plaintiff's patent, a clear colourable imitation of their rights, and they are entitled to the injunction they ask for with costs.

Solicitors for plaintiffs, *Mead and Daubeny*.

Solicitors for defendants, *Gregory and Co.*

Dec. 7 and 8, 1876.

CHEAVIN v. WALKER. (a)

Expired patent—Trade label—Original patentee's name—Use of word "patent"—Piracy—Injunction.

In 1862, G. C., jointly with S. C., who died shortly afterwards, obtained letters patent for the manufacture of a water filter. In 1865 the patent was allowed to drop. From 1862 G. C. made and sold filters under the patent, for the first five years under the name of S. C., and thenceforth under the name of G. C. On each filter a tablet or label was imprinted or affixed bearing the inscription "G. Cheavin's improved patent gold medal self-cleansing rapid water filter, Boston, England."

In 1875, the defendants, who had formerly been in the plaintiff's employ, commenced to manufacture and sell filters under the patent with tablets impressed thereon similar in shape to the plaintiff's and bearing the inscription "S. Cheavin's patent prize medal self-cleansing rapid water filter, improved and manufactured by Walker, Brightman, and Co."

Held, that the plaintiff's tablet was his trade mark in which he had acquired a property, and that the defendants' tablet was an infringement, and an injunction granted accordingly.

Held, also, that the plaintiff had not so used the word "patent" in his trade label as to disentitle himself to relief.

This was an action to restrain the defendants from pirating the plaintiff's trade mark.

Letters patent for the manufacture of a filter, or apparatus for filtering water, were on the 26th April 1862, granted to Squier Cheavin, the father of the plaintiff, and the plaintiff, George Cheavin, jointly.

Squier Cheavin died in August 1862. On the death of S. Cheavin, the plaintiff, who had been in

partnership with his father, continued to carry on at Boston in Lincolnshire, and was still carrying on, the business of manufacturing and selling filters. For some years the plaintiff carried on such business under the firm of S. Cheavin, but for the last nine years he had carried it on in his own name. The filters so manufactured and sold by the plaintiff had acquired a great reputation at home and abroad, and each filter had, in order to distinguish it from the filters of other manufacturers, a tablet or inscription bearing the following words: "G. Cheavin's improved patent gold medal self-cleansing rapid water filter, Boston, England." Such filters so manufactured and sold by the plaintiff were generally known and asked for both in the trade and by the public as Cheavin's filters, and were manufactured upon the principle protected by the said letters patent which had expired.

The defendants were a firm carrying on business also at Boston, and were formerly in the employ of the plaintiff, and had recently commenced to carry on the business of manufacturing and selling filters upon the principle of the filters so manufactured and sold by the plaintiff, and with a view of inducing the belief that the filters manufactured by them were filters manufactured by the plaintiff they caused their filters to bear externally so close a resemblance to the plaintiff's filters that the difference between them was not perceptible except upon a close examination. In particular the defendants placed upon each of their filters a tablet or inscription bearing the following words: "S. Cheavin's patent prize medal self-cleansing rapid water filter, improved and manufactured by Walker, Brightman, and Co., Boston, England." The defendants issued circulars relating to their filters in which the phraseology of the plaintiff's circulars relating to his filters was largely adopted or copied.

The defendants having refused, on the application of the plaintiff, to discontinue the use of the name "Cheavin," the latter, on the 13th Oct., 1876, commenced this action, claiming an injunction to restrain them from selling, or offering for sale, filters bearing the name "Cheavin," or "S. Cheavin," marked or inscribed thereon, and from selling or otherwise disposing of or offering for sale filters, or filtering apparatus, bearing tablets or inscriptions similar to, or being colourable imitations, in words, arrangements, or otherwise, of the tablets or inscriptions used by the plaintiff. The claim also alleged that from the time the plaintiff so commenced to carry on his business down to the date of the wrongful acts of the defendants, no person, except the plaintiff, manufactured and sold filters or filtering apparatus as "Cheavin's filters," or "S. Cheavin's filters," or "G. Cheavin's filters," or used the name of "Cheavin" in connection with any business connected with the manufacture and sale of filters; and that many persons had been misled by the wrongful acts of the defendants.

To this statement of claim the defendants demurred, but the demurrer was overruled. At the same time a motion for an interlocutory injunction by the plaintiff was arranged to stand over till the hearing, the defendants giving the usual undertaking to account (see Weekly Notes, 1876, p. 273).

On the 5th Dec. the defendants delivered their statement of defence in which they admitted the

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material allegations in the claim, but alleged that the patent expired in 1865, and that from the year 1856 to the year 1871, one William Pike, of Spalding, either alone or in partnership with one Charles Harvey, and after the death of Pike, one Grimmel, of the same place, made and sold filters upon the principle of those manufactured by the plaintiff and his father, and called their filters "Cheavin's" or "S. Cheavin's" filters, and put upon them the inscription "S. Cheavin and Co." or "S. Cheavin and Co.'s patent," to the knowledge of the plaintiff, and the filters so made and sold were well known to the public as "Cheavin's" or "S. Cheavin's" filters.

The cause now came on for trial.

Kay, Q.C. and *J. Outler*, for the plaintiff.—The plaintiff claims the word "Cheavin" as his exclusive trade mark, and complains that the defendants, who were formerly in his employ, are making filters of the same shape and colour as those made by himself, and are putting on them labels in all respects similar to those which have been used by him since the year 1862, and are, in fact, pirating his trade mark.

Hall v. Barrow, 9 L. T. Rep. N. S. 561; 4 De G. J. & S. 150.

Sykes v. Sykes, 3 B. & Cr. 541;

Millington v. Foz, 3 M. & Cr. 338.

The fact that the defendants add the words "improved and manufactured by Walker, Brightman, and Co." in no way detracts from the plaintiff's rights, because they cannot take a material part of the plaintiff's trade mark and incorporate it with their own.

Braham v. Bustard, 9 L. T. Rep. N.S. 199; 1 H. & M. 447;

Kinnahan v. Bolton, 15 Ir. Ch. Rep. 75;

Ford v. Foster, L. Rep. 7 Ch. App. 611, 682; 27 L. T. Rep. N. S. 223.

Then it is said that the plaintiff is not entitled to relief, because he has, by the use of the word "patent," acquired his trade mark by misrepresentation, and for this *The Leather Cloth Company v. The American Cloth Company* (11 H. L. Ca. 543; 12 L. T. Rep. N.S. 742), will be relied on. But that case was decided on other grounds, and there is only a *dictum* of Lord Kingsdown which may favour the defendants' contention. But in truth the defendants cannot say there has been any misrepresentation in the use of the word "patent," because they and all the world knew that the word had become part of the plaintiff's trade mark, although the patent had expired.

Eldensten v. Vick, 11 Hare 76;

Marshall v. Ross, L. Rep. 8 Eq. 651; 21 L. T. Rep. N. S. 280.

Then the *mala fides* of the defendants is shown by their circulars, in which they adopt and insert whole paragraphs taken from the plaintiff's circulars, and otherwise closely imitate the form of his circulars.

Sir *H. M. Jackson*, Q.C. and *W. Phillimore* for the defendants.—We raise two points. First, whether the plaintiff has established his right to a trade mark; and, secondly, assuming that he has made out his title, whether what has been done is an infringement of his trade mark. Now, what is the plaintiff's title? He claims the word "Cheavin," and the right to prevent anybody from using that word in connection with filters; but the evidence shows that, from the year 1856 to the year 1872, there has been a concurrent use of the words "S. Cheavin," or "G.

Cheavin," or "Cheavin and Co.," by Pike and other persons. The inference is that the word "Cheavin" was no longer applicable to the name of a particular manufacturer, but became the descriptive or generic name of the article manufactured; and, therefore, the patent having expired, any person can use that name to describe the article he is selling so long as he shows, as here, that it is manufactured by himself.

Singer Manufacturing Company v. Wilson, L. Rep. 2 Ch. D. 434; 34 L. T. Rep. N. S. 858;

James v. James, L. Rep. 13 Eq. 421; 16 L. T. Rep. N. S. 568;

Wheeler and Wilson Company v. Shakespeare, 39 L.J. 36, Ch.

Further, whatever trade mark there was was lost when S. Cheavin died in 1862, and no administration was taken out to his estate, nor was his will proved. Consequently, the representatives of S. Cheavin are not here to oppose, and we have as much right as the plaintiff to use the word "S. Cheavin." We submit, therefore, that the plaintiff has failed to establish a personal right to the use of the word "Cheavin" (*Hovenden v. Lloyd*, 18 W. R. 1132). Secondly, if the plaintiff has a trade mark, he acquired it by the false assertion of a patent right. He has for years intentionally made and sold his filters as being protected by letters patent when he knew that he had no patent at all after 1865. By this misrepresentation he has prevented rival manufacturers from competing with him; and has, in fact, practised a fraud which disentitles him to any relief in this Court (per Lord Kingsdown in *The Leathercloth Company v. The American Leather Cloth Company, sup.*). As to the circulars, they are perfectly *bona fide*, and distinctly and exactly express the defendants' case. They say, "we are making and selling Cheavin's filters, and we are entitled to make them, and we show that we are not G. Cheavin."

Kay, Q.C. in reply.—The decision in the *Singer Manufacturing Company v. Wilson (sup.)* is based upon the fact that there the defendant had not put upon the articles which he sold anything which was part, or parcel, or an imitation of any trade mark of the plaintiffs. He had copied no trade mark of theirs. Here the defendants have done so.

BACON, V.C.—This is a case of considerable importance. That a trade mark is property there can be no reason to doubt. Now, what is the plaintiff's case? In 1862 a patent was granted to the plaintiff, and his father, jointly, for the manufacture of a filter. The fact that the plaintiff was then a lad about seventeen years of age does not affect the validity of the patent, because S. Cheavin had a perfect right to take out the patent in the joint names of himself and his son if he thought fit. When the patent was granted the plaintiff, jointly with his father, was entitled to it. On the death of his father the plaintiff continued to carry on the business for some years in the name of his father, and after that in his own name; and during all that time he placed the tablet or label, mentioned in the pleadings, upon all the articles manufactured by himself. All this is admitted by the pleadings. If, then, a trade mark can be obtained by such a course of trading, it is unquestionably established by the evidence before me, and the plaintiff so claims. The trade mark being established, no

man can lawfully interfere with it, but the defendants have chosen to do so. They are, no doubt, entitled to make filters in accordance with the patent that was originally granted to the plaintiff; but they have no right to adopt the distinctive trade mark which had been adopted by him to distinguish the articles manufactured by him from similar articles in the market. Upon the facts before me no jury could fail to find the defendants have literally and plainly copied the shape and colour of the articles manufactured by the plaintiff, and have plainly infringed his trade label. But then, it is said that the plaintiff's property in his trade mark is impaired, because there has been a concurrent user by Pike, Grimes, and others of the patent. But that is wholly irrelevant to the issue here. The test is, have the defendants willfully imitated and infringed on the property of the plaintiff? That is the test laid down in *Sykes v. Sykes* (sup.), which is a most valuable case as a statement of the law. The most important case relied on by the defendants is *The Leathercloth Company v. The American Leathercloth Company* (sup.). But does it proceed upon Lord Kingsdown's dictum? He there says in the course of his observations, p. 543: "If a trade mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade mark to relief in a court of equity against any one who pirated it;" but then he goes on to say: "In *Flavel v. Harrison* (10 Hare 467), Vice-Chancellor Wood intimated his opinion that this would be so when there never had been any patent at all; but in the subsequent case of *Edelsten v. Vick* (11 Hare, 78), he seems to doubt whether the rule would be the same if there had originally been a patent, and the statement in the trade mark, being true when first introduced, had been continued after it had ceased to be true. I confess that I should have great difficulty in assenting to that distinction. If the word 'patent' be not so used as to indicate the existing protection of a patent, but merely a part of the designation of an article known in the market by that term (and this I collect to have been the main ground of his Honour's decision), then I quite agree in his view. In such case nobody is meant to be deceived; a patent may have expired, and may be known to have expired fifty years ago, and yet the name of 'patent' may have become attached to the article, and be used in the trade as designating it; but if the trade mark represents the article as protected by a patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist." So that there has been no misrepresentation on the part of the plaintiff unless he has so inserted the word "patent" in his trade mark as to indicate that his goods are protected by letters patent, but the defendants have failed to prove this, or to show that a single individual has been deceived by the use of the word. Then Lord Westbury says (p. 546): "What is here called by the appellants a trade mark is, in reality, an advertisement of the character and quality of their goods. And, dropping for a moment all reference to the incorrect and untrue statement contained in that advertisement, I will only take what is called the

'trade mark' of the plaintiffs, and the rival or antagonistic trade mark of the defendants, and compare them together, taking them as if they were simply what in reality they are, two advertisements, each affixed by way of label to the articles manufactured by the parties respectively. Now, comparing them merely as advertisements, and taking them in that character alone, we shall at once find that there are various statements contained in the advertisement of the appellants, which are not to be found in any form, direct or indirect, in the advertisement of the respondents. My Lords, this advertisement is the sole foundation of the plaintiffs' case, and their allegations must be reduced in substance to this: that having advertised and described their goods in a particular manner, the defendants have borrowed their advertisements and described their goods in substantially the same manner; let us see then whether that is at all correct." He then proceeds to compare the two labels, or advertisements as he calls them, and then says: "If, therefore, these are regarded as being what in reality they are, representations of two different articles, it is impossible to say that the representation which is contained in the advertisement of the one contains, either identically or substantially, the representation which is contained in the advertisement of the other." Reading these observations of Lord Kingsdown and Lord Westbury in connection with the facts now before me, I read them as being in favour of the plaintiff. Then, as to the conduct of the parties, the circulars or advertisements of the defendants, which are relied on by the plaintiff as evidence of the *mala fides* of the defendants make it abundantly clear to my mind that the defendants have deliberately, literally, and in bad faith copied the trade mark of the plaintiff, and have largely incorporated the substance of his circulars into their circulars. In my judgment, therefore, the plaintiff is entitled to an injunction to restrain the defendants "from selling or offering for sale filters or filtering apparatus bearing tablets or inscriptions similar to or being colourable imitations in words, arrangements, or otherwise, of the tablets or inscriptions used by the plaintiff."

Order accordingly.

Solicitor for the plaintiff, J. S. Salaman.

Solicitors for the defendants, Wright and Pilley.

Dec. 9 and 16, 1876.

(Before Vice-Chancellor Hall.)

BILLBOROUGH v. HOLMES. (a)

Banker's deposit notes—Change in firm, and death of former partner—Payment of interest by new firm—Release of former partner.

A firm of bankers was in the habit of receiving money on deposit, paying interest thereon, and giving deposit notes. Whenever a change was made, either by additional payments or by drawings out, in the amount of the deposit, the old deposit note was given up, and a new one given for the new balance. In 1872 two new partners were taken into the firm. One of the original partners died in the same year, the other original partner died in 1874. The business was carried on by the new partners alone until 1875, when the

(a) Reported by H. C. Drake, Esq., Barrister-at-Law.

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bank stopped payment. The firm continued to receive money on deposit, giving notes as before, such notes bearing the same signature as those issued by the original partnership. The new firm also paid, or credited, interest to the depositors until the bank failed. After the failure the depositors carried in proofs against the estates of the bankrupt partners, and then sought to prove for the balance against the estate of an original partner.

Held, that the depositors had, by their acts, accepted the liability of the new partners in lieu of that of the old partners, and that the latter were consequently released.

This was an adjourned summons in a suit instituted for the administration of the estate of John Holmes, deceased.

Up to April, 1872, John Holmes and George Exley had carried on business as bankers at Leeds, the firm being known both as the "Leeds Mercantile Bank" and as "John Holmes and Company." On the 16th April, 1872, two new partners—Woodhead and Joseph Holmes—were admitted into the firm, and on the 29th April, 1872, John Holmes died. The three surviving partners carried on the business, under the same name, until May 1874, when Exley died. After that date Woodhead and Joseph Holmes carried on the business as before, until Dec. 1875, when the bank stopped payment.

The bank was in the habit of receiving deposits from customers and paying interest for the same. Whenever a deposit was made the customer received a deposit note, stating the amount deposited and the rate of interest to be paid thereon. If the customer increased or diminished the amount of the deposit, he gave up the old note, in pursuance of a memorandum to that effect printed at the foot of each deposit note, and a new note, in similar terms, for the actual amount then standing to his credit was given to him. The same course was adopted if a customer allowed the interest on his deposit note to accumulate.

The question raised by the summons was whether such customers, having already proved in bankruptcy against the estates of the surviving partners, could now prove for the unsatisfied balance against John Holmes' estate; and three representative cases had been selected for this purpose.

The first case was that of Miss Amiel. She was the holder of a deposit note which had been given to her by the firm, whilst John Holmes was a member of it. She had neither increased nor diminished her deposit, but had regularly received interest on it from the firm for the time being, until the time of the bank's stopping payment.

The second case was that of Mr. Priest. He had received a deposit note from the firm, when it consisted of John Holmes and Exley only. After the death of John Holmes he increased his original deposit, giving up his old note and receiving a new one. He had not, however, actually received any interest from the firm, since the death of John Holmes.

The third case was that of Mr. Stoney. He had received a deposit note during John Holmes' lifetime. Afterwards, he had drawn out a part of his balance, and received a fresh note for the amount left to his credit. He had received interest on his balance down to the time when the bank failed.

Each deposit note, whether issued before or after the death of John Holmes, was signed "John

Holmes and Co." At the time when Woodhead and Joseph Holmes were taken into partnership, a circular announcing that fact was sent to every customer of the bank. And the usual statutory notices for creditors were advertised after John Holmes' death, but no claims were made by customers of the bank, which at that time was solvent.

Robinson, Q.C. and N. Lawrence for the claimants.—None of these claimants have abandoned their claims against John Holmes' estate. *Kellock's Case* (18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. 769) shows that they have not lost their rights by proving in the bankruptcy. Neither does the receipt of interest bar them. In *Daniell v. Cross* (3 Ves. 277) bankers gave deposit notes, bearing interest; the partnership was dissolved; one of the partners afterwards died, and his creditors were called by advertisement; another partnership was formed by the survivors and others, who reissued notes of the former partnership, and paid the interest on the deposit notes for nearly two years, when they failed. Nevertheless, the assets of the deceased partner were held not to be discharged. That case entirely covers Miss Amiel's case, and is conclusive in her favour. Neither can it be said that the other claimants have lost their rights against John Holmes' estate by taking fresh deposit notes after his death. For these notes were merely a continuance of the former practice; they still bore the name of John Holmes, and nothing was said to the depositors when the new notes were taken as to the liability of the original firm being thereby discharged. Consequently that liability still continues.

Bleech's case, 1 Mer. 539, 568;

Harris v. Farwell, 15 Beav. 31;

Swire v. Redman, 35 L. T. Rep. N.S. 470; L. Rep. 1 Q. B. Div. 536;

Lindley on Partnership, 3rd edit., pp. 459, 463.

Taking a new deposit note was not a substitution of a new security for a former one, because such a note is not a security: (*Hopkinson v. Abbott*, L. Rep. 19 Eq. 222.) And even if it were, the taking it would not release John Holmes' estate unless the note had been taken with that intention: (*Harris v. Farwell*, *ubi sup.*) Neither does the fact that some time has elapsed since the old firm was dissolved, nor the advertisement for creditors, affect the rights of these claimants.

Harris v. Farwell (*ubi sup.*);

Winter v. Innes, 4 M. & Cr. 101;

Daniell v. Cross (*ubi sup.*)

W. Pearson, Q.C. and Freeling, for the persons beneficially interested under John Holmes' will.—First, there has been in all these cases a novation, by the acceptance of the liability of the new firm in lieu of the liability of the old firm. Next, the laches of the claimants disentitle them, in any case, to relief here. This is not the case of partners being all from the first jointly liable, in which case, no doubt, receipt of interest from surviving partners would not, of itself, discharge the estate of one who had died. But it is the case of creditors having a claim against two persons, and afterwards accepting, on account of that claim, the liability of other persons who had not originally been liable at all. It is clear that when the new partners were taken into the firm they were not, as between themselves and the creditors, liable to existing debts of the firm, unless by express arrangement with the creditors. And it is

also clear that where the liability is accepted of persons who were not previously liable, that, irrespective of any question of intention, is a release of the person who was originally liable. They cited on this point:

Hart v. Alexander, 2 Mee & W. 494;
Re National Provincial Life Assurance Society, 22 L. T. Rep. N. S. 465; L. Rep. 9 Eq. 306;
Re International Life Assurance Society, 22 L. T. Rep. N. S. 460; L. Rep. 9 Eq. 316;
Re Times Life Assurance Company, 22 L. T. Rep. N. S. 198; L. Rep. 5 Ch. 381;
Re Anchor Assurance Company, L. Rep. 5 Ch. 632;
Spencer's case, 24 L. T. Rep. N. S. 455; L. Rep. 6 Ch. 362;
Reed v. White, 5 Esp. 122;
Gaius, Book III., Tit. 30;
Pothier's Pandects, Book 46;

Moreover, the claimants are barred by having proved in the bankruptcy. For they could only prove there on the footing of having no proof against our estate:

Cuson v. Chadley, 3 B. & C. 591;
Wharton v. Walker, 4 B. & C. 163.

Dickinson, Q.C. and *Romer* were for the executors of John Holmes.

Robinson, Q.C. in reply.—The proof in bankruptcy did not take away the claimant's rights against John Holmes' estate. It may be that it ought not to have been admitted, but its admission cannot affect the question. The object of the notice which was given when Joseph Holmes and Woodhead came into the firm was not to release John Holmes, but to inform customers that the original liability of the old firm had been converted into the joint and several liability of all the members of the new firm. There cannot be novation unless there is an express intention to that effect by both parties: (*Pothier's Pandects*, Book 46, sect. 20.) The exchange of deposit notes being merely a part of the original contract, no intention to release the old firm can be implied from it.

HALL, V.C.—It seems to me that, as regards the second and third of these claims, there can be no question that the claimants, by giving up the old deposit notes, and taking fresh ones instead, accepted the liability of the new firm. It has been argued that this was a matter of form only, and that the original liability was intended to remain, notwithstanding. But the new notes were given after the new partners had come in, and when they were the only members of the firm. They, therefore, gave a new consideration by undertaking the liability of the old firm. Hence, there was a new liability and a new consideration substituted for the original liability. *Miss Amiel's case* is somewhat different from the others. She, however, continued to receive interest from the new firm, first from the surviving partner, *Exley*, who had been originally liable, and the two new partners, and after *Exley's* death from the two new partners alone; from two persons, that is, who were under no liability to her, except on the assumption that the former liability had been discharged. That being so, the new partners were treated by all the claimants, and treated themselves, as being liable to satisfy these claims; since they could not be considered as paying interest on behalf of John Holmes' representatives, they must have paid it solely on their own account. Again, the proof against the bankrupt partner's estates was not, as in *Harris v. Farwell* (15 Beav. 31),

for money had and received by them, but for money which had been left in their hands. And the judgment in that case shows that the payment and acceptance of interest, irrespective of giving up the old securities, is sufficient to imply an acceptance of the new partner's liability in lieu of that of the old partners. If any question had arisen as to admitting the proof in bankruptcy, the case might have been different. But these claimants are now, in fact, attempting to have the benefit of two distinct sets of securities. And it seems to me that by carrying in their proofs they have shown that they accepted the liability of the new partners, and released the former members of the firm. I think that these facts distinguish this case from that of *Harris v. Farwell*, and consequently that these claims must be disallowed. There will be no order as to costs.

Solicitors, *Linklater and Co*; *Torr and Co*; *Speechley and Co*.

QUEEN'S BENCH DIVISION.

Friday, Nov. 10, 1876.

(Before MELLOR and LUSH, JJ.)

GLEGG v. GILBEY. (a)

Bankruptcy Act 1869, 32 & 33 Vict. c. 71, s. 126—
Composition by instalments—Deed of inspectorship—Construction—Subsequent bankruptcy—Liability of surety.

Where a surety has guaranteed the payment of an instalment under a composition deed, he is not released by the debtor's subsequently being adjudged a bankrupt.

By resolutions duly registered the creditors of a liquidating debtor agreed to accept a composition of 7s. 6d. in the pound, payable by three instalments, the last of such instalments to be guaranteed by G., the surety.

By a subsequent deed of inspectorship the debtor was to be allowed to carry on his business; but in case he failed to pay the instalments due under the composition, the inspectors might apply for an adjudication in bankruptcy or an assignment of all his property; and further, that in the event of the said debtor being adjudicated bankrupt, or of an assignment of his property under the provisions of the deed, G. should thereupon stand released from his aforesaid guarantee.

The debtor, upon the petition of a third party, was subsequently adjudged a bankrupt.

Held, that such bankruptcy did not per se relieve G. of his liability as surety under the composition.

Held, also, that the adjudication contemplated by the deed of inspectorship, was one brought about by the inspectors, and not by a third party.

This action came before the court upon a special case stated by the parties as follows:

1. The plaintiff is an accountant carrying on business at No. 3, Moorgate-street, in the City of London.

2. The defendant is a wine merchant, carrying on business at the Pantheon, Oxford-street, in the county of Middlesex.

3. On the 19th Oct. 1874 Charles Bedell, who was a wine merchant carrying on business at No. 23, Mark-lane, in the City of London, presented a petition under the Bankruptcy Act 1869, for the liquidation of his affairs by arrangement or com-

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position with his creditors in pursuance of the provisions of the said Act.

4. At a first general meeting of the creditors of the said Charles Bedell, duly held under the provisions of the said Act on the 17th Dec. 1874, the requisite statutory majority of the said creditors by an extraordinary resolution resolved:

(a) That a composition of 7*s.* 6*d.* in the pound should be accepted in satisfaction of the debts due to the creditors from the said Charles Bedell.

(b) That such composition should be payable as follows: 4*s.* in three months, 2*s.* in six months, and 1*s.* 6*d.* in nine months from the date of the registration of those resolutions; the last of such instalments to be guaranteed by Mr. Henry Parry Gilbey (the defendant), such guarantee to be filed with those resolutions.

(c) That the said composition should be secured by the promissory notes of the debtor, to be dated on the day of the date of the registration of those resolutions, and to be delivered by the debtor to James Glegg (the plaintiff), for the use of and to distribute to the several creditors.

(d) And that until payment of the said composition, the debtor shall carry on his business under the inspection of Messrs. Young, Pearson, and Goldsmith, who were thereby appointed inspectors; and that a deed of inspectorship to contain all usual and proper clauses should be forthwith prepared by the debtor's solicitor, and be approved by Mr. Sorrell, for and on behalf of the inspectors and creditors, the form and contents of such deed to be determined in the event of difference by a counsel to be nominated by the inspectors.

5. On the 21st Dec. 1874 the defendant, pursuant to the said resolution, gave to the plaintiff his guarantee for the payment of the said third instalment, which said guarantee is in the words and figures following, that is to say:

The Bankruptcy Act 1869.

In the London Bankruptcy Court. In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by Charles Bedell, of No. 38, Mark-lane, in the City of London, wine merchant.

In consideration of the creditors of the above-named debtor passing an extraordinary resolution to accept a composition of 7*s.* 6*d.* in the pound in satisfaction of the debts due to the creditors from the said debtor, and that such composition be payable as follows: 4*s.* in the pound within three months from the date of the registration of the resolution, 2*s.* in the pound within six months from the date aforesaid, and 1*s.* 6*d.* in the pound within nine months from the date aforesaid, I agree to guarantee the due payment of the last instalment of such composition to Mr. James Glegg (meaning the plaintiff), for the use of and to distribute to the several creditors.

Dated this 21st Dec. 1874.

H. P. GILBEY.

6. The said extraordinary resolution was duly passed and confirmed by the said creditors on the 31st Dec. 1874, and the said guarantee was duly filed with the said resolution, and the said resolution was afterwards duly registered pursuant to the said Act; and the said Charles Bedell made, signed, and delivered as hereinafter-mentioned to the creditors or to the plaintiff for distribution to the creditors of the said Charles Bedell, the several promissory notes stipulated for by the said resolution.

7. The number of the creditors of the said Charles Bedell, whose names and addresses, and the amount of whose debts were shown in the statement of the said Charles Bedell produced at the meetings at which the said resolutions were

passed, and who became and were bound by the said resolutions was fifty-three.

8. After the said resolution and guarantee were registered and filed as aforesaid, a deed, dated the 8th March 1875, was made and entered into between the said Charles Bedell of the first part, the defendant of the second part, and David Hill Young, Charles Froggart Pearson, and Walter Charles Goldsmith therein called the inspectors of the third part. The parties to the said deed of the fourth part, were therein expressed and described in and by the words "the creditors of the said Charles Bedell," but only fifteen of the creditors of the said Charles Bedell in fact executed the said deed.

11. The deed was settled by counsel on behalf of the debtor, and by counsel instructed by Mr. J. B. Sorrell. The terms of the same were finally approved by Mr. J. B. Sorrell, acting for and on behalf of the inspectors and creditors under the authority conferred upon him by the said resolutions.

12. The terms of the intended deed were not discussed at the said meetings of creditors. The plaintiff was never consulted as to the terms of the said deed, and was not aware until after it was brought to him as hereinafter-mentioned that it contained a proviso releasing the defendant in the event of the bankruptcy of the said Charles Bedell. Several of the fifteen creditors who executed the deed did so in ignorance of the existence therein of the said proviso.

13. The said deed, after it had been executed by the fifteen creditors before-mentioned, was brought by the said Charles Bedell to the plaintiff, together with the promissory notes in favour of those of the fifty-three creditors who had not executed it for the purpose of his procuring their signatures to the deed and distributing the promissory notes to them. The plaintiff then, for the first time, became aware of the existence of the proviso for the release of the surety, and considered it an improper clause, and on that ground he declined to ask any creditors to sign the deed, and though he distributed the promissory notes among them, he did not present the deed to them for execution.

14. When creditors agree to accept a composition upon their debts, it is not unusual to provide by an inspectorship deed that the debtor's affairs shall be carried on under inspection until the composition shall have been paid; but it is unusual to provide for such inspection when payment of the composition or of any part of it is guaranteed by a surety, and consequently inspectorship deeds rarely contain any clauses relating to a surety by whom payment of a composition is guaranteed.

15. In the case of an ordinary composition deed when one of the parties to the deed guarantees the payment by the debtor of the composition in whole or in part, a clause releasing the surety in the event of the debtor's bankruptcy is not a usual clause.

16. The inspectors acted upon the said deed, and the said Charles Bedell was allowed thereunder to continue in possession of and carry on his said trade and business.

17. The said promissory notes so made by the said Charles Bedell, and delivered as aforesaid to the creditors for and in respect of the said first instalment were duly paid. The said Charles Bedell had not sufficient means to pay the said promissory notes so made by him and delivered as

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foresaid in respect of the said second instalment, and default was made by him in payment thereof.

18. Certain persons, to wit, William John Sloper Dawe, and Joseph Odling Dawe, who were creditors of the said Charles Bedell at the time of the passing and confirming of the said resolution, and whose names and addresses and the amount of the debts due to whom were not shown in the statement of the debtor produced at the meeting at which the said resolution was passed, and who were therefore not bound by such resolution, and who had not executed the deed of inspectorship foreshaid, did on or about the 1st Oct. petition and institute proceedings in bankruptcy against the said Charles Bedell in respect to the said debt.

19. On the 14th Oct. 1875 the said Charles Bedell was adjudicated a bankrupt. The act of bankruptcy was the non-compliance by the said Bedell with a trader debtor's summons served upon him by the said Messrs. Dawe in respect of their said debt. A trustee was appointed under the said bankruptcy.

20. Some of the creditors who were bound by the resolution above set forth, proved against the estate of the said Charles Bedell under the said bankruptcy proceedings. Their proofs in every case but one, allowed the amount guaranteed by the defendant.

21. After the said adjudication the said Charles Bedell made default in the due payment of the last instalment of the said composition, and he same has not been paid by him or any part thereof.

22. The defendant has not paid to the plaintiff the amount of the said third instalment according to his guarantee for the use of and to distribute to the creditors of the said Charles Bedell. The question for the opinion of the court is, whether the plaintiff is entitled to recover from the defendant the amount of the said third instalment under the defendant's said guarantee.

Russell, Q.C. (Holl with him).—The terms of the guarantee are absolute; the surety is released only by the debtor's being adjudicated bankrupt under the provisions of the deed of inspectorship; that is to say, by the act of the inspectors, that is the natural interpretation of the deed. The bankruptcy has been brought about in a totally different manner than that contemplated by the deed, and therefore the surety is bound by the guarantee as has been given.

Benjamin, Q.C. (Willis with him), for the defendant.—Here there was a composition agreed upon by the creditors and an instalment guaranteed. But the composition arrangement has been interrupted and put an end to by the proceedings in bankruptcy. The effect of that is that the surety must be released. Plaintiff cannot avail himself of the guarantee under the composition which has been put an end to and yet prove for his debt under the adjudication. The surety relied upon the property in the debtor's possession which has been taken away under the bankruptcy. He might have taken some security upon the effects of the debtor, and then they could not have been touched under the bankruptcy: (*Re Robinson; Ex parte Burrell*, L. Rep. 1 Ch. D. 537.) Moreover the deed of inspectorship was framed so as to do away with this hardship; upon an adjudication of bankruptcy by the terms of the deed the surety was to be released, no matter by whom the bank-

ruptcy was brought about. On both these grounds defendant cannot be held liable.

Russell, Q.C. in reply.

MELLOR, J.—This case has arisen from the winding-up of a debtor's affairs by means of a composition and deed of inspectorship. In accordance with one of the provisions of the composition the debtor undertook to pay his debts in instalments, and also to give security for the due payment of the last of such instalments. The defendant Mr. Gilbey agreed to become surety for that payment. Now we must take it that he made all prudent inquiries as to the estate of the debtor and the number of his creditors, and calculated all that he made himself liable for when he undertook to guarantee the payment of the final instalment. I think that as he executed the deed of inspectorship, which recites that it had been prepared by the debtor's solicitor, and approved by the solicitor, acting on behalf of the inspectors and creditors as required by the express terms of the resolution, we must hold that that is a deed binding upon the defendant, and it is upon the construction of that deed that this case turns. It would be an extraordinary thing if the defendant's interpretation of the deed which would defeat the whole effect of the composition were the true one. It would carry one to say there cannot be a secure composition agreed upon. I prefer taking Mr. Russell's construction that the bankruptcy contemplated was one that should be brought about under the provisions of the deed of inspectorship as stated at the third page of that deed. [His Lordship here read the proviso referred to.] (a) That I think is the nature of the bankruptcy which is to release the defendant from his liability; it would be monstrous to give the deed a wider interpretation, and to say that any bankruptcy would suffice to free the defendant would be a most dangerous doctrine. I am satisfied that such is the true and reasonable construction of this deed, and one that gives effect to all its terms as contemplated by the parties, who at that time never dreamed there would be another petition in bankruptcy.

LUSH, J.—I am of the same opinion. The creditors of Bedell had agreed by a statutory majority to accept a composition of 7s. 6d. in the pound,

(a) The deed of inspectorship contained the following proviso: "That it is hereby agreed and declared that if the said Charles Bedell shall make default in the observance of or performance of his covenants herein contained, or in the payment of the aforesaid promissory notes respectively as and when the same shall become payable, or if it shall appear to the inspectors from the state of the business of the said Charles Bedell or otherwise that the said instalments of the composition or any of them will not be duly met or provided for, or that the composition agreed to cannot be carried into effect, it shall be lawful for the inspectors to apply to the Court of Bankruptcy to adjudge the said Charles Bedell a bankrupt; and without prejudice to their right to apply to the court as aforesaid, it shall be lawful for the inspectors in any such aforementioned event to require by notice in writing the said Charles Bedell to carry and assign all his effects to the inspectors."

Then followed provisions as to ownership and indemnities or to the inspectors, and then this clause:

Provided always and it is hereby agreed that in the event of the said Charles Bedell being adjudicated bankrupt, or of a conveyance and assignment of his property and effects being made or required under the provisions of these presents before full payment of all the aforesaid promissory notes, the said Henry Parry Gilbey shall thereupon stand released from his aforesaid guarantee.

the creditors that until default in payment of the instalments the debtor was to carry on his business under a deed of inspectorship, to be approved of by the parties, and, if necessary, settled by counsel. The guarantee stated that on condition of the creditors agreeing to accept a composition, the defendant agreed to guarantee the last instalment of such composition. The guarantee is, therefore, absolute in form. It happened, however, that a creditor not named in the composition deed applied to the Court of Bankruptcy for an adjudication; such application had no relation to the date of the composition, and was based solely upon non-payment of a debtor's summons. Mr. Benjamin thereupon contends on the first place that bankruptcy *per se* discharged the surety, no matter at whose instance it had been brought about. I am utterly unable to see anything in the Act of Parliament that authorises that contention. True that if the instalments are not paid the creditors are remitted back to their old position, and may prove for their debts under an adjudication in bankruptcy; but they are not bound so to do, they may if they prefer it adhere to the original composition. I cannot see what bankruptcy has to do with this guarantee. Mr. Benjamin argues that it is hard that the surety should be bound after the property on which he relied has been taken away; that may be so, but the surety himself must provide for such a contingency; it is no argument for holding that a subsequent bankruptcy annuls a composition. The point is, as to the true construction of the deed of inspectorship; under that deed the inspectors took power to apply to the Court of Bankruptcy for an adjudication against Bedell so as to supersede the composition, or else to require him to assign to them the whole of his assets; and then further on there is the proviso that "in the event of the said Charles Bedell being adjudicated bankrupt or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents, the surety shall be released." Does that mean a bankruptcy brought about at the instigation of the inspectors or does it mean an adjudication on the initiative of anybody? In my opinion it means the former, and the structure of the sentence confirms in my mind that view. The words "in the event of," are not repeated before the words "of a conveyance or assignment," which shows there must be some connection between the two clauses; that both might, in fact, be brought about by the inspectors. I come to the conclusion, therefore, that the only bankruptcy contemplated by the deed is one brought about by the inspectors, and not by an independent creditor, which would itself have no effect upon the composition.

Judgment for plaintiff.

Solicitors for the plaintiff, *Lewis, Munns, and Longden.*

Solicitor for the defendant, *Broughton.*

ERRATUM.—In the case of *The Silkestone and Dodsworth Coal and Iron Company (Limited) v. The Joint Stock Coal Company (Limited)* (Ex. Div.), ante p. 671, col. 1, line 31 from the top, delete the word "purchasers."

Wednesday, Nov. 22, 1876.

(Before KELLY, C.B. and CLEASBY, B.)

BENNETT (trustee, &c.) v. GAMGEE AND ANOTHER.(a)

Demurrer—Action by debtor before his insolvency—Liquidation of plaintiff after issue joined—Trustee of liquidation declining to continue action—Fresh action by trustee—Estoppel—"Action" and "cause of action."

In an action brought by debtors before their insolvency and the filing of a petition for liquidation under the Bankruptcy Act 1869, the trustee appointed under the liquidation was called on to elect, under sect. 142 of the Common Law Procedure Act 1852, whether he would continue the action and give security for costs, and he declined to continue the action and give such security, and it was

Held, by the Exchequer Division (Kelly, C.B. and Cleasby, B.), that the trustee was not thereby estopped from subsequently bringing a fresh action against the same defendants for the same cause of action.

Newington v. Levy (in error, 23 L. T. Rep. N. S. 595; L. Rep. 6 C. P. 180; 40 L. J. 29, C. P.) discussed and distinguished.

THE statement of claim delivered by the plaintiff in this case, alleged that a contract, in writing, dated 4th Sept. 1874, duly signed by the defendants, was made between David Foster and William Lockwood, of the one part, and the defendants of the other part, for the sale by the said David Foster and William Lockwood, and the purchase by the defendants, of a certain leasehold foundry, with buildings, offices, engines, stock, and goodwill, &c., for the sum of 10,000*l.*, a deposit of 2500*l.* to be paid down, and the balance, with interest to be paid by instalments at three, six, nine, twelve, and fifteen months, as therein mentioned; that the defendants took possession of the said foundry, and all the property and stock agreed to be sold to them as aforesaid shortly after making the said contract, and that the said David Foster and William Lockwood were always ready and willing to perform and observe the said contract on their parts; but that the defendants had not paid the deposit of 2500*l.*, or any part thereof, but had neglected and refused to pay the same. And it then alleged that "after the making the said agreement, and in 1874, the said D. Foster and W. Lockwood, being debtors unable to pay their debts within the meaning of the 125th and 126th section of the Bankruptcy Act 1869, presented a petition, according to the form in the schedule to the Bankruptcy Rules 1870 made in pursuance of the said Act, to the County Court of Yorkshire, holden at Sheffield, having jurisdiction in that behalf, and the plaintiff was duly appointed trustee of the property of the said D. Foster and W. Lockwood, being such debtors as aforesaid. The plaintiff, as such trustee as aforesaid claims, first, 2500*l.*, the said deposit; secondly, the costs of this action; thirdly, such further or other relief as the case may require.

The statement of defence was in substance as follows: It averred that the plaintiff ought not to be admitted to sue the defendants in reference to the causes of action in the statement of claim mentioned, because the said D. Foster and W.

(a) Reported by HENRY LEIGH, Esq. Barrister-at-Law

Lockwood heretofore, in the late Court of Queen's Bench at Westminster, sued the defendants for the same causes of action as in the statement of claim alleged, and on the 6th Nov. 1874, declared against the defendants in the said action, &c. (the pleadings in the said action were here set forth in the statement of defence down to the joinder of issue upon and demurrer to the defendant's pleas), and afterwards, and before the trial and determination either of the said issues of fact or of law, the petition mentioned in the statement of claim was presented by the said D. Foster and W. Lockwood, and the plaintiff was appointed trustee, as in the said statement of claim mentioned; and the plaintiff was subsequently, in accordance with the provisions of the Common Law Procedure Act 1852, called upon to elect whether he would continue the said action brought by the said D. Foster and Wm. Lockwood against the defendants, and give security for costs, and the plaintiff declined to continue the said action and give security for costs, whereupon, in accordance with a master's order to that effect, the defendants pleaded in bar the liquidation by arrangement of the affairs of the said D. Foster and Wm. Lockwood, and the appointment of the plaintiff as trustee of their property, being such debtors as aforesaid; and that all things necessary in that behalf having happened and been done, the property of the said D. Foster and Wm. Lockwood, including the said alleged causes of action, thereupon became and was vested in the said trustee. And thereupon the said D. Foster and W. Lockwood confessed the truth of the matter stated in the last-mentioned plea, and prayed judgment for their costs of suit, which was ordered, and the said costs were taxed at 134*l.* 2*s.*, and paid by the defendants to the said D. Foster and W. Lockwood; and such proceedings were thereupon had in the same action, that the same was finally determined and decided against the said D. Foster and Wm. Lockwood, and against the plaintiff as their trustee (except as aforesaid). The statement of defence then averred that all conditions were fulfilled, and all things were done and happened, and all times elapsed to estop the said D. Foster and W. Lockwood, or the plaintiff as their trustee, from bringing this action; wherefore, the defendants pray judgment if the plaintiff, as such trustee as aforesaid, ought to be admitted, against his said election not to continue the said action and give security for the costs thereof, and against the said confession of the said D. Foster and Wm. Lockwood, to sue the defendants, or to say that the defendants have not paid the said deposit of 2500*l.*, or to claim the same from the defendants, or the costs of, or any further or other relief in, this action.

Demurrer and joinder.

The 142nd section of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), enacts that "the bankruptcy or insolvency of the plaintiff, in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose within such reasonable time as the judge may order; but the proceedings may be stayed until such election is made, and in case the assignees neglect or refuse to continue the action, and give such security

within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy."

The plaintiff's points for argument.—First, the circumstance that the debtors sued for the same cause of action and confessed the defendants' plea of liquidation and took costs, constitutes no defence to the present action; secondly, the effect of that replication was to estop the debtors from disputing that plea only in a future action; thirdly, an estoppel created by the debtor after the commencement of the liquidation cannot bind the present plaintiff, the trustee; fourthly, the subject matter of the estoppel (namely, that the right of action had passed to the present plaintiff) is not prejudicial to him, and is no defence to the present action; fifthly, a trustee of a bankrupt or liquidating debtor is not bound to continue actions brought by the bankrupt or debtor, in which he might be bound by disadvantageous pleading and evidence; sixthly, if the bankrupt or debtor goes on after such an election the defendant may either plead the bankruptcy or liquidation, or obtain security for costs, or stay the action on the trustee's suing, and so is under no hardship.

The defendant's points for argument.—First, that the plaintiff as trustee is estopped by his election not to continue the action brought by the liquidating debtors, and by their confession in the said action from bringing another action in respect of the same causes; secondly, that the effect of the said confession, and the taxation of the liquidating debtor's costs under rules 22 & 23 of the Pleading Rules of Trinity Term 1853, was to put an end altogether to the right of action as it then existed, and the demurrer admits that the plaintiff is suing in respect of the same cause of action; thirdly, that the liquidating debtors could not maintain another action, and that the plaintiff, as their trustee, cannot have any greater rights than they have.

Lush (with whom was *Waddy*, Q.C.) for the plaintiff, the trustee, argued in support of the demurrer.—In considering the question, whether or not the trustee is estopped by the bankrupt debtors having confessed the defendant's plea of liquidation and signed judgment for costs, and the trustee not having elected, under sect. 142 of the Common Law Procedure Act 1852, to proceed with the action, it is well to consider what was the effect of a plea of bankruptcy before the enacting of that section. Now it is clear that such a plea was a good plea in bar to the action, but the assignees of the bankrupt plaintiff could bring a fresh action (*Kinnear v. Tarrant*, 15 East, 622); and to such an action by the assignees the defendant could not plead the pendency of a former action brought against him by the bankrupt for the same cause of action: (*Biggs and others* (assignees, &c.) v. *Cox*, 7 D. & R. 409; 4 L. J. 58, K. B.) Then came the Common Law Procedure Act 1852, sect. 142, and the question is, does that section estop a trustee not electing to proceed thereunder from bringing a fresh action, as he could have done previously. It is submitted that it does not. There is nothing in the section to make election binding on the trustee. It provides in fact not a substituted but an additional remedy for the trustee, and gives him the benefit of a speedier road when necessary; a remedy which he may adopt if he finds the pleas that have been pleaded are favourable, and the course that has been

pursued in the action has been proper. Had the contrary been intended apt words might and would doubtless have been inserted which could admit of no doubt. [He was here stopped by the court, who called on]

Herschell Q.C. (with him was *S. Woolf*) for the defendants to support their defence.—The trustee in liquidation is invested only with those rights that the bankrupt was possessed of, except only in cases of fraud, &c., as to which there is no question in the present case. The right of action in such cases is in the trustee as such, and not for the reason that the bankrupt previously had a cause of action. Here an action was pending to the right of continuing which the plaintiff succeeded and, having elected to abandon it, he is bound by that election, and cannot be permitted to turn round now and bring a fresh action for the very same cause. It is like the case of a lease where the election either to adopt or to disclaim it must be made once and for all, and the lease be taken to or be rejected, according to whether it is considered beneficial or the reverse. In the case of *Newington v. Levy* the matter was considered in the Common Pleas (23 L. T. Rep. N. S. 70; L. Rep. 5 C. P. 607; 39 L. J. 384, C. P.), and again in error in the Exchequer Chamber (23 L. T. Rep. N. S. 595; L. Rep. 6 C. P. 180; 45 L. J. 29, C. P.) and it was held that the effect of the confession of the plea in the former action, under the Pleading rules 22 and 23 of Trin. Term 1853, was to put an end to the litigation altogether as it stood at the time of the confession. It was a final end not of the "action only, but of the cause of action." There is but one "cause of action" in the present case, and that having been abandoned by the plaintiff in the former action, it is abandoned and gone for ever. The consequence of the plaintiff's demurrer being allowed would be that the defendants would be saddled with two sets of costs, which would be a monstrous injustice.

Lush was heard in reply.

Kelly, C.B.—I am of opinion that the judgment of the court on this demurrer must be for the plaintiff. The question before us is whether a right to continue an already pending action, which had been previously commenced by the liquidating debtors, as well also as a right to bring a fresh and separate action, accrued to the plaintiff as the trustee of the debtors in respect of a cause of action which the debtors themselves had, and whether these can be said to be one and the same right? They are, I think, very different. It is not contended or pretended by the defendants that there has been no breach of contract, and no right in consequence therefore to recover without reference to and apart from any question of bankruptcy, or liquidation; and therefore, for the purposes of this demurrer, such a right must be taken to exist. The defendant, however, contended in argument, that the necessary consequence and result of the trustee's electing not to continue the action commenced by his debtors would be that the right of action remained vested in the debtors, and that it was not competent to the trustee to take any further proceedings. The insolvency of the debtors, and their petition in liquidation, took place subsequently to the accruing to them of the cause of action, and under the very admirable provisions of the Common Law Procedure Act 1852, the present plaintiff, the trustee in liquidation, was called upon to exercise his election,

whether or not to go on with the action which the debtor had previously brought, and which was now pending, and give security for costs, and he then declined to continue the action and give such security; whereupon the defendants, having pleaded the liquidation proceedings in bar, the debtors admitted their insolvency, and confessed the truth of the matters in the plea, and had judgment for their costs, which were duly paid by the defendants. Then it has been argued for the defendants, that the trustee is to be barred and hindered from recovering in this fresh action brought by him, because, if he be allowed to proceed, the defendants may be rendered liable to a claim by reason of the insolvency of the debtors. But can it be that we are to hold the trustee to be so estopped from recovering for the benefit of the creditors of their debtors generally? for if the argument and contention on the part of the defendants be well founded, the defendants would be relieved and discharged from paying a debt due from them to the estate of the liquidating debtors, and simply because they may have had to pay costs in the former action, and may have to pay costs again in the present action. There is nothing in the statute or in the law that I can see which enables the defendants so to evade their liabilities, and therefore the plaintiffs' demurrer must be allowed.

Cleasby, B.—I am entirely of the same opinion. The defendants, in my opinion, have in no way answered the claim of the plaintiffs in their statement of defence. In this action by the plaintiff as the trustee of certain liquidating debtors, we must, for the purposes of the demurrer, consider and treat the debt now sued for as a present existing debt. The defendants, however, have contended before us that the present action is barred because the plaintiff, the trustee, has already elected that he would not continue the action which the debtors had previously brought against the defendants for the same cause of action, in which action the insolvency of the debtors and the proceedings in liquidation were pleaded in bar by the defendants; and the truth of such plea was confessed by the debtors, who thereupon had judgment for their costs under rules 22 & 23 of Trinity Term 1853. There can be no doubt that the debtors themselves would be barred by this from bringing another action, because the fact of the cause of their action having been the subject of a judgment would be a complete answer to any fresh or future action by the same parties for the same cause; and the case of *Newington v. Levy* (*ubi sup.*), cited and relied on by Mr. *Herschell* in his argument for the defendants, really decided that and nothing more. But I am at a loss to see on what possible ground it can be put forward as a bar to the trustee's action, which has not been the subject of any judgment; nor can I discover a tittle of authority for the proposition that, because the trustee heretofore elected not to go on with the action which the debtors had previously brought, he is, therefore, now barred from bringing this present action in his own name. The trustee of an insolvent debtor does not simply represent the debtor by merely standing in the latter's shoes. It has been over and over again said and pointed out that their positions are very different, the one from the other, and numerous and obvious fallacies have arisen from upholding the assumption to the contrary: (See *Heilbutt* and

Div.]

STICKLAND v. STICKLAND—In the Goods of RICHARDSON.

[Prob.]

others v. Neville, 22 L. T. Rep. N. S. 662; L. Rep. 5 C. P. 478; 39 L. J. 245.) It would have been quite different had the trustee, the present plaintiff, elected to go on with the former action in the debtor's names; and he would then, without doubt, have been bound by their acts. In the present case, however, he is suing in and by virtue of his position as trustee under the bankruptcy laws, and with all the rights which are vested in a trustee by those laws. There is, in my opinion, neither authority for, nor reason in, the contention that has been urged upon us on the part of the defendants.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Charles Butcher*, agent or *Henry Patteson*, Sheffield.

Solicitors for the defendants, *Michael Abrahams*, and *Roffey*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Nov. 4 and Dec. 5, 1876.

(Before the Right Hon. the PRESIDENT.)

STICKLAND v. STICKLAND. (a)

Desertion—What constitutes—Presumptive evidence.

A husband left his house in England, with the consent and knowledge of his wife, for Australia, and for some years regularly corresponded with her. The correspondence having suddenly been broken off, and nothing heard of the husband, inquiries were made, when it was found that he had been living with another woman as his wife, who had born him three children.

Held, that there was evidence of an intention to desert from the time when the intimacy with the woman in Australia commenced or from the time when the correspondence with the wife at home ceased.

THIS was a suit on behalf of the wife for a divorce on the ground of her husband's adultery and desertion. The husband had not appeared, and the case was undefended.

H. Lord, for the petitioner, called evidence and proved the following facts. The husband and wife, who had lived happily from their marriage, found themselves in 1855 in straitened circumstances, and hereupon the husband with the knowledge and consent of the wife, started for the gold diggings in Australia. From the time of his arrival in Australia down to the year 1859 he corresponded regularly and in affectionate terms with his wife, until suddenly in that year all ceased, and the wife heard no more from or of her husband. In 1874, from inquiries she had made, she found that he had for some years been living with a woman in Australia, who passed as his wife, and by whom he had three children. The adultery was clearly proved by evidence taken on commission in Australia, and the question was whether upon the facts as stated, which were uncontradicted, there was evidence of desertion: (*Gatehouse v. Gatehouse*, L. Rep. 1 P. & D. 331). *Cur. adv. vult.*

Dec. 5.—Sir JAMES HANNEN.—In this case I am satisfied, on the authority of *Gatehouse v. Gatehouse*, that I may make the decree for a divorce as prayed for. The only question in my mind was whether the desertion alleged was sufficiently proved, and I now think I am justified in holding

that the intention to desert is clearly proved from the fact of the respondent suddenly breaking off from all correspondence with his wife, and thereby leaving her in a position from which in course of time she might legally have implied that he was dead, and further by his taking to another woman and living with her up to the time of the commencement of this suit as her husband.

Decree nisi.

Solicitors for the petitioner, *Combs and Wainwright*.

PROBATE BUSINESS.

Nov. 21, 28, and Dec. 5, 1876.

(Before the Right Hon. the PRESIDENT.)

In the Goods of RICHARDSON. (a)

Appointment of administrator—Chancery suit—Practice.

On an application in the Probate Division by the defendant in a Chancery suit for a grant of letters of administration to the estate of the plaintiff in that suit with a view to wind-up the Chancery suit;

Held, that an affidavit by the parties interested in the estate and assenting to such a course is necessary.

Held further, that even with an affidavit before the court no order can be made without first a certificate under the hand of the judge in the Chancery Division before whom the suit is pending, which shall state that the course proposed is a proper one under the circumstances.

F. Clarke moved the court on behalf of a person named Camp, who is the defendant in the suit *Richardson v. Camp* now pending in the Chancery Division, for an order granting letters of administration to the estate of Richardson, the plaintiff in the said Chancery suit, for the purpose of winding-up the Chancery proceedings.

Sir JAMES HANNEN.—You have no affidavit of the parties interested in the estate of Richardson, consenting to the course which you ask me to adopt, and I cannot act without their consents.

Nov. 28.—F. Clarke renewed his application, handing in the affidavit of all the parties interested in the estate and their consents to the required order.

Cur. adv. vult.

Dec. 5.—Sir JAMES HANNEN.—In this case I am asked to make an order, which is in itself a contradiction in terms, and that is, to appoint a person who is the defendant in a Chancery suit administrator of the estate of the plaintiff in the same suit, and thereby to make the defendant the representative of and to stand in the place of the plaintiff. I am unwilling to do this for any purpose whatsoever. In this case the object suggested to me is for the purpose of winding-up the estate, and terminating the suit in the Chancery Division. Only the tribunal before which that suit is pending can be really cognisant of the facts and capable of forming an opinion as to whether the order asked for is a proper one to be granted, and I refuse to make this order unless or until I have before me a certificate of the judge before whom the Chancery suit is pending that the order prayed for is one proper for me to make under the circumstances of this case. *Application refused.*

Solicitors for the applicant, *H. B. Clarke* and *Sons*.

Monday, Dec. 4, 1876.
(Before the CHIEF JUDGE).

Re PARRY. (a)

Practice—Bankruptcy Rules 1870, Schedule No. 40
—Trustee's bond—Enforcement of.

The introduction of the name of the Chief Judge in Bankruptcy in the bond given by a trustee and his surety as specified in Form 40 in the Schedule to the Bankruptcy Rules 1870, is a mere matter of form; and the bond, when required, can be enforced in the County Court without application to the Chief Judge.

In this bankruptcy the creditors, at the first meeting, appointed a trustee, and resolved, pursuant to sect. 16, rule 2, that he should give security for the due performance of his duties by means of a bond with a surety. Accordingly a bond was executed in the Form No. 40 specified in the Schedule to the Bankruptcy Rules 1870, by which the trustees and his surety became jointly and severally bound "to Sir James Bacon, the Chief Judge in Bankruptcy" in a penal sum "to be paid to the said Sir James Bacon or his certain attorneys, executors, administrators, and assigns," and so on.

The trustee having made default, it became necessary to enforce the bond against the surety, and an application for that purpose was accordingly made to the judge of the Ruthin County Court. The judge, however, being of opinion that the application ought to be made to the Chief Judge himself gave leave for that purpose.

Bagley, for the applicant, mentioned the matter to the court.

The CHIEF JUDGE referred the matter back to the County Court Judge with an intimation that his name was only inserted in the bond as a matter of form, and that in his opinion the County Court judge had ample jurisdiction to order the bond to be put in suit.

Solicitors: Finney and Bruff.

Monday, Dec. 4, 1876.

(Before the CHIEF JUDGE).

Ex parte CORBRIDGE; Re BEALE. (a)

Proof—Loan for purposes of business—Bankruptcy
—Partnership Amendment Act 1865.

In 1857 A., a trader, went through the ceremony of marriage with his deceased wife's sister. In 1858 she became entitled to a legacy of 3000l. which was by her direction paid to A., upon the understanding that he should whenever called upon execute a proper settlement thereof upon her. No settlement was ever executed. In 1876 he filed a liquidation petition.

Held, that no proof could be admitted against the estate until all the trade creditors had been paid in full.

This was an appeal from a decision of the judge of the County Court of Yorkshire holden at Sheffield.

On the 11th July 1857 John Beale, a wine and spirit merchant, went through the ceremony of marriage with Mary Walker, his deceased wife's sister.

In March 1858, Mary Walker became entitled to

self, it was, after some discussion, agreed and arranged that 2000l., part of the 3000l., should be settled so as to secure the control thereof to Mary Walker, and that the remaining 1000l. should be paid to John Beale for his own use. This agreement was never formally effected, and in Aug. 1858, the whole 3000l. was, by the direction of Mary Walker, paid to John Beale, upon the understanding that he should, whenever called upon, execute a proper settlement or declaration of trust thereof. The money so advanced to John Beale was used by him for the purposes of his business.

In July 1876, John Beale filed a liquidation petition. At the first meeting resolutions for a liquidation by arrangement were duly passed, and one Cooper Corbridge was appointed trustee.

Mary Walker tendered a proof for the said sum of 3000l., as "for money lent and advanced and paid by me to the said John Beale, at his request, in the year 1858." On the 31st Aug. the trustee rejected this proof "in consequence of the same being out of date, if such a claim ever existed, and of the relationship existing between Mary Walker and the debtor."

On the 5th Oct. the County Court Judge, upon the application of Mary Walker, allowed her proof to the extent of 2000l.

Against this order the trustee appealed.

Winslow, Q.C. and F. Gould appeared for the appellant.—The proof, as first tendered, was very different to that now sought to be made. The original proof was for money lent and advanced, now it was said to be trust money. That was a device to get rid of the Statute of Limitations by alleging an express trust. Even if it were trust money, it had been lost in the business and could not be traced. They cited

Ex parte Butterfield, Re Butterfield, De Gex. 570;

Ex parte New, Re Childs, L. Rep. 9 Ch. App. 508;
30 L. T. Rep. N. S. 447.

De Gex, Q.C. and Finlay Knight, for Mary Walker, contended that the evidence in support of the trust was wholly uncontradicted, and that there was nothing unreasonable in the transaction.

The CHIEF JUDGE.—This is a singular case. The debtor and the respondent were to all intents and purposes married, but for the provisions of the law of England. He was a wine merchant, and she lent him her money to employ in his business, and it thereby became exposed to all the hazards of that business. He goes into the world and trades with the money as part of his assets. Have not, therefore, his trade creditors the right to say that they must be paid out of the assets of the business in priority to the lender of the money? If there be a surplus after paying the creditors, the respondent may have an equity against it, but that is her only right. Then it is said that a trust had been created on behalf of the respondent, but in my opinion the trust set up is wholly repugnant to the original stipulation for the loan. Although it is not said that the respondent participated directly in the profits of the business, no one can doubt that the business was in a certain sense carried on for the joint benefit of the debtor and herself. The Partnership Act of 1865 expressly provides that a person who lends money to a partnership under an agreement to share in the

(a) Reported by A. A. DORIA, ESQ., Barrister-at-Law.

[BANK.]

Ex parte DICKIN; Re WAUGH.

[BANK.]

profits cannot call for payment of his money until all the creditors of the partnership have been paid in full. If that statute have any application to the present case the result is plain. The respondent knew her money was to be employed in the business, and if she had sued him whilst he was solvent it would have been a sufficient answer for him to say, "I have employed the money in the business, and have lost it all." In my opinion the order of the County Court judge cannot be sustained and must be discharged, but without costs.

Solicitors for the appellant, *Torr and Co.*

Solicitor for the respondent, *W. F. Watson.*

Monday, Dec. 11, 1876.

(Before the CHIEF JUDGE).

Ex parte DICKIN; Re WAUGH.(a)

building club—License to seize on bankruptcy of contractor—Seizure after filing of a liquidation petition, but without notice, protected—The Bankruptcy Act 1869, s. 94.

In March 1875 *A.* entered into a contract with a building club to erect some houses for them upon their land. The contract provided that if *A.* should neglect to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt or insolvent, or otherwise be rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to *A.*, to appoint other persons to complete the contract, and also to seize and retain all materials, plant, and implements upon the ground provided that *A.* had received money on account of the contract. On the 30th May 1876, the architects gave *A.* notice under the contract of their intention, at the expiration of two days, to employ other persons to complete the works, and warned him not to remove the plant, implements, and materials. The same day *A.* filed a liquidation petition. On the 2nd June the architects took possession of the plant, implements, and materials. The trustees under the liquidation having claimed the property seized by the architect upon the ground that his title related back to a date anterior to the day when the seizure was made.

It is held, that the effect of the proviso was to give the club an equitable lien upon the property seized, and that, as the lien was perfected by seizure before notice of an act of bankruptcy, the transaction was within the protection of sect. 94 of the Bankruptcy Act 1869.

There was an appeal from a decision of the judge of the County Court of Yorkshire holden at Bradford.

On or about the 13th March 1875, John Waugh, who carried on the business of a contractor at Bradford, entered into a contract with the Farcliffe Place Building Society to do the masons' and joiners' work in the erection of twenty houses.

The material clauses of the contract were the following:

6. Should any contractor or contractors neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architects, or become bankrupt or insolvent, or otherwise be

rendered incapable of completing his or their contract or contracts, the architects shall have full power, after giving two clear days' notice in writing to such contractor or contractors, or leaving such written notice at his or their usual place or places of business or residence, to order and appoint such other persons to proceed with and complete the work, as they may think fit; and to provide or cause to be provided all such materials as may be requisite for the same: they, the architects, shall also in such case have full power to seize and retain all materials, plant, implements, and also all materials wholly or partially made up or completed and ready for fixing, and which were intended to be fixed upon the proprietor's work, but which shall not yet have been removed from the contractor's or manufacturer's premises; provided that the contractor or contractors shall have drawn and obtained money on account of this contract: the architects may then either have such work and materials proceeded with and completed, or they may sell them and apply the proceeds to the completion of the work.

8. In the event of any contract being at any time determined and put an end to as aforesaid, and of the work being taken out of the original contractor's hands, he shall not remove anything, either work, materials, implements, scaffolding, or plant, from the works and premises of the proprietor, but all materials of every kind, and all work which may be either in course of preparation or ready for fixing, and which may then be on the works and premises either of the proprietor or of the contractor or contractors, shall be left or appropriated for the use of whomsoever may be appointed to finish the work. And if the amount of the balance of money and of the material worked or unworked so left in the hand of the proprietor, upon the determination of the contract or contracts as herein provided, shall not be sufficient to complete the remaining works contained in the contract then the architects shall have full power to sell the whole of the implements, plant, and scaffolding left upon the premises and works of the proprietor, originally belonging to the first contractor or contractors, and to appropriate the purchase-money to the completion of the works without further notice, suit, question, delay, or litigation after the said determination of the original contract or contracts.

John Waugh proceeded with the contract, and received payments on account to the amount of 5400*l.*

On the 30th May, 1876, the architects of the building club wrote and sent the following letter to John Waugh: "As you have neglected to proceed with the work and buildings for which you have contracted with this society, we hereby give you notice that on the expiration of two clear days from this date we intend to employ other means, and to provide all necessary materials for completing the work; and we also give you notice that from and after this date you must not remove from their present position any materials or plant used in or intended to be used in and about the work and buildings of this society, as under the conditions of your contract all such materials, implements, and plant belong to the Farcliffe Building Society."

The same day John Waugh filed a petition for liquidation.

(a) Reported by A. A. DORRIS, Esq., Barrister-at-Law.

meeting, held on the 26th June, resolutions for liquidation by arrangement were duly passed, and a trustee was appointed.

On the 28th June the architects gave the trustee notice that the society claimed all the implements, materials, and plant, upon the premises, and requiring them not to interfere with or remove the same.

On the 5th July the trustee went to remove some of the materials, and found the architects in possession. On the 13th Oct. the County Court Judge, upon the application of the architect, granted an injunction to restrain the trustee from removing, or in any way interfering with the materials, implements, and plant, upon the works.

Against this order the trustee appealed.

There was a conflict of evidence as to whether the architects had or had not notice of the liquidation petition before they took possession.

De Gez, Q.C. and *Robertson Griffiths*, for the appellant, contended that the case rested upon the construction of the 6th clause in the building contract above set out, and was not an immediate assignment of future property, but merely a licence to seize materials when brought upon the ground. If, therefore, the seizure were not made before the act of bankruptcy, the title of the trustee would relate back, and the goods belong to him. The title of the trustee avoided all transactions except such as were within sect. 94 of the Act, and a licence to seize, which was not perfected until after the filing of the petition, could not be within that section. They referred to

Reeve v. Whitmore, 7 L. T. Rep. N. S. 839 ;

Ex parte Eyles; *re Edwards*, L. Rep. 16 Eq. 99.

Further, the onus lay on the other side to show that possession was taken without notice of an act of bankruptcy having been committed (*Krehl v. Great Central Gas, &c., Company*, 23 L. T. Rep. N. S. 72; L. Rep. 5 Ex. 289), and that they had failed to do.

Winslow, Q.C. and *West* appeared for the respondent.—The licence to seize operated as a charge upon the property, and gave an equitable interest in the property which the society were entitled to perfect upon giving notice. *Brown v. Bateman* (L. Rep. 2 C. P. 272; 15 L. T. Rep. N. S. 658) was an express authority in their favour. They also referred to

Wood v. Leadbitter, 13 M. & W. 813 ;

Hawthorne v. Newcastle Railway Company, 3 Q. B. 734.

De Gez, Q.C. in reply.—There was no evidence to show that the seizure was without knowledge of an act of bankruptcy: (*Ex parte Schulte, re Matanic*, L. Rep. 9 Ch. App. 413; 30 L. T. Rep. N. S. 478.) Further, a proviso to seize upon bankruptcy or insolvency was an unlawful contract.

Ex parte Brown, re Jeavons, L. Rep. 9 Ch. App. 304; 30 L. T. Rep. N. S. 108.

THE CHIEF JUDGE.—No doubt the ground upon which the learned judge of the County Court decided this case presents some difficulties, because by the bankruptcy law the filing of the petition is an act of bankruptcy; and that the title of the trustee relates back to the act of bankruptcy cannot, in general, be disputed. But I do not think that is all that the learned judge meant to

there granted were unimpeachable, it does not signify to what the trustee's title related. There is a little obscurity upon the title of the trustee from the circumstance that in this Act of Parliament, which is not the best drawn Act of Parliament I ever saw, sometimes the title of the trustee is said to date from the adjudication, and sometimes it is left to be implied that it extends to the act of bankruptcy. The 7th sub-section of the 125th clause somewhat mixes up these things together. [His Lordship having read the section, proceeded:] The case, as I have said, was upon this contract, which contains, in the events which have happened, a licence to seize. Well, unless it can be imputed to that contract that it was, in itself, invalid; unless the persons entering into it were told that an act of bankruptcy had been committed, it is a perfectly good contract, reasonable in its terms, and of very ordinary occurrence in such like transactions. And the contract is this: [His Lordship having read article 6 of the contract stated above proceeded:] That must mean such as are upon the works or are being done at the time, "and also all materials wholly or partially made up or completed and ready for fixing, and which were intended to be fixed upon the proprietor's works, but which shall not yet have been removed from the contractor's or manufacturer's premises." And then all is over-ridden by this proviso, "Provided that the contractor or contractors shall have drawn and obtained money on account of this contract, the architects may then either have such work and materials proceeded with and completed, or they may sell them and apply the proceeds to the completion of the work." That is a contract entered into on the 13th March 1875, before any suggestion of any act of bankruptcy. Now is not that a valid transaction between the parties? If so, by subsect. 3 of sect. 94 of the Bankruptcy Act all valid transactions are unimpeachable in bankruptcy if they take place before the date of the order of adjudication by a person not having at the time of making such contract, or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication, and that is not suggested here. Admitting that *dictum*, which, if were it necessary to decide the case, would require some further consideration, when it is alleged that the transaction was before such notice of an act of bankruptcy the onus is upon such person sustaining the transaction to prove that he had no notice, and that he inquired and desired to be informed whether there was any notice of an act of bankruptcy in this case at the time when the notice to seize was given. The matter is left in some obscurity, and the only attempt to prove notice has been by an affidavit made by one of the officers of the society, in which he says he is willing to become a receiver. But that does not go beyond intention, that does not establish the fact even that the petition had been filed although it happens to be on the very day upon which it was filed. It is left there without any proof of that, but however that may be, it does not matter, because all these transactions took place without notice of an act of bankruptcy. The case of *Krehl*

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THE UNITED STATES v. LAWRENCE.

[AMERICAN REPS.]

Great Central Gas, &c., Company (ubi sup.), which has been referred to, seems to me to be applicable to this part of the case. That was a case where a society had given a guarantee for the honest conduct of a person employed, and had taken a power, if certain events happened, to levy upon and seize his goods. Those events happened, and they did so seize, and he became bankrupt. In the judgment there, Martin, B. refers to the word "transaction" in the statute, with which they had to deal then, and, in my opinion, the words in this statute are equivalent to the words in that, and he says, "The 'transaction' ought not to be confined to the act of entering to seize the goods. It includes the whole of the arrangement between the parties from the contract by Higgs with the Guarantee Society downwards." And in the judgment of the other judges the same principle is inverted to. The Chief Baron says, "It seems to me quite immaterial whether the goods were the bankrupt's own, or merely in his order and disposition, or whether he was actually a party to the seizure or not. I am of opinion that the transaction was protected within the letter and spirit of the statute, and, accordingly, that judgment should be given for the defendants." The other judgments are to the same effect, and I do not think it is necessary to read any more of them. Well, then, under those circumstances, this fact being clear that they shortly after the filing of the petition the society put in force the contract which was dated 1874, and that they had a right to do so is not questioned at all, they in the exercise of the powers which this contractor gave them long before he was a bankrupt, and probably before there was any thought of his being a bankrupt, at in force those powers and they did seize. The case of *Hawthorne v. The Newcastle Railway Company (ubi sup.)*, which has been referred to, seems to me to cover the principle of this case and more than cover it. It is said by Mr. De Gex that they there stipulated for a lien. I cannot read this contract, considering the time at which it was entered into, being any less than a lien, if the event should happen, in which it is stipulated that the society would have full power to seize and retain all tools, plant, and implements. Without, therefore, disturbing the judgment, without saying whether or not to its full extent the change of property is enough to justify the order that was made, I think that upon the clear terms of this contract, a contract unimpeachable notwithstanding the later bankruptcy, and even if the change were made, as unquestionably it is proved now that it was made after the petition for liquidation was filed, I think it was a transaction which was, I do not say protected, but perfectly lawful and unimpeachable in the bankruptcy, and that the seizure that has been made has been lawfully made, and that the society entitled to the benefit of the contract.

Solicitors for appellant, *H. B. Clarke and Son*.
Solicitors for respondent, *Singleton and Tatterhall*.

AMERICAN REPORTS.

UNITED STATES CIRCUIT COURT—
SOUTHERN DISTRICT OF NEW YORK.

March Term, 1876.

THE UNITED STATES v. LAWRENCE. (a)

Extradition—Treaty between England and the United States—Other offences—Effect of an agreement between Governments before extradition—Executive and judicial questions.

The Extradition Treaty of 1842 between England and the United States does not provide that a person extradited shall not be tried for an offence other than that for which he is extradited.

The Statutes of the United States, passed in 1848 and 1869, in relation to extradited criminals, do not give such a construction to the treaty.

If the English Statute of 1870 is held in England to give such a construction to the Treaty (which may be doubted), yet that statute cannot be held to have had that effect in the United States.

Nor can that statute be held to have been such a modification of the treaty of 1842, that the failure of the Government of the United States thereupon to give notice of the abrogation of the treaty, can be held to have been an assent by that Government to such modification.

Nor can an agreement entered into between the representatives of the two governments in any case before the extradition, as to the offences for which the extradited person shall be tried, have the effect to deprive the court of jurisdiction to try him for other offences. The effect of such an agreement is a question for the executive, and not for the judicial department, of the government.

CHARLES L. LAWRENCE was, before the Circuit Court of the United States, held at the City of New York. He was indicted for forgery. The charges were, that he forged and uttered a certain bond of one Blanding, and also a certain affidavit known as the "Owner's oath," purporting to be made by Blanding upon an entry of certain goods at the custom house in New York, and also the entry of the same goods, upon the back of which the owner's oath was written. These charges were set forth under different forms in separate counts of the indictment.

Lawrence, when required to plead to the indictment, filed a special plea to the jurisdiction of the court, in which plea, among other things, he set up that, on the 7th of March 1875, in Ireland, upon a requisition made on behalf of the Government of the United States, he was seized and thereupon charged with the crime of forging and uttering a certain bond, being the bond referred to in the indictment, and the forging of a certain affidavit, being the affidavit referred to in the indictment; and thereupon such proceedings were had that, in pursuance of the Extradition Act of the Parliament of Great Britain, passed 1870, and upon the faith thereof, an extradition warrant was issued, reciting that the defendant was accused of forging and uttering a certain bond and affidavit within the United States, by virtue of which warrant the accused was conveyed within the jurisdiction of the United States, where he is subject to be tried for the crime of forging and uttering the said bond and affidavit, and for no other

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crime or charge whatever. The plea then averred that the accused is charged in the indictment with offences other than the offences on which his surrender to the United States was grounded, and specified in the warrant of extradition. The plea also set up the British Extradition Act of 1870, and that there was an understanding that he was to be tried only for the crime stated in the extradition warrant. Wherefore the accused insisted that the court had no jurisdiction to try the present indictment until a reasonable time should have elapsed after the trial of the accused for the crimes specified in the extradition warrant, that he might have an opportunity to return to Her Britannic Majesty's Dominions.

The practice adopted by the respective parties enabled the attorney for the Government to deny that the indictment charged the accused with any other crimes than those mentioned in the extradition warrant, and also to deny any understanding as to what crimes Lawrence would be tried for; while at the same time he could ask the determination of the court upon the questions of law raised by the facts stated in the plea to the jurisdiction.

In disposing of these questions the court remarked as follows: in regard to the effect of the extradition proceedings and the construction of the treaty of 1842 between England and the United States.

BENEDICT, J.—In disposing of the questions argued before me upon this demurrer, I first notice the position taken that all extradition proceedings by their nature secure to the person surrendered immunity from prosecution for any offence other than the one upon which his surrender is made. This question is not open in this court. It was decided in *Caldwell's case* (8 Blatchford's Rep. p. 131) in 1871. That determination has since received strong support from the decision of the Court of Appeals of this state in *Adrian v. Lagrove* (59 New York Rep. 115) where the existence of any such immunity was denied in a civil case. This ground of defence is, therefore, dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and justice, which he has offended, no rights accrue to the offender by flight. He remains at all times and everywhere liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm. But here it has been contended that the accused has such immunity by reason of the provisions of the treaty with England of 1842, under which his surrender was made, which, it is correctly said, is a law of the United States binding upon the courts. The decision of *Caldwell's case* is decisive of this question also, for *Caldwell* was surrendered under the treaty of 1842. But, as no argument was made in *Caldwell's case*, based upon the provisions of this particular treaty, the argument now made in support of this construction of the treaty may properly be examined. At the outset let it be noticed, that no language is used in the treaty which can be supposed to confer the immunity here claimed. On the contrary, the language of the treaty is calculated to repel the idea, for it declares that the offender shall be "delivered up to justice." A significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice

without qualification. It is, however, argued that both the parties to this treaty have placed a construction upon its provisions, which confers the immunity for which the accused contends; and reference is made to Acts of Congress of 1869 and of 1848 (U.S. Revised Statutes § 5272, § 3274, and to the British Extradition Act of 1870 as supporting the assertion. The Act of Congress of 1869 is a general law intended for the protection of extraordinary offenders; but the protection it confers is expressly limited to cases of "barbarous violence." It is true that it assumes, as well it may, that the offender will be tried for the offence upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offences. The absence of any provisions indicating an intention to prevent prosecution for other offences in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of force the suggestion that the Act of 1869, as a legislative Act, gives to the treaty of 1842 the construction contended for by the accused. As to the Act of 1848, the provision of which relied upon is as follows: "It shall be lawful for the Secretary of State to order the offender to be delivered to such person as shall be authorised in the name and on behalf of such foreign Government to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." It does not seem reasonable to suppose that it was the intention of Congress by the above language to give a legislative construction to the existing treaty of 1842. The provision of the Act of 1848 is within the broad provision of that treaty, but does not restrict the operation of that provision; and it may be safely assumed that, if the intention to limit the effect of, or give a construction to that or any other treaty had been entertained (assuming such a function to belong to a statute of this character, such intention would have been plainly expressed. The Acts of Congress referred to, therefore, fail to afford a legislative construction of the treaty in the particular case under consideration. It is still more difficult to find support for the doctrine of the defence in the provisions of the British Extradition Act of 1870. How can it be that, without any action on the part of the treaty-making power of the United States, the Parliament of England, by a statute of England passed twenty-eight years after the treaty of 1842, can engraft upon that treaty a provision of immunity not found in the treaty, and which must therefore be enforced by courts of the United States as part of the laws of the United States? The construction proper to be given by the executive department of the improvement to any condition found in an extradition statute of England to which the Government of the United States has assented in any particular case, is not under consideration. Here the question is judicial; and it is whether the British Act of 1870, by reason of its subject-matter, becomes a law of the United States, as such affords a legislative construction of the treaty, binding upon the courts of the United States. Upon such a question no time was spent, and it is dismissed with the observation that it would appear that the English courts incline to the opinion that the Act of 1870 has no effect in England even to limit the operation of the treaty of 1842, as is seen by the opinions delivered by

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Court of Queen's Bench in *Bouvier's case* (27 L. J. Rep. N. S. 844). The words of the Lord Chief Justice in that case are: "I see plainly that it was the intention of the Legislature, that is to say, it was intended (by the Act of 1873), while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full force and effect." How is it made to appear that any such construction of the treaty of 1842 has been adopted by the executive department of either Government? An agreement for such immunity in the present instance is set up by the plea. It may be competent for the Government of the United States to enter into such an agreement with the Government of England, in the absence of any provision for immunity in the treaty; and the demand for such an agreement on the one side, as well as the giving thereof on the other, leads to the inference that no such protection is afforded by the treaty itself. A single instance of such an agreement does not, therefore, help the argument. The understanding of the treaty by the executive department is better shown by the action taken or omitted in the cases that have arisen where there has been no agreement. So in the case of Heilbron, who was surrendered by the United States upon the request of England for an extradition crime: a trial was had in England for an offence not provided for in the treaty without interference by the executive there, and without complaint from the Government of the United States. So also, Burley, an offender surrendered by England to this Government, was put upon trial in this country for an offence other than the one upon which he was extradited, and the case being called to the attention of the law officer of the Crown, it was considered that "if the United States put him *bonâ fide* upon his trial for the offence in respect of which he was given up, it would be difficult to question the right to put him upon his trial also for piracy or any other offence which he might be accused of committing within their territory, whether or not such offence was a ground of extradition or within the treaty." No case has been referred to where the right above spoken of has been questioned by the British Government. On the contrary, if I am correctly informed, such right has not hitherto been denied in England. As to the effect of the fact of a previous trial for the offence for which the offender was given up, to which allusion is above made, it is plain that such fact is immaterial in determining the judicial question, where legal immunity is set up by way of defence in a prosecution for other offences, however important that fact might be, as evidence of good faith, in determining the political question when it arises. It may be added that the action of the Executive Department of the Government of the United States in the cases where extradited offenders have been tried in this country for offences other than those upon which their surrender had been asked, has a significant bearing upon the legal question under consideration, because in criminal cases, as distinguished from civil cases, the Executive, by reason of the power conferred by law to control the prosecuting officer, as also its power to pardon, is not confined to a consideration of the political question alone, but may also act upon the determination of the judicial question. But it is further said that the British Act of 1870 amounts either to an abrogation of the extradition section

of the treaty of 1842, or to a modification of the provision, and, inasmuch as by the 11th section the Government of Great Britain could at any time abrogate that portion of the treaty, the Act of 1870, if considered by the Government of the United States as an abrogation, would have been so declared, and, in the absence of such a declaration must be considered to be acquiesced in by the Government of the United States as its construction of the treaty, and becomes a part of the treaty binding upon the courts. This proposition is answered by what has been already said in regard to the effect of the British Act of 1870, and the action of the Government of the United States in the cases which have hitherto arisen. Moreover, if the action of the two Governments and the Act of 1870 be given the utmost effect possible in favour of the accused, all that can be extracted from them is an implied engagement to afford protection to persons extradited in pursuance of the treaty from prosecution for causes other than those upon which their surrender was asked—which addresses itself to the political not to the judicial department. It is not intended to suggest that such can be their effect, but simply to express the opinion that in any aspect they have no greater effect, and in view of the language of the treaty, cannot be relied on as affording a legislative or executive construction of the instrument binding upon the courts. It may therefore, without hesitation, be declared that the claim of legal immunity here made is without foundation in the treaty of 1842. In support of this conclusion, reference is made to the authority of the Court of Appeal of the State of New York, which high court, in *Lagrange's case*, was called on to declare the effect of this same treaty. [The court then, after considering some other questions in the case, takes up the question of the effect of the allegation in the plea, that there was an agreement made before Lawrence was extradited as to the offences for which he was to be tried, as follows:] Upon this point the argument made is that the existence of such an agreement being deemed to be admitted by the demurrer, it must be recognised by the court, and the accused be protected by the court from prosecution upon an indictment charging offences other than those mentioned in the agreement as stated. This position is supposed to be supported by the rule applied in civil cases, when a defendant has been inveigled within reach of the process of the court. But the rule referred to has no application in criminal cases. The duty of the courts in criminal cases is stated by the Court of King's Bench in *Scott's case* (9 B. & C. 447). Scott was indicted in England for perjury, and a warrant for her arrest issued. The officer proceeded to Brussels, and there finding Scott, seized her without resort to extradition proceedings or other legal process. Application for assistance was then made by her to the British Ambassador at Brussels, who refused to interfere, and she was carried to London, where she was brought before the court upon *habeas corpus*, and the above facts were made to appear. Tenterden, C.J., in delivering the opinion of the court, thus lays down the rule in criminal cases: "The question is whether, if a person charged with crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought,

court. A different rule would seriously embarrass the administration of the criminal laws, and cannot be permitted here to obtain, until it has received the sanction of controlling authority. If, then, an agreement exists between the Government of the United States and the Government of Great Britain, such as is set forth in the plea, the performance thereof is within the power of the Government, by reason of its legal control over the prosecuting officer. And all that need be said here is that such an agreement can avail nothing to a defendant, setting it up by way of plea to the jurisdiction of the court before which his trial is moved by the Government. The decision, therefore, must be that the plea to the jurisdiction and all subsequent pleadings in this case be set aside, with liberty to the defendant to plead anew to the charges in the indictment contained.

For the United States, *George Bliss*, U. S. District Attorney.

For Lawrence, *E. W. Stoughton* and *B. F. Tracy*.

CROWN CASES RESERVED.

Saturday, Jan. 20.

(Before *KELLY, C.B., DENMAN, J., FIELD, J., HUDLESTON, B., and MANISTY, J.*)

REG. v. RYMER. (a)

Innkeeper—Indictment for refusing to serve customer—Refreshment bar—Customer accompanied by a large dog—Traveller—Legal cause for refusing.

A refreshment bar attached to and under the same roof as an hotel, having a separate entrance to the hotel, the hotel being used for the accommodation of sojourners, and the refreshment bar for the refreshment of persons casually passing, is not a common law inn, and the keeper is not liable to the common law regulations of an innkeeper.

Seemingly, also, that a tavern or shop where liquors are sold by retail merely, and no accommodation is held out for travellers or wayfarers, is not a common law inn.

A person living in the same town, 1200 yards off an inn, and walking about the town with a dog, for his own recreation and amusement, is not a traveller in the sense that he has a right at common law to be provided with refreshment and entertainment by the innkeeper.

A traveller accompanied by a large dog, which had been offensive on a former occasion, and of which timid persons and children may be afraid, has no right to demand entertainment and accommodation at an inn for himself and dog.

CASE reserved for the opinion of this Court by the Chairman of Quarter Sessions for the Western division of the county of Sussex.

The defendant was tried at the Michaelmas Sessions for the western division of the county of Sussex, for that he, being a licensed innkeeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others not; but otherwise nothing turned upon the form of the indictment.

(a) Reported by *JOHN THOMPSON, Esq., Barrister-at-Law.*

under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the *Carlton*, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel, and serving from behind the counter.

The prosecutor, who was a householder, lived in the same town within 1200 yards, had been in the habit of coming to the premises of the defendant accompanied by two dogs; he had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal. They were very large, of the *St. Bernard mastiff* breed.

On the 3rd March, after a recent visit from the prosecutor, the defendant wrote to him as follows:

Royal Sea House Hotel,

3rd March 1876.

W. Cramer, Esq.

Dear Sir,—I regret to have to request you will be so good as not to bring your dog or dogs into the "*Carlton*." The shop and mess this evening has been much complained of, and the dogs are as objectionable in the "*Carlton*" as in the hotel.—I am, yours truly,

JAMES RYMER.

And on the 4th the prosecutor wrote in reply to the defendant as follows:

Worthing, 4th March 1876.

Dear Sir,—In reply to your note of yesterday I will so far comply with your request as not to bring my dogs into the refreshment bar, or as you facetiously call it, the "*Carlton*," when they are wet or dirty, but otherwise I must be allowed to follow my inclinations as heretofore. The consequence of refusing a person refreshment without reasonable cause I need not point out to you, believing you superior to the general run of publicans; but I may add that hostilities as well as public houses are placed under special laws, some of which tend to protect the public against the petty tyrannical, whimsical mad freaks or acts of individual landlords.—Yours respectfully,

W. CRAMER.

Mr. James Rymer.

On the 6th March the prosecutor went into the refreshment bar, leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but was refused by the person attending the bar, by order of the defendant; the same occurred on the 7th and 8th, when he again went to the refreshment bar leading the same dog in leash, and taking it into the passage above described, and demanded refreshment, tendering the money in payment, but was again refused by order of the defendant.

On each occasion the bar was open, the hour was proper, and the order in itself reasonable. It was proved by other hotel keepers that complaints had been made of the prosecutor's dogs by their customers, and some of them had gone elsewhere in consequence, and that the prosecutor had been remonstrated with and himself admitted to one of the witnesses that "no doubt his dogs were a nuisance to the hotel keepers." It was also proved that other tradesmen in the town had complained of the dogs, and also that the dog in question had upon one occasion vomited on the door mat of a tradesman's shop in the town. It was not proved that the prosecutor was a traveller in any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement.

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It was contended on the part of the prosecutor that by so refusing to provide him with refreshments the defendant committed an indictable offence. On the other hand, it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveller, and therefore there was no obligation on the part of the defendant to serve him; and, secondly, that at all events the defendant was justified under the foregoing circumstances in refusing to do so.

I declined to stop the case, which ultimately went to the jury. I told them that *prima facie* the defendant was bound by law to supply the prosecutor, as one of the public, with refreshment upon his reasonable demand. That he could not select his customers or reject any from caprice or dislike, but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which from its size, breed, nature, or habits, was obnoxious to his customers and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor.

The jury found the defendant guilty, and in answer to me said they considered the defendant was bound to serve the prosecutor, though accompanied by any dog, even a savage one, but they found as a fact that the dog in question was not a savage one.

The defendant was bound over in his own recognisance in 50*l.* to appear to receive judgment when called upon.

If the Court shall be of opinion that the conviction was right, it is to stand, otherwise to be quashed.

JOHN JAMES JOHNSON, Q.C.,
 Vice-Chairman of the Court of
 Quarter Sessions for the Western
 Division of the County of Sussex.

No counsel appeared to argue on either side.

KELLY, C.B.—We regret that the case has not been argued by counsel, as the points raised are of very great public and general importance. However, they present no difficulty and no member of the court entertains any reasonable doubt upon any one of them. This was an indictment against the defendant alleging that he was an innkeeper and under a legal obligation to receive travellers and supply them with refreshments for their accommodation, and that he refused to receive the prosecutor into his house and provide him with refreshments, without any lawful and reasonable excuse. The case presents three questions for our consideration: First, was the defendant's house, or that portion of the house into which the prosecutor desired to enter, an inn within the meaning of the old common law, which obliges an innkeeper to receive travellers and wayfarers, and provide them with food, sustenance and accommodation; secondly, was the prosecutor a traveller on the occasion in question; and, thirdly, assuming this part of the house to have been an inn, and the prosecutor a traveller or wayfarer on the occasion, was there any lawful and reasonable excuse for the defendant's refusing to receive him and supply him with the refreshment he asked for? As to the first question, was this part of the house an inn within the meaning of the common law? The case states "that the defendant was the proprietor of the Sea House Hotel at Worthing," and, if the statement had stopped there, there could have been no doubt on this point; but it proceeds: "attached to which, and under the same roof and

licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about 10ft. wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel, and serving behind the counter." [His Lordship also here read the letters set out in the case in order to show that it was not the house or hotel to which the case related, but a mere shop or bar in which spirits were sold.] Upon these facts, I am of opinion that a shop or refreshment bar of the description like this one is not an inn within the meaning of the common law. An inn at common law is defined to be a place for the accommodation of travellers and wayfarers. A tavern or shop, or bar, where only liquors are sold by retail is not within the legal meaning of the word "inn," and the proprietor is not bound to comply with all the obligations of an innkeeper at common law. On this ground alone, viz., that the prosecutor is not an innkeeper within the definition of the term innkeeper at common law, it would be enough for the purposes of the case to say that the conviction could not be sustained. The second question is, Whether the prosecutor was a traveller or wayfarer on the occasion in question? Now the case states that the prosecutor lived in the same town, within 1200 yards of the defendant, and had been in the habit of coming to the premises of the defendant accompanied by two dogs; and on the 3rd March went into the refreshment bar leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but was refused by order of the defendant. The same thing occurred on the 7th and 8th of March. It thus appears that the defendant lived on the spot, no matter whether a quarter or a half mile off. Now can anyone suppose for a moment that under the circumstances the defendant was a traveller? He clearly was not a traveller or wayfarer, but a mere resident in the town taking a walk and calling at this bar for a glass of whisky. It is scarcely necessary to say that it is essential that the indictment should allege that the prosecutor was a traveller, but there is the case of *The King v. Luellen* (12 Mod. 445), where an indictment against an innkeeper for not receiving a guest was quashed for not alleging that he was a traveller. The third question is one which might be attended with some difficulty in certain cases, but upon the facts stated here there is none. Assuming for the purpose of this question that this refreshment bar was an inn and the prosecutor a traveller or wayfarer, was the refusal to serve the prosecutor made on a lawful and reasonable ground? It appears that the prosecutor had been in the habit of going to the defendant's bar accompanied by two dogs, and had had three. One of the two was a savage dog, and generally wore a muzzle; the other dog was a quiet one; and they were very large dogs of the St. Bernard mastiff breed. On the 3rd of March, after a recent visit from the prosecutor, the defendant wrote the letter set out, and on the 4th the prosecutor wrote the letter in reply, also set out in the case; and then on the 6th the prosecutor went to the bar accompanied by a large dog of the St. Bernard breed, and though the jury have found

rule upon this point, for there may be a case in which an innkeeper would be bound to supply a traveller or wayfarer with refreshment though he might be accompanied by a dog; but the innkeeper would have a right to say that he would put him into a safe place. I will reserve my opinion as to that till such a case arises. In this case, however, I think the defendant was not bound to admit the prosecutor as a guest. The innkeeper has a right to say that "the men, women, and children who are likewise to be accommodated, and are within this house, are likely to be disturbed and alarmed by a large dog, and I do not think that I ought to subject my guests to such an annoyance." Taking all the facts stated in the case together, I am of opinion that this was not such a dog as entitled the owner to require that the dog should be admitted into the inn as well as himself. I am, therefore, of opinion that the conviction should be quashed.

DENMAN, J.—I also think that the conviction should be quashed. It is desirable to call attention to the definition of an inn, laid down in 4 Stephen's Comm. 271 (7th edit.): "We may remark here an inn, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeeper fined if a traveller be refused entertainment by him without a very sufficient cause; for thus to frustrate the end of its institution is held to be disorderly behaviour, and therefore punishable as an offence, besides exposing the landlord to be sued for damages." Now three things are required to support the indictment by the common law: first, that the defendant be an innkeeper; secondly, that he refuse entertainment to a traveller; thirdly, that he have no sufficient cause for such refusal. This is an indictable offence, and must be clearly made out, and there must be evidence on which it can be reasonably found that the defendant comes within the three propositions to be established. Do these elements exist in this case? First, as to whether this was an inn; it is clear to me upon the evidence that although the defendant was keeping an inn immediately adjoining the refreshment bar, still, in reference to the refreshment bar, he was not acting as an innkeeper. I think that the refreshment bar was in the nature of a shop and not an inn within the meaning of the innkeeper's liability, as to which the law requires that people when travelling should not be kept out at a time when they require food, lodging, and entertainment by a capricious choice of customers on the part of the innkeeper. There must be a liability to do the act *quâ* innkeeper. On that ground I think the conviction ought to be quashed. The second point is correlative to the first point, and flows from the law applicable to that. The prosecutor was not a traveller coming to an inn to obtain hospitality there. He simply came and asked for a glass of spirits at a place where there was no such accommodation as an inn affords. In *Burgess v. Clements* (4 M. & S. 396)—an action against an innkeeper for the loss of goods—Lord Ellenborough, C.J. says "Now the law obliges an innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely; so that, in the language of the writ, *pro defectu hospitatoris damnum non eveniat ullo modo*;" and in the course of his judgment he says, "Now let us con-

sider goods to an inn, and had a private room to show his goods to customers, and one of his boxes was lost out of that room. Lord Ellenborough said "An innkeeper is not bound by law to find show rooms for his guests, but only convenient lodging rooms and lodging. The innkeeper not being bound to find any more than lodging and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room for the purpose of exposing in it his wares to view, and of introducing a number of persons over whom the innkeeper can have no check or control, and this, as it seems to me, for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. I therefore think that the prosecutor in this case was not a traveller coming to an inn, *causâ hospitandi*, but a mere customer." Besides, the case states that it was not proved that the prosecutor was a traveller in any sense otherwise than that he was walking about the town with his dog for his own recreation and amusement. As to the third point. The finding of the jury that the defendant was bound to serve the prosecutor though accompanied by any dog, even a savage one, is a most unreasonable statement of the law, with which the jury had nothing to do. If a customer enters with a savage dog a landlord must have a right to protect himself and his customers against it. The jury, however, have found that this was not a savage dog, yet it was a large dog calculated to frighten small people, and we cannot leave out of sight what occurred on a former occasion with respect to this dog and its weakness on that occasion. I think, therefore, there was a sufficient legal excuse for refusing to serve the prosecutor.

FIELD, J. and HUDDLESTON, B. concurred.

MANISTY, J.—I am of the same opinion. I only wish to guard against being supposed to admit that a traveller coming to an inn has a right to take his dog with him into a room occupied by several customers. If one may do it all may do it, and as at present advised I think a landlord is justified in refusing to admit a traveller bringing his dog into a room so occupied.

Conviction quashed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Nov. 15 and 22, 1876.

(Before JAMES, L.J., and BAGGALLAY, and BRANWELL, J.J.A.)

Re THE PHOENIX BESSEMER STEEL COMPANY;
Ex parte THE CARNFORTH HEMATITE IRON COMPANY (a).

Company—Meeting of creditors—Ability to meet engagements—Insolvency—Contract to deliver goods—Refusal to deliver—Cancellation of contract.

A company carrying on business as a solvent concern, but requiring additional capital, called the

(a) Reported by E. STEWART ROGER, Esq., Barrister-at-Law.

CT. OF APP.] *Re PHOENIX BESSEMER STEEL CO. ; Ex parte CARNFORTH, &C., IRON CO.* [CT. OF APP.]

principal creditors together, and asked them to modify the stringency of some of the provisions of their contracts in order that the company might not be compelled to discontinue a profitable business.

Held (affirming the decision of the Master of the Rolls) that this was no such practical declaration that the company could not meet their engagements as would justify a creditor, who had contracted to deliver goods on credit, in refusing to make the deliveries according to his contract.

THIS was an appeal by the Carnforth Hematite Iron Company from the refusal of the Master of the Rolls to admit them to prove for the sum of 2138*l.* damages against the estate of the Phoenix Bessemer Steel Company, now in liquidation. On the 31st Oct. 1874, the Carnforth Company entered into a contract with the Phoenix Company for the sale to the latter company of 2000 tons of pig iron, as to 1250 tons at 5*l.* per ton, and as to the other 1250 tons at 4*l.* 17*s.* 6*d.*, per ton, to be delivered at the buyer's siding at Ickles over the next ten months, "say, in about equal monthly quantities; payment by four months' bills net, or cash less 2½ per cent. discount, on the 10th of the month following each delivery." On the 4th Nov. 1874, a similar contract was entered into between the same parties for the sale of 2000 tons more of pig iron, but the payment was to be "in cash on the 15th of the month next following each delivery, less 2½ per cent. discount." There was also another contract on the 11th Jan. 1876, for 200 tons of pig iron, "delivery to be made in about equal proportions over the next four months," and payment to be in cash on similar terms. Under the first contract the Carnforth Company delivered to the Phoenix Company 266 tons in Nov. 1874; 262 tons in Dec. 1874; 180 tons in Jan. 1875; and 102 tons in Feb. 1875. Under the second contract the Carnforth Company delivered to the Phoenix Company 42 tons in Nov. 1874. No further deliveries were made under these two contracts, and no delivery was ever made under the third contract. The deliveries under the second contract were suspended after the first delivery in Nov. 1874 at the request of the Phoenix Company. On the 24th Feb. 1875, the Phoenix Company called together a meeting of their principal creditors, and stated to them that the company required further capital to carry on their business, and asked the creditors to consent to modify the terms of their contracts and to give the company an extension of time for payment so as to enable them to raise further capital. The Carnforth Company attended this meeting. After this meeting the Carnforth Company made no more deliveries under their contracts, and they now alleged that the Phoenix Company had at that meeting, in effect, declared themselves insolvent, and that the Carnforth Company were thenceforth justified in refusing to make any more deliveries, except upon the terms of immediate cash payment. As a matter of fact, however, the shareholders of the Phoenix Company afterwards resolved to raise more capital by means of calls, and the company continued to carry on their business during March, April, and May 1875. On the 23rd April 1875, as the Carnforth Company refused to make any more deliveries under their contracts, the Phoenix Company gave them notice that they cancelled the contracts. At the end of May a firm, whose acceptances to a large amount

were held by the Phoenix Company, stopped payment, and the result was that the Phoenix Company was compelled to suspend payment also, and they resolved upon a voluntary winding-up. The Carnforth Company claimed to prove in the winding-up for 2138*l.* damages, caused by the cancellation of the contracts by the Phoenix Company, that sum being in respect of the difference between the market price, at the date of the winding-up, of the iron that had not been delivered under the three several contracts, and the price of the same reserved by the contracts.

In the court below the Master of the Rolls in giving judgment, after stating the facts, said: "The question is whether there was such notice of insolvency as entitled the vendors to refuse to deliver any more iron without cash, *i.e.*, to alter the terms of the contracts. Now, as I understand the decisions, when there has been an actual insolvency, and a declaration that the man does not choose to pay, the vendor is not bound to deliver without the cash. It is unreasonable to say that he commits a breach of contract by not delivering that which he has notice will not be paid for. All the cases on the point are, I think, summed up by Melish, L.J., in the case, which has been so often referred to, of *Ex parte Chalmers* (L. Rep. 8 Ch. App. 289; 28 L. T. Rep. N. S. 325); and, as I understand it, he comes to the conclusion that it depends upon the question whether the insolvent purchaser in that case was ready and willing to pay the price both of the November and December instalments. It is quite clear that he was not. Then he goes on to say why not—namely, because he had given notice of insolvency, which means that he did not intend to pay. Therefore, the real question is whether the company has given notice of insolvency—*i.e.*, of not intending to pay. Now, what happened? [After referring to the facts upon this point, his Lordship continued]: Under these circumstances, can I hold that there was such a declaration of insolvency as was notice to the vendors that their bills, if given, would not be paid, so that it made it unreasonable to call upon them to perform their contract. Now, in the absence of decision, I do not think I ought to carry the principle farther. The principle, no doubt, is not to interfere with men's contracts, and not to imply a term unnecessarily; but the courts have gone to this extent: they have said that when there is an insolvency declared which amounts to a notice to the vendor that he will not be paid, it is unreasonable to suppose that persons contracted in view of that contingency, and intended that the vendor should be liable in damages for not delivering goods when it was certain that he would not be paid for them. It is similar to the doctrine of stoppage *in transitu*, by which, on the insolvency of the purchaser becoming known, the vendor may stay his goods and prevent them from being delivered, although perhaps by law the legal right of possession has passed from the vendor to the purchaser. Those are, so to say, terms implied by the law of contracts, or rather, they are little additions made to the contract in view of their reasonableness, but you are not to alter men's contracts on that ground. It appears to me that, to bring it within the rule, there must be that sort of insolvency declared which ought to satisfy every reasonable man that there is no intention on the part of the purchaser to pay for the goods. That there is neither intention nor probability of his doing

so, is, I think, the way in which Mellish, L.J., intends to put it in *Ex parte Chambers*. Now, in the case of *Morgan v. Bain* (L. Rep. 10 C. P. 15) it is put on rather a different ground, although it still follows out what took place in *Ex parte Chalmers*. It is there said that the insolvent must intend to abandon and to put an end to the contract, and that in that case, the vendor certainly will not insist on delivery, because if he insists on delivery he insists on delivering the goods without getting paid for them. In other words, it comes to this, that the insolvent not having done anything, would be held to have abandoned the contract by reason of his insolvency, and his not having given notice to anybody to complete, and the vendor, not having done anything, and having taken no steps to deliver, must be treated as having abandoned it too. The result of that was that in that case there was a mutual intention to abandon and rescind. I cannot possibly hold that in this case there was anything like that on the part of the purchasers. They were willing to pay the money, and they were insisting that they would be able to pay it by the time the delivery was made. There was no abandonment on the part of the vendors, because they said, 'We will deliver if you will pay us cash.' Therefore, this is not a case of abandonment, but a case of refusal, and the only question is whether they were justified in making the refusal; and, as I said before, I think they were not. The company were actually solvent and taking steps to raise the money, which steps were assumed by both parties to be reasonable and likely to succeed. They were giving notice that they would be able to pay in due time if the other side would deliver, and they *bond fide* intended to raise the money and pay for the goods. They were not then insolvent, and they did not declare themselves insolvent, in the sense of meaning or saying that there was neither possibility nor intention of paying. The mere fact that a man says, 'I am embarrassed and I may have a difficulty to pay, but go on with the contract and I will find money enough to pay your claim,' cannot be sufficient to bring it within the rule so as to superadd a term to the contract or entitle a man to say, 'I will vary the terms and not strictly adhere to the original terms of the contract.' It appears to me that if I were to hold that, I should be extending the rule to a case in which the principle does not really apply by saying this was a case which entitled the vendors to say, 'We will not deliver without cash payments.' Therefore, in my opinion, the application fails, and the applicants must pay the costs."

The Carnforth Company appealed from this decision.

Locock Webb, Q.C. and *A. Bailey*, for the appellants, contended that the Phoenix Company at the meeting of the 24th Feb. 1875, had declared themselves insolvent within the meaning of the decision of the Court of Appeal, in the case of *Ex parte Chalmers*. The meeting of the 24th Feb. was to ask forbearance, and to say that the company could not go on without an extension of credit, thus, in the language of Mellish, L.J., in *Ex parte Chalmers*, practically giving notice of their inability to pay. They also referred to

Re Contract Corporation, 20 L. T. Rep. N.S. 964; L. Rep. 8 Eq. 14;

Blomer v. Bernstein and another, 31 L. T. Rep. N.S. 306; L. Rep. 9 C. P. 538;

Re Trent and Humber Shipbuilding Company, 20 L. T. Rep. N.S. 301; 38 L. J. 485, Ch.; L. Rep. 4 Ct. App. 112.

Bagshawe, Q.C., *Charles Gould*, and *G. C. Price*, for the liquidators, contended that there was no declaration of insolvency on the 24th Feb., and that, in fact, there was no insolvency then, nor for some months afterwards. The meeting of the 24th was a mere friendly meeting by the Phoenix Company, to attempt to induce some of their principal creditors to modify the stringency of some of the provisions of their contracts. In the cases referred to by the appellants, there had been a distinct declaration of insolvency or actual default, where the vendor was held not bound to deliver any more goods. They cited

Reg. v. Sadlers' Company, 10 H. of L. Cas. 404;

Frost v. Knight, 26 L. T. Rep. N.S. 77; L. Rep. 7 Ex. 111;

Simpson v. Crippin, 27 L. T. Rep. N.S. 546; L. Rep. 8 Q.B. 14; 42 L. J. 28, Q.B.;

Freath v. Burr, 30 L. T. Rep. N.S. 773; L. Rep. 9 C. P. 208;

Withers v. Reynolds, 2 B. & Ad. 883;

Morgan v. Bain, 31 L. T. Rep. N.S. 616; L. Rep. 10 C. P. 15.

Locock Webb, Q.C., in reply.

JAMES L.J.—The full discussion which this case has received, and I may add the very able argument which we have heard from Mr. Bagshawe, have removed entirely the doubts and difficulties which throughout a great part of the case I entertained as to whether the decision of the Master of the Rolls was correct. I am satisfied now that the decision of the Master of the Rolls was correct. The question is whether there was on and after the 24th of Feb. such an insolvency or such a declaration of insolvency as to bring the case within the rule, as laid down in the case of *Ex parte Chalmers*, and the cases which have followed that case. Now, I do not think that I shall be competent to lay down (and I do not know that it would be convenient or useful to lay down) anything pretending to be an exhaustive catalogue of the circumstances and cases in which that would be so held; but I am satisfied, upon the facts as now disclosed and made clear to us, that there was in no sense of the word an insolvency or declaration of insolvency at the time of the meeting of the 24th of Feb. The company, no doubt, was a limited company, but a company having a very large amount of property and fixed plant; having also a very considerable amount of uncalled capital, and during the months of Feb., March, and April, and I believe during the month of May, if not later, at all events during the month of May, they continued to carry on their business, continued meeting their liabilities and receiving the debts due to them as a going and a solvent concern. It is not immaterial to observe that during that interval they paid one bill of exchange due to the appellants under their own contract. They accepted another bill of exchange, which was tendered to them by the appellants for their acceptance. Therefore they were going on meeting their liabilities and receiving the sums from which those liabilities were to be met. But it is said that in the month of Feb. they called their creditors together. Of course that is an ambiguous phrase. Calling creditors together has a kind of technical meaning under the Acts of Parliament, and also in commercial phraseology. According to that view it amounts to a judicial winding-up, or something

of that kind. But here what really did take place, when we understand it, is that, being under-capitalised, having a larger business than they could easily and conveniently carry on with the actual amount of ready assets that they had available, they called together a few of their principal creditors, to whom they were customers, and probably profitable customers, in the ordinary course of business as it went on, and said, "Now we require more capital and more credit, and if we do not get one or both of these we shall have to stop, that is to say, not stop in the sense in which we shall have to become insolvent and to dishonour our bills, and not to pay our creditors, but we shall have to do as a banker does when he shuts his doors, and we shall have to discontinue that business which we are carrying on, which, if it is carried on, may be profitable to us, and which may be profitable to you, but which is not profitable at present." They said: "We shall want more capital and more time; will you come in to us, and make an arrangement with us?" A discussion with a few friends seems to me to be very little more than a discussion with a banker under similar circumstances; but in this case it ended with an intention to raise 30,000*l.* more capital by preference shares, and by calling up the shares of those shareholders whose solvency has not been questioned by anything which has been laid before us, and then it was sought to get further time for their contracts, which would enable them to carry on a much larger business than they otherwise could carry on. That being the state of things it seems to me that reversing the decision of the Master of the Rolls would be extending the rule beyond any reasonable limit, and lead to enormous inconvenience, and that it would entitle persons who, like the appellants, had refused to complete a contract to say, "We suspected that you were not solvent, and that if things came to a winding-up, you would not be able to pay your bills, and the event has shown that we were right." That is not, in my opinion, sufficient to bring it within the rule; but there must be something at all events like proved or admitted insolvency, or circumstances showing beyond all doubt that they were insolvent at that time—circumstances which amounted to a tacit or practical declaration that they would not be ready and willing to meet their engagements when their engagements became due. That has not been proved in this case, and not being proved, I am of opinion that the Master of the Rolls' judgment is right, and that this application must be dismissed with costs.

BAGGALLAY, J.A.—It is unnecessary for me to say what my opinion of this case would have been if the meeting of creditors held on the 24th Feb. had been a meeting summoned under the Bankruptcy Act, and if at that meeting a statement, either in writing or verbally, had been laid before the creditors, indicating an inability on the part of the Phoenix Company to meet their engagements; but I am by no means certain, even if such had been the case, having regard to the circumstances which subsequently transpired, and particularly to the payment of the cheque of 210*l.*, and to the meeting of the bill which became due in the month of March, that this case would even then have been brought under the authority of the case of *Ex parte Chalmers* and the other cases that have been

referred to. It is unnecessary, however, into that question, for I am satisfied that the meeting of creditors on the 24th of Feb. statement was made. The meeting was by notice addressed by the Phoenix saying, in effect, that they had requested three of their principal creditors, their meet them for the purpose of seeing what arrangements might be made; and one test which I applied in my own mind to the consideration of this question is this: Would it be possible for the Phoenix Company to obtain a compulsory order made upon a winding-up in respect of what took place at that meeting. I venture to think it would. None of the circumstances pointed out by the House of Parliament as amounting to inability to make the payment of their debts would be covered by what took place. It appears to me to have been an honest endeavour on the part of the Phoenix company to obtain from their creditors certain modifications of the conditions of a contract by which they were bound. If they could have obtained such a modification, they might possibly have carried on a successful business. It appears that they were not willing to render the assistance which was asked them, and therefore they took a certain amount of additional capital, and incurred misfortunes and losses and liabilities on their part from the failure of the firm of Smith, and Co., which fell like a heavy weight upon them, and in consequence of which a few days afterwards they became subject to a winding-up order. It appears to me that the decision of the Master of the Rolls is right, and that it is very much stretching the principles which have been laid down by the court in the cases to which I have referred, to apply them to a case like this.

BRAMWELL, J.A.—I am of the same opinion as the other judges. I agree with Lord Justice James that it is no more difficult than to give an exhaustive list of circumstances applicable to such a case as this is, or almost any other matter; at least it is so to my experience. But it seems to me that the question of solvency, such as would excuse the non-fulfilment of a contract, is not to be determined from what was a breach on their part of the contract, unless they had an excuse for it, or an inability, avowed either in act or in intention, or a consequent intention on their part not to pay their debts. Now, I see no evidence of avowed inability on their part; at least, I say there is no evidence, but at all events no sufficient evidence to induce me to come to the conclusion that there was such inability, and consequently, I think that the order of the Master of the Rolls was right.

Solicitors: *O. W. Dommett*, for *Slater and Manchester*;

Pilgrim and Phillips, for *Watson and Sheffield*.

Tuesday, Dec. 7, 1876.

(Before JAMES, L.J., BAGGALLAY and BRETT)
ON APPEAL FROM THE ADMIRALTY DIVISION.

THE MEDINA. (a)

Salvage of life—Agreement—Exorbitancy—aside.

Where the master of a vessel found passing

(a) Reported by JAMES F. ASPINALL and F. W. RAIK, Barristers-at-Law.

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another vessel (550 pilgrims) wrecked on a rock in the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than 4000*l.*, and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that amount, and the service was performed without difficulty or danger, the agreement was held inequitable and set aside; 1800*l.* awarded in the place thereof.

This was an appeal from a judgment of the Admiralty Division of the High Court of Justice.

The action was originally brought in the Exchequer Division, and was transferred to the Admiralty Division.

The claim, as it appeared on the indorsement of the writ, was for "4000*l.* due from the defendants to the plaintiffs under an agreement dated the 1st Oct. 1875, between Capt. J. Brown, master of the plaintiffs' ship *Timor*, for and on behalf of the plaintiffs and Capt. Charles Black, master of the defendants' ship *Medina*, for and on behalf of the defendants, for the conveyance at the defendants' request of passengers by the plaintiffs' ship *Timor*, from Parkin Rock, Harnish Island, to Jeddah."

The *Medina* was a steamship engaged in trading between Singapore and the Red Sea, and her owners, by means of that and other ships, conveyed pilgrims from various ports in the East to Jeddah, on their way to Mecca.

The *Medina*, in the course of a voyage to Jeddah with 550 pilgrims on board, was wrecked on Parkin Rock, in the Red Sea, and her pilgrims were landed on the rock, which is only just above the level of the sea.

The *Timor*, passing on her way from Singapore to Liverpool, *via* the Suez Canal, was asked for assistance, and after considerable bargaining her master agreed to take the pilgrims to Jeddah for 4000*l.*, and an agreement to that effect was signed by the masters of the two vessels.

There was a considerable conflict of evidence as to what passed between the masters, especially as to who offered and who refused to refer the matter to arbitration, but in the result the master of the *Timor* refused to carry the pilgrims for any less sum than 4000*l.*, alleging that the risks of going to Jeddah, of being detained in quarantine, &c., were such as to justify his demand.

The master of the *Medina* alleged that he was compelled to agree to pay this sum by the perilous position of the pilgrims, and that he did his best to induce the master of the *Timor* to take a less sum, but was unable to do so. There were other steamers in the neighbourhood, and one came up before the *Timor* left.

The judge of the court below, assisted by nautical assessors, held that the sum demanded was excessive and exorbitant, and awarded 1800*l.* without costs.

The pleadings, facts, and judgment will be found set out in the report of the case in the court below: (34 L. T. Rep. N. S. 918; 3 Asp. Mar. Law Cas. 220.)

Myburgh (The Admiralty Advocate, Dr. Deane, Q.C. with him), for the appellants.—Besides the risk run by the *Timor*, the master of the *Medina* knew that his owners were in the habit of taking pilgrims to Jeddah, and that it would be injurious to their trade if they failed to carry out their contracts, and he considered this in agreeing to this sum, which was not unreasonable. Unless exorbi-

tant or obtained by compulsion or fraud, the court ought not to upset the agreement:

The Helen and George, Swab. 368;

Cargo ex Woosung, L. Rep. 1 P. Div. 260; 35 L. T. Rep. N. S. 8; 3 Asp. Mar. Law Cas. 239.

Cohen, Q.C. and *Wood Hill*, for the respondent, were not called upon.

JAMES, L.J.—I am of opinion that the decision of the court below was a right decision upon the balance of evidence. If the story of the defendant is the right one, the story of the plaintiff is wrong, that it was agreed to refer the case to arbitration before the agreement was made. We see no reason for coming to a different conclusion to that at which the court below arrived. Therefore we start from this, that there was no such preliminary. Then we come to whether this was an exorbitant sum which was got by compulsion, making it impracticable that the agreement could be enforced. It was stated in the court below that there were 500 pilgrims on a rock, whose lives might have been endangered at any moment. There was one ship, and one ship only, near them, and a man on that ship says, "I will take you to Suez for 3000*l.*; I will not take you for a farthing less." It involved nothing whatever but the mere taking the men on board and carrying them on to Suez. Afterwards he says, I will take them to Jeddah for 4000*l.* The defendant denies the 3000*l.*, but gives his own account as to what was asked, a sum of 4000*l.*, and says that this was a very exorbitant sum for a ship for only a few days' coming up to the rock and merely taking the pilgrims on board and carrying them on to the point defined. I agree that the conclusion of the Judge of the Admiralty Court was right, that it was exorbitant; and, having regard to the peculiar circumstances under which pressure was exercised, that it ought not to stand. Therefore, the court was right in giving a reasonable amount. That reasonable amount the court below, with the assistance of the two assessors, fix at 1800*l.* On one hand there was salvage to be paid, and there was no tender on the other hand. There was an attempt to set up an agreement. On the whole, we think that there should be no costs on either side.

BAGGALLAY, J.A.—I am of opinion that the principle of these cases was expressed correctly by Dr. Lushington, that the agreement for salvage should be upheld unless obtained by compulsion or fraud. Now, by the very fact that you find a very large amount agreed to be paid in comparison with the services rendered, you are led to the conclusion that there may have been some unfair dealing in the transaction. But that applies with particular force where persons, who are in an extremity, in order to obtain assistance in their extremity, have been required to pay a large price for the assistance. That appears to have been the case here. There were 550 pilgrims on a barren rock in the Red Sea. Bad weather might have come on, or they might have been attacked by the natives, of whom there are plenty about there. In either case the pilgrims were in great peril, and from the fact that the rock was some distance from the course of vessels passing down the Red Sea, the captain of the *Medina* was bound to accept any terms which were pressed upon him by the *Timor*.

BRETT, J.A.—I think the old rule of the Admiralty Court ought not to be encroached upon lightly.

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THE CORINNA—THE CITY OF CAMBRIDGE.

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viz., that where there is an agreement made by competent persons, and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to show that it is inequitable, but I think that this agreement cannot be upheld, upon the ground that the amount claimed by the *Timor* was an exorbitant sum—not merely too large a sum, but, for the services to be rendered, a grossly exorbitant sum, and that it was forced upon the captain of the *Medina* by practical compulsion. Now, that the sum was grossly exorbitant, I think, follows, from this consideration—that the service was one of no difficulty at all, and under the circumstances, there was no danger to the salving ship whatever. She could take these people off with perfect facility; the service was not an onerous service; the pretence of a difficulty in going into a known port like Jeddah is fallacious, there was no difficulty or danger from the beginning to the end to the salving ship; and at the time the agreement was made there was no probability of any danger to her. Therefore, for performing so easy a service the sum of 4000*l.* was not only exorbitant but grossly exorbitant. But there is more in this case. It was forced upon the captain of the *Medina* by practical compulsion, because his position was this—and that it is to be considered—he was the captain of the *Medina*, the *Medina* was rendered helpless; it is true she was not at the bottom of the sea, but, so far as her being a useful ship for the pilgrims, she was useless, and could not be practically brought into use. You have these 500 human beings on a rock, twelve miles out of the course of ships, on a rock which was awash slightly over the ordinary level of the sea, so that if a sea rose the people on the rock would be drowned. Therefore the captain of the vessel was responsible for them in case of weather coming on wherein their lives might be lost. Under those circumstances, it seems unfair to him to say, I will not take these people off for whom you are responsible unless you pay me a sum, which upon the assumption of the finding of the court below being correct, is a grossly exorbitant sum. If the captain had refused, he took upon himself the responsibility of allowing 500 human beings under his care to be left to the danger of being drowned. That is compulsion to the mind of any honest man. Therefore, I think there was a grossly exorbitant sum obtained on practical compulsion. Under all these circumstances, I think by the Admiralty rules of law it cannot stand.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Brooks, Jenkins and Co.*

Solicitors for the defendants, *Daves and Sons.*

Nov. 27, 28, and Dec. 1, 1876.

(Before COCKBURN, C.J., JAMES, L.J., BAGGALLAY and BRAMWELL, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE CORINNA (a).

Damage by collision—Both vessels to blame—Costs. Where the Court of Appeal varies a decision of the Judge of the Admiralty Division, by which he

found one vessel wholly to blame for a collision, by finding that both vessels are to blame, each party will pay its own costs, both in the Court below and in the Court of Appeal.

The Agra and the Elizabeth Jenkins (L. Rep. 1 P.C. 501; 16 L. T. Rep. N. S. 755) followed.

This was a cause arising out of a collision in the river Thames, between the steamship *Corinna* and the barque *Mary Anne*. The Judge of the Admiralty Division found the *Corinna* alone to blame for the collision; and from that decision the owners of that vessel appealed. The appeal was heard on the 27th and 28th Nov., and 1st Dec., 1876, and on the latter day the judgment of the Court was delivered by Cockburn, C.J., reversing the decision of the court below so far as concerned the *Mary Anne*, and finding both vessels to blame for the collision, and ordering the damages to be divided.

Raikes (with him Dr. Deane, Q.C. and Clarkson), applied for costs, admitting that the practice in the Privy Council, in such a case, was that each party should pay their own costs; the case is different now; a successful appellant always gets his costs: (Practice of the Court, W.N., 1875, pp. 185, 186.)

Milward, Q.C. (with him W. Phillimore), contra. COCKBURN, C.J.—In these cases the rule of the Privy Council will be retained; though the plaintiff has partially succeeded in his appeal, he is not found to be free from blame for the collision, each party will bear his own costs both here and in the court below.

Solicitors for appellants, *Gellatly, Son, and Warton.*

Solicitors for respondents, *Clarkson, Son, and Greenwell.*

Nov. 28 and Dec. 1 and 5, 1876.

(Before COCKBURN, C.J., JAMES, L.J., BAGGALLAY and BRAMWELL, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE CITY OF CAMBRIDGE. (a)

Damage by collision—Inevitable accident—Costs. Where the Court of Appeal varies the decision of the Judge of the Admiralty Division, by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except under very exceptional circumstances, pay their own costs, will be followed. The Marpesia and America (L. Rep. 4 P. O. 212; 26 L. T. Rep. N. S. 333) followed.

This was a cause arising out of a collision in the river Thames, between the steamship *City of Cambridge* and the steamship *Brenda*. The Judge of the Admiralty Division on the 25th March 1876 found the *City of Cambridge* alone to blame for the collision, and from that decision the owners of the *City of Cambridge* appealed. The appeal was heard on 28th Nov. and 1st and 5th Dec., and on the latter day the judgment of the court was delivered by Cockburn, C.J. reversing the decision of the court below, so far as concerned the *City of Cambridge*, and finding the collision to be the result of inevitable accident.

E. O. Clarkson (with him Benjamin, Q.C.) applied for costs.—It has been the uniform

(a) Reported by J. F. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

(a) Reported by J. F. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

to give a successful appellant his costs: (Practice of the Court, W. N. 1875, pp. 185, 186.) There is no reason why the rule as to costs in appeals from the Admiralty Division should be different from that in appeals from the other divisions. The rule as to costs in such a case in the Privy Council was not invariable, it was the same as that of the High Court of Admiralty. Dr. Lushington says, "On principle costs ought to follow the event," and in that case condemned the plaintiff in costs: (*The London*, Br. & L. 82; 9 L. T. Rep. N. S. 348, and *The Thornby*, 7 Jur. 659.)

Milward, Q.C. and Bruce, contra.—The practice of the Privy Council and High Court of Admiralty was that no order should be made as to costs in case of inevitable accident: (*The Marpesia*, L. Rep. 4 P. C. 212; 26 L. T. Rep. N. S. 333.) In the cases where a plaintiff has been condemned in costs, it has been because the court considered that he ought not to have brought the action, and that reason can hardly apply to a case in which he has obtained a decision of the court below in his favour. And this court will follow the practice of the Privy Council in appeals from the Admiralty Division: (*The Corinna*, ante p. 781.)

Clarkson in reply.

COCKBURN, C.J.—In cases of inevitable accident this court will follow the practice of the Privy Council, and, as a rule, make no order as to costs.

The suit against the *City of Cambridge* was therefore dismissed, and no order made as to costs either in the court below or Court of Appeal.

Solicitors for appellants, *Gellatly, Son, and Warton*.

Solicitor for respondents, *Thomas Cooper*.

December 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE VIVAR. (a)

Proceedings on protest—Service of writ out of jurisdiction—Cause of action arising on the high seas—Foreign ships.

The practice of the High Court of Admiralty previous to the passing of the Judicature Acts in proceedings on protest (R. G. Admiralty 1859, r. 37) is preserved by sect. 18 of Supreme Court of Judicature Act 1875.

THIS was an application to dismiss an action in personam against John McAndrew, instituted under the following circumstances.

On the 3rd Sept. 1876, the American ship *Sonora* of Boston was proceeding to Liverpool in tow of a steam tug, and when the South Stack Light, Holyhead, bore about N.E. by E. $\frac{1}{2}$ E. and was about ten miles distant, she and the *Vivar*, a registered Spanish steamer, came into collision and both sank.

Under these circumstances, on the 23rd Oct. 1876, leave was given by the assistant registrar to serve a writ of summons on John McAndrew out of the jurisdiction, requiring him to enter an appearance within fourteen days after service. John McAndrew, who was alleged to be

residing. He handed it to his solicitors in London, who wrote to the plaintiffs' solicitors the following letter:

24, Carter-lane, Doctors' Commons,
14th Nov. 1876.

Owners of Sonora and others v. McAndrew: The Vivar.

Dear Sirs,—The notice, dated the 23rd Oct., last which you have caused to be served on Mr. John McAndrew, has been handed to us with instructions to act on his behalf. The *Vivar* was a Spanish vessel Spanish owned. Mr. John McAndrew is a British subject, and resides in England. By the law of Spain a foreigner cannot own a Spanish vessel or shares in a Spanish vessel. Mr. McAndrew was not owner and could not be owner of the *Vivar*, or of any share in her. Under these circumstances we presume you will withdraw the notice you have given, otherwise we are quite prepared to appear to the action, and in that case shall, of course, ask for costs. You may consider this as an undertaking on our part on behalf of Mr. McAndrew. Be good enough to let us hear from you at once.—We are, dear Sirs, yours truly,

CLARKSON, SON, AND GREENWELL.

Messrs. Stokes, Saunders, and Stokes.

Subsequently the defendant by his solicitor entered an appearance under protest, but took no further steps and before filing a preliminary act.

On the 6th Dec. 1876, the Judge of the Admiralty Division was moved to dismiss the suit.

The arguments of counsel (*Webster*, for the defendant, and *W. Phillimore*, for the plaintiff) are reported below, being the same as those used in the Court of Appeal. At the termination of the argument,

Sir R. Phillimore.—I am asked in this case to dismiss the writ as having been improperly issued. It is admitted that if the protest can be looked at the court has no jurisdiction. Unless the decisions of the court in *Re Smith* (L. Rep. 1 P. D. 300; 35 L. T. Rep. N. S. 380), and *The Evangelistria* (35 L. T. Rep. N. S. 410), are wrong, I must abide by them till they are set aside elsewhere, and the following order was made:

On the 6th Dec. 1876, the Judge, having heard counsel on both sides, dismissed the defendant John McAndrew from this action and all further observance of justice therein.

From this order the plaintiffs appealed, and on the 20th Dec. the appeal was argued, after a preliminary objection on the part of the defendants, that, under sect. 50 Supreme Court of Judicature Act 1873, there was no appeal except by special leave which had not been obtained in this case, had been overruled.

W. Phillimore (with him *Stubbs*), for the appellants, admitting that the registrar had no power to order service in such a case out of the jurisdiction, the defect has been waived by the appearance. The appearance spoken of in the letter from the defendant's solicitors is an absolute appearance; it says nothing of appearing under protest to raise the question of jurisdiction; the ground of defence alleged is that the defendant was not the owner of the ship. [JAMES, L.J. referred to the conditional appearance in the Court of Chancery where a person desired to object to the jurisdiction. BRAMWELL, J.A.—Supposing the defendant to have been within the jurisdiction, could you have served him? Yes, we could; and though this writ was one for service out of the jurisdiction, there is no difference in the form of the writ except as to the time for appearance to it.]

a) Reported by JAMES P. ASPINALL and F. W. RAIKES, ESQTS., Barristers-at-Law.

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ABBOTT v. FREEMAN.

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(*Westmans v. Aktiebolaget Ekman's Mechaniska Smickerfabrik*, L. Rep. 1 Ex. D. 237.) The order of the registrar would have been perfectly valid so far as the mere issue of a writ was concerned; it only went too far in allowing service abroad. The rule as to appearance under the Judicature Acts (Order IX., r. 1) is the same for all courts, and is borrowed from the practice of the Common Law Courts before those Acts. What that practice was is clearly shown by *Staniforth v. Richmond* (13 W. R. 374); *Oulton v. Radcliffe* (L. Rep. 9 C. P. 189; 30 L. T. Rep. N. S. 22); *Diamond v. Sutton* (L. Rep. 1 Ex. 130; 13 L. T. Rep. N. S. 800), and they decide that when a person has attorned to the jurisdiction it is too late to protest against it. The only difference made by the Judicature Acts and Rules is that under them leave has to be obtained before service: (*Scott v. Royal Wax Candle Company*, 34 L. T. Rep. N. S. 683; L. Rep. 1 Q. B. Div. 404.) The proceedings on appearance under protest were peculiar to the High Court of Admiralty, and rendered necessary by its limited jurisdiction, and have been abolished, if not expressly, by necessary inference, by the fusion of the High Court of Admiralty with the other Superior Courts. If it still exists in the Admiralty Division, then it must also exist in all the other Divisions of the High Court of Justice.

Webster.—The letter of defendant's solicitors was not an unconditional appearance, if it was an unconditional undertaking to appear on behalf of the defendant by his solicitor the proper course for the plaintiffs to pursue is to attach the solicitor for contempt. The practice of the High Court of Admiralty in regard to proceedings on appearance under protest are preserved by sect. 18 of the Supreme Court of Judicature Act 1875. The Admiralty Rules 1859, r. 37 says, "If the proctor intends to object to the jurisdiction of the court, the appearance must be under protest." The letter of defendant's solicitor was only an undertaking to appear under protest; after appearance it was the practice for the defendant to move the court: (*Williams and Bruce Ad. Pra.* 203.) That we have done. The court then, according to the circumstances of the case, either directed a plea to the jurisdiction or petition on protest, as it is called, to be filed (the *Lyes Moon*, not reported), or dismissed the defendant from the suit, as in this case, or overruled the objection to the jurisdiction: (*The Catterina Chiasnara*, L. Rep. 1 P. D. 365; 34 L. T. Rep. N. S. 588; *The Charkieh* L. Rep. 4 Ad. 59; 28 L. T. Rep. N. S. 513). Sect. 18 of Supreme Court of Judicature Act 1875, preserves all the existing rules of practice of the Admiralty Court, unless expressly varied by the rules under the Judicature Acts, and the rule as to appearance under protest has not been repealed or varied even by implication, still less expressly, and has been acted on: (*Re Smith*, L. Rep. 1 P. D. 300; 35 L. T. Rep. N. S. 380; *The Evangelistria*, 35 L. T. Rep. N. S. 410.) It was the duty of the defendant when served with a writ to appear, but under protest, in the Admiralty Division. The order of the court, dismissing the defendant, will not relieve him from the necessity of appearing to a writ served on him properly should he return to England.

W. Phillimore, in reply.—Supreme Court of Judicature Act 1875, Sc. L., Order XII., rr. 6, 15, by ordering one general method of appearance in the High Court of Justice, satisfies the requirements

of sect. 18 of the Act of 1875, and expressly abolishes appearance under protest.

JAMES, L.J.—The real point which was raised in the court below, and the real point laid before us, is, whether the defendant was estopped by what had taken place from objecting to the validity of the order for service abroad. I am of opinion that he is not estopped. The solicitor, writing the letter undertaking to appear, in ignorance of the fact that there might be disclosed a perfectly good objection on the ground of the cause of action having taken place out of the jurisdiction, did not bind the defendant. I am also of opinion that appearance under protest is not an idle form, but that it is the old form known to the Court of Admiralty, and is not expressly taken away by the new rules under the Judicature Act. The solicitor appeared under protest for the real purpose of raising the question whether he was properly cited, and was subject to the jurisdiction of the court by the procedure which had taken place—whether he was properly compellable to appear, and the learned judge dismissed the defendant from the action. I am of opinion that the learned judge was right.

BAGGALLAY and BRAMWELL, J.J.A. concurred.

Appeal dismissed with costs.

Solicitors for the appellants, *Stokes, Saunders, and Stokes*.

Solicitors for the respondents, *Clarkson, Son, and Greenwell*.

SITTINGS AT WESTMINSTER.

Wednesday, June 21, 1876.

(Before JAMES and MELLISH, L.J.J., BAGGALLAY, J.A., and QUAIN and ARCHIBALD, JJ.)

ABBOTT v. FREEMAN. (a)

Showing horse for sale—Negligence—Injury to looker on.

The defendant was the proprietor of a yard and premises used for the sale of horses. The plaintiff attended a sale and was walking up the yard behind a row of spectators who were watching a horse then on sale. In order to show the horse's pace a servant of the defendant led it with a halter down a lane formed by the spectators on one side and a blank wall on the other. There was no barrier between the horse and the spectators, and when the horse was about ten yards from the plaintiff another servant of the defendant struck it with a whip in order to make it trot. On being struck the horse swerved into and through the crowd, and kicked and injured the plaintiff. It was a usual thing for a man to be stationed with a whip at the particular point when horses were brought out for sale. There was no evidence as to the kind of blow that was given, nor the character of the horse, nor how it was being led, nor that it was customary to put a barrier for the protection of the public in yards where horses were being sold.

The plaintiff sued the defendant to recover damages for injuries caused by the negligence of the defendant's servant.

Held (reversing the judgment of the Exchequer Division below), that there was no evidence upon which the jury could reasonably find negligence on the part of the defendant.

THIS was an appeal from a decision of the Ex-

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

chequer Division making absolute a rule nisi obtained by the plaintiff for a new trial.

The plaintiff brought his action for injuries sustained through his having been kicked by a horse whilst attending a horse sale at Aldridge's Horse Repository, of which the defendant was the proprietor. The evidence given at the trial before Pollock, B., at the Hilary sittings at Guildhall, 1876, was shortly as is set out in the head note above. Pollock, B., on the facts nonsuited the plaintiff. A rule nisi for a new trial was afterwards obtained by the plaintiff, on the ground that there was some evidence of negligence to go to the jury. The Exchequer Division made this rule absolute.

The case in the court below will be found fully reported 34 L. T. Rep. N. S. 545.

On appeal *Powell*, Q.C., for the plaintiff.

Cole, Q.C. (with him *D. N. Lord*), for the defendant.

The decision of the Court of Appeal turned entirely on the facts, and they reversed the judgment of the court below, being on the whole of opinion that, taking into consideration the fact that the plaintiff voluntarily went into a place where he knew horses were being tried without a protecting barrier, and upon all the facts disclosed upon the trial there was no evidence upon which a jury might reasonably find negligence on the part of the defendant.

Judgment below reversed: Judgment for defendant.

Solicitors for plaintiff, *Fisher and Co.*

Solicitors for the defendant, *Dixon, Ward, Letchworth, and Weld.*

Dec. 14 and 15, 1876.

(Before COCKBURN, C.J. and BRAMWELL and AMPHLETT, JJ.A.)

SEAMAN v. NETHERCLIFT. (a)

Slander—Privilege—Statement by witness.

The defendant, an expert in handwriting, was asked in cross-examination at a police court whether he had read some severe comments made on his evidence by the judge in a recent case, in which he had given evidence against the genuineness of a will. He said he had, and desired to make a further statement. The magistrate refused to hear him, but he persisted, and said that he still believed the will to be forged. An attesting witness brought an action for slander, and the jury, in answer to questions put to them by the judge, found that the words were not spoken by the defendant in good faith as a witness, but as a volunteer, for defendant's own purposes and maliciously, and they found a verdict for the plaintiff.

Held (affirming the judgment of the Common Pleas Division below), that the words were privileged, and that the judge ought to have withdrawn the case from the jury, and that the defendant was entitled to judgment.

The court, however, expressed their opinion that, although it would make no difference whether the words were relevant or not to the enquiry, so long as the witness might reasonably believe they "had reference" to it, yet where the words were obviously spoken not in the character

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

of a witness, and without any reference to the enquiry, the privilege of a witness might not apply.

THIS was an appeal from a decision of the Common Pleas Division making absolute a rule to show cause why the verdict should not be entered for the defendant.

The case in the court below will be found fully reported 34 L. T. Rep. N. S. 878. The facts are sufficiently stated in the judgment of Cockburn, C.J.

Montagu Chambers, Q.C. and *James Torr*, for the plaintiff.—The only question is, had the plaintiff any cause of action. The question whether there was malice is for the jury. They have found there was, and the finding is borne out by the observations of Lord Coleridge in giving judgment. The rule laid down as to the privilege of a witness in Roscoe's *Nisi Prius* Evidence, p. 835, 13th edition is founded on the old authorities, which when examined do not bear it out

Brode's case cited *Palmer* 144;

Harding v. Bulman, 1 Brownlow 2;

Buckley v. Wood, Cro. Eliz. 230; 4 Co. 14b.

[COCKBURN, C.J. referred to *Chamberlain's case* cited in the case in *Palmer*.] *Trotman v. Dunn* (4 Camp. 211) is in the plaintiff's favour. In *Hodgson v. Scarlett* (1 B. & A. 232) reliance was placed on the words being pertinent to the matter in question, and the same observation applies to *Brook v. Montague* (Cro. Jac. 90). In *Revis v. Smith* (18 C. B. 128) according to all the authorities, the defendant had been acting as a party. The marginal note is misleading and granting the correctness of the decision it is not a decision that a witness speaking of irrelevant matter is absolutely exempt. In *Dawkins v. Lord Rokeby* (L. Rep. 7 H. L. 775), the head-note is incorrect. There the statement was relevant, and the judges and Lord Cairns rely on this. The findings of the jury distinguish the present case. In *Kennedy v. Hilliard* (10 Ir. C. L. R.) the judgment of Pigot, C.B. is founded on Bacon's Abridgment, *Slander E.* (vol. 7); the cases there cited are cases of parties. See also *Allardice and Boswell v. Robertson* in House of Lords (1 Dow. 445).

M'Intyre, Q.C. and *E. C. Clark* (with him *Agabeg*), for defendant.—A series of decisions shows that the privilege of judge, counsel, and witness is absolute as long as they are acting as judge, counsel, and witness.

Bacon's Abridgment, *Slander E.*;

Buckley v. Wood, *ubi sup.*;

In *Reg. v. Skinner* (Lofft 55) Lord Mansfield said "Neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken in office." That is material to the decision. It is the office that gives protection: *Scott v. Stansfield* (L. Rep. 3 Ex. 220; 18 L. T. Rep. N. S. 572; 27 L. J. 155, Ex.). The question was put to disparage. If the witness had left the imputation unanswered he would have diminished the value of his testimony. Counsel would clearly have been entitled to re-examine him as to his belief about the genuineness of the will, and it makes no difference whether the statement is made in answer to a question or not; he re-examined himself. See also

Astley v. Young, 2 Burrow;

Revis v. Smith, *ubi sup.* and 25 L. J. 195, C. P.;

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SEAMAN v. NETHERCLIFT.

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Henderson v. Broomhead in the Exchequer Chamber,
4 H. & N. 589; 28 L. J., 380, Ex.

Thomas v. Churton, 2 B. & S. 475; 31 L. J. 139,
Q. B.

In *Kennedy v. Hilliard* (*ubi sup.*) all the decisions are reviewed. In *Dawkins v. Lord Rokeby* (*ubi sup.*) the Lord Chancellor speaks of the settled law as to protection of witnesses.

Montagu Chambers, Q.C. replied.

COCKBURN, C.J.—This case is so abundantly clear to my mind that I think we cannot hesitate in pronouncing a decision upon it. The facts are as follows: The plaintiff brings his action against the defendant, and seeks to recover damages for the defendant's having uttered certain slanderous words of him. The occasion upon which the words were uttered was during the course of a case at the Guildhall Police Court before Sir James Lawrence, the presiding magistrate. Mr. Netherclift's defence is "True, I did utter the words, but I did so whilst I was giving evidence as a witness in a court of justice, and I am protected by the privilege attaching to a witness in respect of what he says in the box." The answer to that is "Yes; at the time you spoke the words you were giving evidence as a witness, but you spoke them unnecessarily and maliciously, and altogether *dehors* your character as a witness." Now, in the trial before Lord Coleridge in the Common Pleas Division, it appeared that whereas there had been a case called *Davies v. May* in the Probate Division, the defendant had been called as an expert in handwriting to give evidence as to the signature to a will. On that occasion the president, Sir James Hannen, made some strong observations upon the defendant's testimony. Now, when cross-examined at the police court in the case before Sir James Lawrence, the defendant had been also called as an adept in handwriting, and he is asked by the prosecuting counsel in cross-examination whether he had been a witness in *Davies v. May*. Answer: Yes. The next question was "Then did you read the remarks Sir James Hannen made upon your evidence?" and the defendant said that he had. Then the counsel, presuming that Sir James Lawrence knew all about *Davies v. May*, sat down without putting further questions. The defendant then said "I believe that will to be a rank forgery, and shall believe so until the day of my death." On these facts being given in evidence at the trial of this action before Lord Coleridge, the learned judge directed a verdict for the plaintiff, and reserved leave to the defendant to move to have the verdict entered for him, but he, nevertheless, thought well to obtain the opinion of the jury upon certain facts, and the jury accordingly found, in answer to questions, that the words were not spoken by the defendant in good faith as a witness, or in answer to a question put to him as a witness; that he spoke them maliciously as a volunteer for his own purposes, and otherwise as a witness. Now, the defendant had leave reserved to him to move upon the question of whether there was evidence to go to the jury in support of the plaintiff's case, and we are now to say whether, upon the leave reserved or upon the findings, the judgment ought to be entered for the defendant. Now, we are asked upon these findings, to disturb what has been considered settled law for a very long period, for if there is any principle of law which may be considered absolutely settled it is that a witness is

privileged with respect to the testimony he gives, and the relevancy or irrelevancy of that testimony does not make any difference to deprive him of that privilege. The case of *Dawkins v. Lord Rokeby* (*ubi sup.*) is a culminating and conclusive case to show this and there the House of Lords held that no action would lie against a witness for what he had said or written in giving evidence before a court of justice. Now, if we are asked to overrule that decision, it is asking us to go very much further than has ever before been gone, but if there had been evidence here that the words complained of were spoken entirely outside (as it were) the character of a witness, it would then become a question (not necessary to be decided here), whether such words were privileged. If for example a man were to be foolish enough to talk before he went into or when he came out of the witness box, of the evidence he was going to give in it, and so was to make slanderous statements, or if, as I put it in the course of the argument, a witness in the box seeing a man coming into the court were to take the opportunity, and availing himself of his position were to state that the man had committed a robbery, I am very far from saying that words spoken in those and similar cases might not be spoken *dehors* the character of a witness, and would not be *dehors* the privilege of a witness. But, in this case, if the jury had even expressly found that these words were spoken apart from the defendant's character as a witness, it is open to great doubt whether they would not be privileged, but there can be no doubt that here the defendant's character was that of a witness; there can be no doubt he spoke the words for the purpose of defending his character and reputation as an expert in handwriting. The witness was conscious that the questions put to him by counsel were for the purpose of shaking his credit, and if there had been counsel present on his side to re-examine him, the questions would have been perfectly proper to be put to him, whether in giving the evidence he gave he acted honestly, and whether he had since had any reason to change his mind, and to doubt the truth of the evidence he then gave. A witness is bound to tell the whole truth, and he is perfectly entitled to make such observations in the interest of justice, and in his own interest, as will tend to rehabilitate him when his credit has been attacked. I think he did no more than that here, and I am of opinion that what he said must be taken as a statement in the evidence in the cause. But for the questions of counsel he would not have made that statement at all. As for malice, it is true that the statement might have the effect of injuring the plaintiff, but the defendant's object obviously was not to injure the plaintiff, but to protect his own credit. No doubt it was a foolish thing to do in the way he did it. I think there was no evidence to go to the jury that the defendant spoke those words otherwise than as witness, and I also think that Lord Coleridge ought not to have left the question to the jury. Looking at *Dawkins v. Lord Rokeby* I think that malice has ceased to be an element in considering whether a witness is privileged, unless you can show that the words were spoken *dehors* the character of a witness altogether. I think that the case of *Allardice v. Robertson* (*ubi sup.*) cited by Mr. Chambers does not apply at all to this case, and I am of opinion that the judgment of the Common Pleas

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KING v. GEORGE.

[CHAN. DIV.]

Division for the defendant was right, and must be affirmed.

BRANWELL, J.A.—I am of the same opinion. The judgment of the Common Pleas Division affirms two propositions. (1.) That the words complained of by the plaintiff were relevant to the inquiry, and were spoken by the defendant as a witness, and (2) that the case should have been withdrawn from the jury. Now I am not sure that the turn "relevant" is a very correct expression. In *Dawkins v. Lord Rokeby* what appears to me a much better expression is used by the Lord Chief Baron, and that is "with reference to." Now the question here is, had the words spoken by the defendant "reference to" the inquiry? I think the question put by counsel "Have you read Sir James Hannen's judgment?" was an improper one, but having been put it was, as Lord Coleridge says in the court below, "eminently suggestive." Then the witness, foolishly, as I think, and coarsely, says "I retain my opinion, I believe the will to be a rank forgery, and shall believe so to the day of my death." If he had said it in other words, decently and becomingly, would not that have "had reference" to the inquiry before the magistrate? I think it would. Mr. Clark addressed to us an argument that everything spoken by a witness must be protected by privilege. I cannot go that length; I think that in the cases put by the Lord Chief Justice, and by me, a witness would not be privileged. I am of opinion that the expression "with reference to" the inquiry used by the Lord Chief Baron in the court below ought to receive as comprehensive a construction as possible, and that what a witness might reasonably think had reference to the inquiry is within the privilege. I am of opinion, therefore, that the first proposition of the court below is established. If that is so, as to the second proposition, no other inquiry should have been gone into whether the witness spoke the words as a volunteer or maliciously, and in bad faith. *Dawkins v. Lord Rokeby* is conclusive that the privilege of a witness in giving evidence is absolute, and that case has not been attempted to be distinguished from the present one except upon the ground that there the tribunal was a military one. I do not think it is distinguishable upon that ground. The House of Lords held, it seems to me, that a witness giving evidence in a court of justice, whether it be a civil or a military court, is protected, and that being so I think that the case of *Henderson v. Broomhead* (*ubi sup.*) is also not distinguishable from this, and that we ought to affirm the judgment of the court below.

AMPLETT, J.A.—I am of the same opinion. How it would have been if the witness's statement had been made without questions upon the former case of *Davies v. May* having been put to him by counsel, we are not bound to express an opinion. But that would be distinguishable from the present case, because it might be said that in volunteering such a statement without question the defendant was no longer speaking as a witness in the action. I am not saying that if that were so he would not be protected, but I think the question would be open to great doubt, and I can conceive cases where there would be no reason for affording the protection of privilege to a witness, as for instance where he might choose to make an abusive statement which was wholly

immaterial to the inquiry. I offer no positive opinion upon such a case, but I certainly agree that here what the witness said was relevant to the issue. I think it was right and fair for him to give an explanation after he had been asked questions disparaging to him as an expert in handwriting. Almost the first question in cross-examination to an expert (I have myself heard it put to the defendant) is, "I suppose you remember the case of *Davies v. May*?" and the answer is that the witness will explain, and that he still retains the opinion he has formed. In this case the defendant expressed his opinion in coarse and improper language. I think he ought to have spoken with more modesty and reserve, but that can make no difference in considering whether the words were privileged. I am of opinion that the rule of privilege which has so long prevailed unchallenged, and which is made in the interest of justice, should be extended to this case, and I think that any rule contrary to that so long established would go very far to prevent witnesses from freely coming forward to give their evidence in a court of justice.

Judgment for the defendant. Judgment below affirmed.

Solicitor for the plaintiff, the plaintiff in person.

Solicitors for the defendant, *Marsden and Son.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS).

Wednesday, Dec. 20, 1876.

KING v. GEORGE. (a)

Will—Construction—General words followed by enumeration of specified articles.

Testatrix made a holograph will, by which she gave "all that I have power over, namely, plate, linen, . . . lace." She was, at her death, possessed of considerable personal property besides the specified articles.

Held that the words "namely, plate, linen, . . . lace" did not cut down the effect of the general words "all that I have power over," it being the intention of the testatrix to dispose of all her property; and that the whole of her personal estate passed by her will.

DEMURRER.

Sarah George, the testator, duly made a holograph will dated the 25th May 1874. Such will was as follows:

I, Sarah George, do bequeath to A. K. George all that I have power over, namely, plate, linen, china, pictures, jewellery, lace the half of all valued to be given to Herbert George, son of Frederick George. The servants, in the house, who have been a year with me to receive 10*l.* and clothes divided among them, also all kitchen utensils.

The said testatrix died on the 24th April 1876; and on the 27th July 1876 letters of administration of her personal estate with the will annexed were granted to the defendant Augustin King George.

The testatrix, in addition to the articles specifically mentioned in her will, was possessed of moneys and securities for money, furniture, horses and carriages, wines, and other personal estate of

(a) Reported by JAMES E. HOKIN Esq., Barrister-at-Law

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considerable value. She was also seised of considerable real estate.

In Oct. 1876, this action was brought by the plaintiff (one of the next of kin of the testatrix) against the defendant Augustin K. George (the legal personal representative), George Dalston Shafto (the heir-at-law of the testatrix), and Thomas Wick (the other next of kin of the testatrix) for the administration of the personal estate, and to have the true construction of the will declared by the court.

The defendant A. K. George demurred.

The question raised by the demurrer was whether the will passed all the property of the testatrix, or whether it only passed the articles particularly enumerated under the words "plate, linen . . . lace."

J. Pearson, Q.C. and Bigby, for the demurrer.—The words "all that I have power over" are sufficient to pass the whole of the personal estate. The subsequent words "namely, plate, linen . . . lace" are only an imperfect enumeration of the particulars, of which the personal estate consisted, and do not restrict the generality of the gift:

Bridges v. Bridges, 8 Vin. Abr. p. 295, pl. 13;

Chalmers v. Storil, 2 V. & B. 222;

Dean v. Gibson, L. Rep. 3 Eq. 713.

They also referred to

Hodgson v. Ieri, L. Rep. 2 Ch. D. 122.

Glasse, Q.C. and Cary, for the plaintiff.—The general gift must be restricted by the particular words: (*Timewell v. Perkins*, 2 Atk. 102, and *Trafford v. Berrige*, 2 Atk. 104n.) *Bridges v. Bridges* is inconsistent with *Timewell v. Perkins*. The latter case was cited with approval in *Rawlings v. Jennings* (13 Ves. 39). Where a testator gives "everything he dies possessed of," and afterwards enumerates what it is he intends to give, the bequest must be confined to the specific enumeration: (*Re Kendall's Trusts*, 14 Beav. 608.) The words "namely, plate, &c." are not merely words of defective enumeration, but a description limiting the subject matter of the gift: (*Wylie v. Wylie*, 1 D. F. & J. 410, affirmed by House of Lords, 10 H. of L. 1). They also referred to

Fisher v. Hepburn, 14 Beav. 626;

Theobald on Wills, p. 89;

In the goods of Goodyar, 1 Sw. & Tr. 127;

Hubbard, p. 171.

J. Pearson, Q.C. in reply.—In *Wylie v. Wylie* (reported in the House of Lords under the name of *Enochin v. Wylie*) their Lordships did not intend to overrule *Bridges v. Bridges* and *Chalmers v. Storil*.

MALINS, V.C. said.—The will is a very curious one; and it has given rise to the very learned and able arguments. The question I have to determine is, whether this will passes all the property of the testatrix, or whether it passes only that property which is enumerated under the words "plate, linen, china, pictures, jewellery, lace." If the proper construction be the latter one, then the testatrix has, to a very great extent, died intestate, because she had real estate, and she had also personal property of various other descriptions. Now, first, let us consider what was the intention of the testatrix? If she had intended merely to give her plate, &c., she might have said, "I do bequeath all my plate, linen, china, pictures, jewellery, and lace" to so and so. That would have been a very simple form of giving only those particular things. It would have shown that, beyond those things,

she did not intend to dispose of anything; that she intended to die intestate. But does the will show that intention? She says, I give "all that I have power over," meaning everything that she had testamentary power over, that is to say, all the property she could, by her will, dispose of. Then, having used these words, which are abundantly sufficient to pass all her property, she goes on to enumerate (as is frequently the case) part of the property she has, not the whole of it. I cannot pretend to say that this is a will which is free from doubt. But my own opinion is, that this testatrix did not intend to die intestate as to any part of her property. Then, applying the same rule in this case, which I applied yesterday in the case of *Unsworth v. Speakman*, that the first duty of the court is to ascertain what was the intention, and then, having done that, to see whether there are words to carry that intention into effect, I am satisfied that the intention was to dispose of all her property, and I am of opinion, both upon principle and authority, that the words are sufficient for the purpose. I cannot help thinking that the doctrine is now pretty well settled, that, where a testator gives his property generally by the words "all my property," or "all my estate," or "all that I have power over" (as in this case), and then proceeds to enumerate particulars, the enumeration of particulars does not abridge or cut down the effect of the general words. *Bridges v. Bridges*, the first case cited by Mr. Pearson, decided by Lord Chancellor King, is a case that has been cited and acted upon ever since the decision was given; and I think it is a much stronger case for a limited construction of the will than this is. There the testator said "I give the remainder of my estate, viz."—as in the present case,—"viz., my Bank Stock, India Stock, S. S. Stock, and S. S. Annuities to my son B. Bridges, and I do hereby make him sole executor of this my will." Lord Chancellor King "was of opinion that the latter words, which came under the "viz." did not restrain the general words precedent (the remainder of my estate), but were added by way of enumeration or description of the main particulars whereof his estate did consist, and not to restrain the word (estate) to those particulars; . . . and, that, when he disposed of the remainder of his estate, it was plain he did not intend to die intestate as to any part of it." That is the criterion: did the testator, or did he not intend to die intestate as to any part of his estate? No doubt it would be difficult to reconcile the case of *Timewell v. Perkins* with the case of *Bridges v. Bridges*. But it is not necessary for me to do that; because I do not think that *Timewell v. Perkins* has been considered a binding authority. I think I do sufficient to show that by going at once to the decision of Sir William Grant in *Chalmers v. Storil*. In that case the Master of the Rolls said "As to the question, whether the whole personal estate passes by the will, my opinion is that it does. The testator gives all his estate whatsoever, whether real or personal," here it is "all that I have power over," which is just as comprehensive, "the subsequent enumeration of the articles, of which he supposed his property to consist, does not limit the gift to the particulars specified. Intending to give everything he could, he has incorrectly stated what he had." He then cites the decision in *Bridges v. Bridges*, and says "Here the testator disposes of the whole of his

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personal estate; and therefore does not mean to die intestate as to any part of it." In my opinion, every word of that is applicable to the present case. Then this subject has been under consideration very recently in the case of *Dean v. Gibson*. That, I think, is a stronger case than the present. There the words were "my personal property, consisting of money and clothes." The question was, whether the general estate passed; that is, that part of the property which consisted neither of money nor clothes. The Vice-Chancellor Page Wood, in giving judgment, after citing *Bridges v. Bridges* and *Chalmers v. Storil*, says "When a person is found making her will (although it is true she does not appoint executors), and the only bequest she makes is a gift of her 'personal property, consisting of money and clothes,' the strong presumption is that she did not intend only to do that which she might have effectually done by giving her 'money and clothes' simply. It appears to me there is no *falsa demonstratio* here, there is simply an imperfect enumeration. The testatrix was a markswoman, and not very cognisant of the force of particular expressions. She attempted to enumerate the items of which her personal estate consisted, and failed to mention them all; just as in *Bridges v. Bridges*, where three kinds of stock only were enumerated, the court nevertheless held that the whole of the property passed." Now, this testatrix, sitting down to make her will, which is a holograph will—intending, as I am satisfied she did intend, to dispose of all the property she had—thinks it not sufficient to give "all that I have power over," but goes on to specify part of her property, not for the purpose of restricting the gift, but for the purpose of allowing it to remain, as it was originally, universal. These decisions, *Bridges v. Bridges*, *Chalmers v. Storil*, and *Dean v. Gibson* are all perfectly consistent, and all bear out the construction which I put upon this will. As I have already said, I think it would be difficult to reconcile *Timewell v. Perkins* with these authorities. I do not think that it is reconcilable, and I think that *Timewell v. Perkins* is not an authority to be followed. The same observation may be applied to *Trafford v. Berrige*, cited in the note to *Timewell v. Perkins*. The case of *Re Kendall's Trusts* is not any authority against the decision to which I shall come in the present case; because, in that case, Lord Romilly had before him a will, which concluded with a clause giving all the residuary estate. That case was only cited to show that, if the clause had not been in the will, his Lordship would have come to a different conclusion. Now, the authority that I have found most embarrassing, is the case of *Enohin v. Wylie*. It is a remarkable case in this respect, that all the judges who gave their opinions upon the construction of such a will were unanimous. They all agreed that that part of the testator's estate which consisted of money in the English funds did not pass by his will. But I am of opinion that the decision did not proceed on the ground of the enumeration of the property being erroneous or defective, but upon what they considered to be the intention of the testator. In that case Sir James Wylie, an eminent English physician, domiciled in Russia, who seems to have been possessed of considerable property in Russia, made, as I collect, his will in Russia. In making his will, was it his intention to dispose of all his property, wherever it might be,

or to dispose of his Russian property only? I think that the House of Lords, and the judges in the courts below, proceeded on the ground that he intended to dispose of his Russian property only; and, accordingly, I find that Lord Westbury puts it on that ground that, as he intended to dispose only of his Russian property, the money in the English funds would not pass. [His Lordship read the words of the will in that case, and continued:] It was a question of intention; it was not a case of an erroneous enumeration of property; it was not a case in which the testator said, "I give all my estate," and then proceeded with a defective enumeration of it, but it was a bequest, giving certain property, with respect to which all the learned judges came to the conclusion that he did not intend to dispose of the property in the English funds. Considering, therefore, the eminence of such authorities as *Bridges v. Bridges* and *Chalmers v. Storil* (the only authorities on the subject at that time), if it had been the intention of their Lordships in *Enohin v. Wylie* to overrule those cases, they would have distinctly said so, and would not have left it to be inferred merely, that their decision was of a contrary nature. It would, no doubt, have been contrary to their intention to overrule those authorities which have so long been acted upon. I think, therefore, that I am not hampered by the case of *Enohin v. Wylie*, because a different question arose in that case; there the question was not whether a general gift of property should be cut down by a defective enumeration, but what was the original gift. With regard to the case of *Fisher v. Hepburn*, cited by the plaintiffs, that case seems to me to be in favour of the demurring parties. The Master of the Rolls there says, "The object was to exclude nothing. Such an enumeration under a *videlicet* a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles." In *Rawlings v. Jennings* the Master of the Rolls held that the words "effects," in that particular case, "must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence: viz., household furniture." As to the meaning of the word "effects" unqualified and unrestrained, I entirely agree with the observations of the Master of the Rolls in *Hodgson v. Jee* that, as a general rule, the word "effects" ought not to be cut down to things *ejusdem generis* with those named before, unless there is something clearly showing that that was the intention. Upon all these grounds I am of opinion that this is a general disposition of the testatrix's property. The consequence is that the plaintiff, as one of the next of kin, has no interest in the estate, and the demurrer will be allowed.

Solicitors: Druce, Sons, and Jackson; Henry Hill.

(Before Vice-Chancellor BACON.)

Dec. 9 and 14, 1876.

Re THE WELSH FREEHOLD COAL AND IRON COMPANY. (a).

Company—Vendor's guarantee as to profits—Part of purchase-money set apart to meet—Winding-up—Fund assets of company—The Companies Act, 1862, s. 38, sub-sect. 7.

(a) Reported by H. L. FRANKS, Esq., Barrister-at-Law.

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Re THE WELSH FREEHOLD COAL AND IRON COMPANY.

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On the sale of property to a company the vendor guaranteed to the shareholders a minimum dividend of 7 per cent. on the paid up capital of the company for four years, and a sufficient part of the purchase-money to answer such dividends was invested in Consols in the names of trustees, and by deed executed by the vendor of the first part, the company of the second part, and the trustees of the third part, it was provided that the trustee should every half-year sell out a sixth part of the trust fund, over a period of three years, so as to exhaust the fund in that period, and pay the proceeds every half-year to the directors; and the vendor covenanted with the company that dividends at the rate of 7 per cent. per annum should for the first four years be paid on the shares issued to the public, and that, if the sum paid to the directors by the trustees was insufficient for that purpose, he would make good the deficiency. Before the fund was exhausted the company went into liquidation. The balance of the fund being claimed by the vendor as his property subject to certain trusts that had ceased to exist, by the liquidator as assets of the company, and by the shareholders as being appropriated as a guarantee to them personally, the trustees paid it into court. On petition by shareholders for payment out and distribution of the fund between them:

Held, that the fund was assets of the company and belonged to the liquidator.

By an agreement dated the 26th Feb., 1872, and made between James Meliss Stuart of the one part, and Edward J. Lozey, (as trustee on behalf of the Welsh Freehold Coal and Iron Company, Limited, then in course of formation) of the other part, J. M. Stuart agreed to sell, and E. J. Lozey agreed to purchase on behalf of the company for 103,500*l.*, certain property belonging to J. M. Stuart in the county of Glamorgan. And it was agreed that the sum of 103,500*l.* should be paid as follows:—15,000*l.* cash on allotment of shares in the company; 15,000*l.* cash within fourteen days after allotment; 15,000*l.* cash at the expiration of fourteen days from the day appointed for payment of the second instalment; 15,000*l.* cash at the expiration of one month from the day appointed for the payment of the second instalment; 23,500*l.* at an interval of three months, and the balance of 20,000*l.* at an interval of six calendar months; and that so much of the two last mentioned instalments of 23,500*l.* and 20,000*l.*, as was necessary to guarantee dividends at the rate of 7*l.* per cent., per annum, upon all shares of the company issued to the public for the term of four years from the date of the first ordinary general meeting of the company, should be invested in 3*l.* per cent. Consols. And by the said agreement J. M. Stuart guaranteed the dividend, and it was provided that immediately after each of eight half-yearly meetings, an eighth part of the amounts directed to be invested should be sold out by the trustees, and by them paid to the directors, together with any dividends, and that the balance of any of the proceeds and income should be paid to J. M. Stuart.

A prospectus of the company was thereupon issued to the public, and contained the following statement:—"Guarantee. A contract has been entered into for the purchase of the estate, with all its rights and appurtenances, for 103,000*l.*, of which 45,000*l.* is to be paid in cash; 15,000*l.* in

paid up shares, and the balance to be invested in Consols in the names of trustees for the purpose of guaranteeing the dividends. So satisfied is the vendor of the success which will attend the development of the resources of this estate, and of the wealth of the iron and coal deposits, that he has guaranteed to the shareholders a minimum annual dividend of 7 per cent. on the paid up capital of the company for four years." And the fact of such guarantee was also prominently stated in the heading, and on the back, and a second time in the body of the prospectus.

The company was shortly afterwards duly incorporated under the provisions of the Companies Acts 1862 and 1867, with a capital of 155,000*l.* in 31,000 shares of 5*l.* each, and a large number of persons, relying on the provisions with regard to the guarantee, took shares in the company.

The 92nd clause of the Articles of Association provided that no dividend should be payable except out of profits arising from the business of the company; and that payments made to the directors of the company out of the guarantee fund mentioned in the agreement of the 26th Feb. 1872, should be considered profits, and be applicable only to the payment of dividends.

By an agreement dated the 24th April 1872, and made between J. M. Stuart of the one part and E. J. Lozey of the other part, the agreement of the 26th Feb. 1872, was altered, and J. M. Stuart accepted in satisfaction of 41,000*l.*, part of the purchase-money, the allotment of 8200 fully paid up shares, and as to the residue of 62,500*l.* the sum of 19,000*l.* was to be paid in cash. And out of the last two instalments of 23,500*l.* and 20,000*l.* J. M. Stuart was to receive such sum only as should be equal to a sum of 28*s.* per share on the shares issued to the public (other than the 8200 shares agreed to be taken by him) before or during the term of four years from the date of the first ordinary general meeting of the company, all such sums to be forthwith invested by J. M. Stuart as a guarantee fund, in manner as mentioned in the agreement of 26th Feb. 1872, and these 8200 shares were not to be considered as guaranteed unless J. M. Stuart invested a further guarantee fund equal to 28*s.* per share; and so much of the two last-mentioned instalments of 23,500*l.* and 20,000*l.* as should not be required to be invested were to be considered as given by J. M. Stuart as an abatement of the purchase-money.

By deed dated the 16th July 1873, and made between J. M. Stuart of the first part, the company of the second part, and two trustees of the third part, after reciting that J. M. Stuart had recently invested the sum of 4772*l.* 5*s.* in the purchase in the names of the trustees of a sum of 5152*l.* 4*s.* 6*d.* Consols as a guarantee fund on behalf of the company, it was declared that the trustees should hold the Consols upon trust to sell out on the 6th Jan. 1874, one-sixth part of the Consols, and pay the proceeds to the directors of the company, and that every succeeding six months from the 6th Jan. 1874, up to and including the 6th Jan. 1876, a similar sum of the Consols should be sold out and paid as above. And J. M. Stuart covenanted with the company that dividends at the rate of 7*l.* per cent. per annum should for the term of four years from the date of the first ordinary general meeting of the company be paid on all the shares issued to the public, and that if the sums paid to the directors under the

trusts of the deed should at any time be insufficient to pay such dividend, then and so often as the same should happen he would on demand pay to the directors of the company such a sum as would be requisite to make good the deficiency.

On the 14th Sept. 1875, a resolution for a voluntary winding-up was passed by the shareholders, and on the 13th Nov. following an order was made that the voluntary winding-up should be continued under the supervision of the Court.

Portions of the Consols held by the trustees were from time to time sold out by them and paid to the directors of the company, and at the date of the winding-up resolution a sum of 3359*l.* 6*s.* 9*d.* Consols was standing in the names of the trustees.

On the 25th Sept. 1876, the trustees paid the Consols then standing in their names into court on the ground that the fund was claimed by three parties, namely, (1) J. M. Stuart, who claimed the same as being his property, subject only to certain trusts which had ceased to exist; (2) the liquidator of the company, who claimed the same on the ground that it was an asset of the company; (3) and the shareholders of the company, who claimed the same on the ground that it was appropriated as a guarantee to them personally.

In November a petition was presented by some of the shareholders praying that the fund, after paying costs of trustees, &c., might be distributed among the shareholders (other than J. M. Stuart) in proportion to the number of shares held by them respectively.

Swanston, Q.C. and *B. B. Rogers*, for the petitioners, contended that the fund was part of Stuart's purchase-money which he had set apart as a guarantee fund impressed with an express trust in favour of the shareholders as individuals, and not as members of the company, and as an inducement to them to take shares.

Crosseley, for other shareholders, supported the petition.

Sir H. M. Jackson, Q.C. and *Tremlett*, for Mr. Stuart, abandoned his claim on the fund, and also argued in favour of the petitioners.

Kay, Q.C. and *H. Burton Buckley*, for the liquidator.—This fund was not really the vendor's money. It was part of the capital of the company, which was to be held *in medio* until it was ascertained whether the vendor's representations as to profits were true. The money was to be paid to the directors and to be applied in payment of dividends; that was in effect equivalent to a reduction of the capital of the company and is illegal: (*Hope v. International Financial Corporation*, 35 L. T. Rep. N. S. 626.) The company alone can recover this fund, and if they recover it it must be applied in payment of the creditors. Then, as to the shareholders, sect. 38, sub-sect. 7 of the Companies Act 1862 concludes the question.

A. E. Miller, Q.C., for the principal creditor of the company, supported the contention of the liquidator and referred to clause 92 of the articles.

E. Ford, for the trustees.

Swanston, Q.C., in reply.—The only question before the court is, what are the trusts of the deed of the 16th July 1873? Mr. Stuart in effect became the sole trader for four years, and guaranteed dividends up to 7*l.* per cent. during that period. If there was a loss it fell upon him. If there was a gain the shareholders were to have it. It is a legitimate commercial agreement conferring

a private advantage on the shareholders for a certain time. Then, this guarantee fund formed no part of the capital of the company. If it was then the subscribed capital of the company would have been 158,000*l.*, but it was 155,000*l.* As to sect. 38 of the Companies Act 1862, it has no application. It provides that no sum due to any member of a company by way of dividends shall be deemed a debt of the company. Due from whom? Due from the company, for it is the company that pays the dividends. It cannot, therefore, apply to a covenant by a third party with the company, by which a benefit is contracted to be conferred on the shareholders individually.

BACON, V.C.—No doubt this is a case, as I have said, of entire novelty; but that fact, of course, does not exempt it from the application of the general rules established by the Legislature and by the general law respecting joint stock companies. If the case were, as Mr. Swanston has argued with great ability and clearness, only a case to be decided upon a contract between the parties, then, having first ascertained who are properly to be called the parties, there would be much less difficulty than it presents in its existing aspect. The contract is between Mr. Stuart and the company. The shareholders, as has been said, and as is quite true, can only act through the company, and it is with the company that Mr. Stuart's contract is made. Now I find it unnecessary to go fully into the earlier history of the transaction. Mr. Stuart has an estate to sell. He contracts for a price, and by way of inducing the shareholders to believe in it beyond doubt, the stipulation with respect to the guarantee is inserted in the prospectus and formed a feature in the original contract. Mr. Stuart's confidence in the value of his property was so great that he undertook to bear the burden of providing that the shareholders should receive a dividend, in other words, profit, from carrying on the operations of the mine during the four years which are mentioned in the contract. That is clear and plain. But then it was because he received the purchase-money that he took upon himself that burden. He took the money of the shareholders, and each man who paid his 5*l.* for a share trusted that the company of which he was a member would see that contract carried properly into effect, and that he should have the benefit for which he stipulated. The deed of 1873 is perhaps the most important of the several documents which have been referred to, and I therefore turn to the terms of it. It is between Mr. Stuart of the first part, the company of the second part, and certain trustees for the shareholders of the third part. It recites that Mr. Stuart had recently invested 4772*l.* in the purchase of some stock as a guarantee fund on behalf of the company—the contract is with the company, and with the company alone—"and might hereafter invest other sums of money in the same manner for the same purpose." Then it goes on to declare that the trustees shall be possessed of that fund upon trust to sell out in manner mentioned. By the same indenture Mr. Stuart covenanted with the company "that dividends at the rate of 7*l.* per cent. per annum should for the term of four years from the date of the first ordinary general meeting of the said company be paid on all the shares of the said company issued to the public, and that if the sums paid to the directors under the trusts aforesaid should at any time

be insufficient to pay a dividend at the rate aforesaid, then and so often as the same should happen, he, the said James Meliss Stuart, his executors or administrators, would on demand pay to the directors of the said company such sums as should from time to time be requisite to make good the deficiency." It is a contract between parties it is true; but the parties are Stuart and the company. The reason is obvious upon the facts which have been mentioned. The purchase-money being the sum specified in the contract an abatement takes place, modifications are made, and ultimately the purchase-money which Mr. Stuart has received is modified to the amount which has been mentioned, and out of that (I do not say that these words are in the contract), and from no other source than that, he takes this 4772l., which is the sum of stock now in question upon this petition. How can I entertain any notion that individual shareholders are entitled to the benefit of that contract? That is a contract made with the company, subject to all the incidents of the company, and liable to all the laws applicable to joint-stock companies. One plain feature in that law is that no shareholder can derive any benefit from the assets of the company, no matter from what source they come, until the debts of the company are paid, and the only contract to which it can be said that the shareholders are parties is that 92nd clause of the Articles which has been mentioned, and in which it is provided that no dividends shall be payable except out of profits. The words of that clause, in my opinion, cannot more distinctly express the statement that the 7l. per cent., whether derived from the business which the company carried on, or from the engagement of Mr. Stuart to make up 7l. per cent., is to be derived from profits and nothing but profits. By the contract, to which the shareholders are individually parties as the company, when Mr. Stuart performs his covenant with them and transfers to the trustees that sum, it becomes the duty of the trustees to pay the directors in order that the directors may declare a dividend. So that it is profits and nothing less, and there is no law in this country which would sanction a trader saying, "I will enter into a contract by which any prospective benefit arising to me shall be exempt from the payment of my debts." That would be directly against the first principles of commercial law. Then the company becomes insolvent. Mr. Stuart it is said performs his agreement by having invested that sum of money; and now the shareholders say, "We, who, *quod* shareholders, are utterly bankrupt and unable to pay our debts, which have been contracted for our benefit and in our own name, will take this sum, which has no other source and origin, and can be ascribed to nothing else than that contract which we through our directors entered into, and which is part of the 4772l. sum of stock," which is the subject of this petition. The statute is unmistakable upon this subject. The statute only expresses what would be the general law without the statute; but it is clear and distinct, and the contract has stated that the sums of money in question shall be considered as profits. Then that there may be full justice done to the subject, the clause in the statute to which I was referring (sect. 33, sub-sect. 7) provides that if there shall be any sum due to any member of a company by way of dividends, profits, or otherwise, it shall not be deemed to be a debt of

the company payable to such member in a case of competition between such member and any other creditor not being a member of the company, but any such sum may be taken into account for the purpose of finally adjusting the rights of the contributories among themselves. In the face of that clause of the Act of Parliament, upon the very terms of the deed of 1873, by the stipulations contained in the articles of association, I am of opinion that this claim of the shareholders, by which they seek to take away money that is first by law applicable to the payment of their debts, cannot be sustained. The order therefore will be for payment of the fund to the official liquidator: the costs of all parties properly appearing to be paid out of the fund.

Solicitors for the company and the petitioners, *Miller, Smith, and Bell*.

Solicitors for other parties, *Batty and Whitehouse; Bevan and Whitting; T. M. Harvey*.

Friday, Dec. 15, 1876.

RUDKIN v. DOLMAN. (a)

Voluntary conveyance—Invalid declaration of trust—Resulting trust to the settlor.

In 1857 R., being seized of freeholds, and being also a holder of shares in joint stock companies, which he then feared would involve him in heavy liabilities, conveyed the property to one C. H. The deeds conveying the property were in the form of purchase deeds: and C. H. purported to give valuable consideration for it, though, in fact, no money really passed. B. received the rents till his death intestate. C. H., after B.'s death, executed a deed of trust, declaring that the property had been conveyed to him in trust for R.'s wife. R.'s wife received the rents till her death, when she purported to dispose of the property by her will in favour of her daughters. The plaintiff, as R.'s heir-at-law, claimed the property, and a reconveyance from C. H.

Held, that the Statute of Frauds was not satisfied, and that, as no declaration of trust had been executed in the lifetime of B., there was a resulting trust in favour of R. at the time, and consequently that the plaintiff was beneficially entitled to the property, and to have a reconveyance from C. H., and an account of rents and profits.

THIS was an action by Thomas Rudkin, the eldest son and heir-at-law of Thomas Rudkin the elder, who died intestate, by which a reconveyance of certain freehold messuages, hereditaments, and premises was sought from one Charles Hardwick, under the following circumstances.

In the month of July, 1857, the said Thomas Rudkin, the elder, being seized of, or equitably entitled to, certain freehold hereditaments and premises, and being also a holder of certain shares in joint stock companies which, as he then feared, would involve him in heavy liabilities, determined to convey his property to the said Charles Hardwick to hold the same as the plaintiff alleged as trustee for him, the said Thomas Rudkin, the elder.

This determination of the said Thomas Rudkin, the elder, was carried out by two several inden-

(a) Reported by H. L. FRANKS, Esq., Barrister-at-Law.

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tures, dated respectively the 24th July 1857, and respectively made between the said Thomas Rudkin, the elder, of the one part, and the said Charles Hardwick of the other part; and both the conveyances were taken in the form of a conveyance as on a purchase. The said Charles Hardwick purported to pay for the property comprised in one of the indentures the sum of 100*l.* in addition to the sum of 200*l.* then due upon mortgage thereof. This conveyance contained the usual covenants for title by the said Thomas Rudkin, the elder, and also a covenant of indemnity by the said Charles Hardwick in respect of the said mortgage. For the property comprised in the second indenture, the said Charles Hardwick purported to pay the sum of 150*l.* Notwithstanding the terms of the said deeds, nothing was actually paid by Charles Hardwick to Thomas Rudkin, the elder, as the purchase-money for the property by such deeds conveyed to the said Charles Hardwick, and Thomas Rudkin, the elder, continued during his life to receive the rents and profits of the premises comprised in the said indentures of conveyance, and applied the same to his own use. Thomas Rudkin, the elder, died intestate on or about the 22nd Jan. 1862. On the 6th May 1862, Charles Hardwick executed a formal declaration of trust in favour of the plaintiff's mother, Jane Rudkin, her heirs and executors absolutely of the property purported to be conveyed by the said indenture of the 24th July 1857, whereby, after reciting the before-mentioned conveyances, the said Charles Hardwick declared that the principal sums of 100*l.* and 150*l.* mentioned to have been paid by him as the purchase-money for the premises comprised in the said indentures were the proper moneys of the said Jane Rudkin, and that his name was made use of in trust only for the said Jane Rudkin, her heirs and assigns, and he thereby covenanted to convey the said property to the said Jane Rudkin, her heirs and assigns, on demand. Jane Rudkin, the plaintiff's mother, received the rents and profits of the property up to the time of her decease on the 24th Jan. 1868, when she purported by her will to dispose of this property in favour of her daughters, the plaintiff's sisters. The plaintiff waived all claim in respect of the rents and profits received by his mother, and also some other rents that one of his sisters, who was delicate, had since received, but claimed a reconveyance by the said Charles Hardwick of the aforesaid property, an account of the rents and profits from 18th Dec. 1875, the time of the marriage of his said sister; and that the defendants, the trustees of Mrs. Rudkin's will, and Charles Hardwick might be restrained from selling the property.

The defendants alleged that the aforesaid property was conveyed by the said Thomas Rudkin, the elder, to Hardwick in trust for his wife absolutely. It appeared from Hardwick's evidence that at the time of the execution of the indentures of 24th July, 1857, the purchase-money, in two sums of 100*l.* and 150*l.*, was paid over in gold by Thomas Rudkin, the elder, to him, with a request that he would hold the same as trustee for his wife, and was then handed back by him, Hardwick, on behalf of Jane Rudkin to Thomas Rudkin, the elder.

Kay, Q.C. and Warrington for the plaintiff contended that the whole business of the two deeds of 24th July, 1857, was a sham transaction, and

that as no deed of trust was executed at the time, there was a resulting trust for Thomas Rudkin the father, and therefore the plaintiff, as his heir-at-law, was beneficially entitled to the property, and that the execution of the deed of trust of 12th May, 1862, subsequently to the death of Thomas Rudkin the father, could not affect the plaintiff's rights. That the Statute of Frauds was not satisfied, nor the rules as to a valid declaration of trust. They also referred to:

Childers v. Childers, 1 De G. & J. 482;

Davies v. Otty, 35 Beav. 208;

Booth v. Turle, L. Rep. 16 Eq. 182;

Haigh v. Kays, 26 L. T. Rep. N. S. 695; L. Rep. 7 Ch. Ap. 469.

Sir H. Jackson, Q.C. and E. Ward, for Hardwick and the beneficiaries under the will of Jane Rudkin, contended that the declaration of trust of 1862 was sufficient. The transaction had stood for nineteen years.

Dale for the trustees of Jane Rudkin's will.

BACON, V.C.—I think this case is very plain, and that no doubt can be entertained as to the nature and meaning of this transaction; when a man finds himself in failing circumstances, he often has recourse to such a plan as this. During the life of the so-called settlor, the property remained his, the money was his, and the land was his, and no trust was ever declared in his lifetime, and consequently the Statute of Frauds was not satisfied, and there was a resulting trust in favour of T. Rudkin, the father. There is no conflict of evidence, it is quite plain what was the intention of the so-called settlor, and also what was done in this matter. As to the length of time that has elapsed before the commencement of this action by the plaintiff, that is, I think, very satisfactorily explained by the plaintiff's unwillingness to deprive his mother of the rents and profits during her life, or, after her death, his invalid sister of her means of living; but on her marriage, in December 1875, he takes steps to obtain his just rights. There must, therefore, be a declaration that the plaintiff is the beneficial owner, and also a re-conveyance and account as asked for by his statement of claim.

Sir H. Jackson, Q.C., asked that the costs of these proceedings might come out of the estate, as the necessity for them had been caused by the acts of the so-called settlor.

BACON, V.C., declined to make this order. There would be no order as to costs.

Solicitors: *Clark and Scoles*; *Newman, Stretton*, and *Hilliard* for C. and A. *Stretton, Leicester*.

Friday, Dec. 1, 1876.

HOGG v. HOGG, (a)

Partnership—Expiration of partnership term—Continuation at will—Death of partner—Agreement by continuing partner to purchase deceased partner's share—Application of clause in original articles of partnership for purchase of a deceased partner's share at a valuation—Stated account. Where a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract.

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

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A. and B. entered into partnership for a term. The articles provided that, in case either partner should die before the expiration of the partnership term, the surviving partner should settle and adjust all accounts, matters, and things relating to the partnership, and should become the purchaser of the share of the deceased partner, at the amount fixed as the value thereof, on the last annual statement of account, and should pay the same by certain instalments. On the expiration of the term, A. and B. continued to carry on the business without any reference to the partnership articles. A. died. B. then expressed his determination to carry on the business alone, and, under an arrangement with A.'s administratrix, stated an account of the value of the business as a going concern at the death of A., and took over the business and A.'s share, at the amount appearing by the account to be the value thereof, and paid sums on account. On the death of B. the partnership assets were sold at a considerable loss, and it was insisted by B.'s representatives that this loss ought to be borne rateably by A.'s and B.'s estates.

Held, that as B. had insisted on his right under the articles to purchase A.'s share at a valuation stated by himself, A.'s administratrix was entitled to prove against B.'s estate for the balance due under the stated account.

Quære: whether, if B. had continued to carry on the business without any express agreement to purchase A.'s share, the clause would have been applicable.

By deed dated the 20th May, 1862, and made between Thomas Bedford of the first part, John Bingley of the second part, and George Stelling Hogg of the third part, after reciting that a partnership had been agreed upon between the said three parties, and that a lease had been taken in their joint names for a term of ten years and five months, commencing from the 28th July 1860, of certain beds of clay at Shipley, it was agreed that the said three parties would be partners in the business of brick and tile makers, commencing from the 17th Aug. 1861, for the term of years in the said lease mentioned, and which would expire on the 25th Dec. 1870, under the name and style of the "Airedale Brick and Tube Company"; and that the capital of the partnership should consist of and comprise the beneficial interest in the said lease, and the stock-in-trade, book debts, and effects of the business. And it was provided that in case either of the said partners should die before the expiration of the term of the partnership, then, and in such case, the surviving partners or partner should, within the space of six calendar months, next after the decease of the party so dying, settle and adjust all accounts, matters, and things relating to the partnership, with the executors or administrators of the deceased partner; provided always that as between the representatives of any deceased partner and the surviving partner or partners the last annual statement of account, made and settled by the said partners, should be deemed and taken and should be conclusive evidence of the state and value of the business at the time when such last annual statement of account should have been so rendered, and the representatives of the deceased partner should in no case be allowed to question the accuracy of such account, or inquire into the particulars thereof, but should in all

respects be bound conclusively thereby, and the increase or decrease in value since the last annual statement of account, should, in case of dispute of the deceased partner's share, be ascertained by reference to two indifferent persons, or their umpire, in the usual way; and, after the increase or decrease in value of such share should have been so affixed, the surviving partners or partner should thereupon become the purchasers of the said share, at the amount fixed as the value thereof on the last annual statement of account, in addition to the amount of the increased value of the same to be ascertained as aforesaid; but if the share should be found to have decreased in value since the taking of such account then the surviving partner or partners should become the purchasers of the said share at the amount fixed as the value thereof in the last annual statement of account less the decrease in value of the share, and should enter into a bond with sufficient penalty for securing to the executors or administrators of the deceased partner the amount of the value of the share thus ascertained, with interest at £5 per cent., such amount to be paid by the instalments therein provided. The deed also contained the usual clauses for winding-up the partnership, realising the assets, and adjusting the shares and interests of the partners on the expiration of the partnership term.

In Aug. 1865, Thomas Bedford retired from the business, but the partnership as between Bingley and Hogg was continued.

On the 31st Dec. 1870, the partnership term expired, but Bingley and Hogg continued to carry on the business in co-partnership without any reference to the terms of the partnership deed, and obtained a renewal of their lease for five years from the 30th Jan. 1871.

On the 14th Feb. 1874, J. Bingley died intestate, and thereupon Hogg took over to himself under an arrangement with Mary Bingley, the administratrix of John Bingley, the business and the business assets, and thenceforth up to the time of his death carried on the business alone on his own account.

On the 4th March, 1875, Hogg died intestate, and the bill was filed in July, 1875, by his infant son against his widow, his administratrix, for the administration of his estate.

On the 24th July, 1875, the usual administration decree was made, and on the 10th Aug. following Mary Bingley obtained leave to attend the proceedings, and carried in a claim for 5516*l.* 17*s.* 11*d.*, as the balance of an account in which Hogg's estate was debited with 6264*l.* 13*s.* 7*d.*, as Bingley's share of the capital, stock-in-trade, and profits of the business at the time of his death.

In support of the claim it was alleged that G. S. Hogg, on the death of J. Bingley, expressed his determination to continue the business; that it was arranged that he should make out and submit an account showing the state of the partnership at the time of Bingley's death; that on the 24th July, 1874, the accounts of the partnership were submitted by him to and were settled by him with William Bingley, on behalf of Mary Bingley, and were signed by both of them; that at the time the account was settled G. S. Hogg was in undisputed possession of the partnership estate, and continued to carry on the business solely on his own account from that time, and had sole possession of the partnership assets; and that on the settlement of

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the account G. S. Hogg stated that he should be unable to pay Mary Bingley the amount shown to be the value of J. Bingley's estate by the instalments mentioned in the articles of partnership, and it was mutually agreed that the same should be paid by instalments of 150*l.* per month, and that he subsequently paid by various instalments the sum of 1150*l.*

On the other hand, it was denied by the administratrix of G. S. Hogg that he ever agreed to purchase J. Bingley's shares in the partnership, or that he was bound to do so; and it was insisted that, as the machinery, plant, and stock-in-trade of the business (which in the account were valued at 6126*l.* 19*s.* 6*d.*) had been sold by public auction, and had realised only 2051*l.* 5*s.* 1*d.*, two-thirds of this loss, together with the costs to be incurred in carrying out certain covenants contained in the lease of the 30th Jan. 1871, ought to be deducted from the claim.

The account referred to showed on the credit side the following item: "By fixed and moveable plant, steam engines and boiler, boiler seating, &c., sheds, buildings, kilns, &c., valued pursuant to the provisions in partnership deed as a going concern, 6126*l.* 19*s.* 6*d.*" By the same account the sum of 6264*l.* 13*s.* 7*d.* appeared to be due to the administratrix of J. Bingley, and was made up thus:

	£ s. d.
14th Feb. 1874. To capital	2007 4 5
To two-thirds of profit to date	4257 9 2

26264 13 7

The same account showed G. S. Hogg's one-third share of the profits to be 2128*l.* 14*s.* 6*d.*, and concluded thus: "The foregoing statement of account has been taken and made by us, and shows the position of the partnership accounts and the capital and profits at the death of Mr. J. Bingley that he had therein and that Mr. Hogg had therein," and was signed by W. Bingley, on behalf of Mary Bingley, the administratrix, and by G. S. Hogg.

Kay, Q.C. and Whitehorne, in support of the claim.—By the account which has been put in the share of the deceased partner was valued pursuant to the clause in the partnership deed, and the surviving partner took over the deceased partner's shares at that valuation. It is, in fact, a settled account, behind which it is not competent for the parties to it to go: (*Laycock v. Pickles*, 9 L. T. Rep. N. S. 378.) It was the basis of an agreement which has been part performed by the business being taken to and carried on by the surviving partner for his own benefit.

A. E. Miller, Q.C. and Nalder, for the defendant, the administratrix of G. S. Hogg.—This is not a purchase account at all, nor an account stated between Hogg and J. Bingley's representative, but a mere ordinary balance sheet and yearly account against both partners and a division of the profits according to their respective interests in the concern. It is therefore not a document amounting to a contract to purchase. Hogg was in no way bound to purchase his deceased partner's shares. The clause on that head applies only to the death of a partner "during the partnership term," and is therefore inconsistent with a partnership at will. They cited

Essex v. Essex, 20 Beav. 442;
Cookson v. Cookson, 8 Sim. 529;
Cook v. Collingridge, Jacob. 620;

Clark v. Leach, 32 Beav. 14; s.c. on appeal, 8 L. T. Rep. N. S. 40; 1 De G. J. & S. 409.

Sir H. M. Jackson, Q.C. and Phear, for the infant plaintiff, supported the defendant's contention.

Kay, Q.C., in reply.

BACON, V.C.—No doubt the general law often acted upon is that if a partnership constituted by articles comes to an end by effluxion of time, and the partners continue to carry on the business, they are held to do so upon the terms of the written articles. There may be exceptions to that case. There may be such a peculiarity as was mentioned by Mr. Miller just now. It was in evidence in that case (*Essex v. Essex*, *sup.*) that they had agreed to carry on the business on the same terms. Without that the decision would have been—and I say would have been, because I believe it ought to have been—the same. It is a fact mentioned as existing in the case, but not on the ground of the judgment. And the law I take to be perfectly clear that after the expiration of a partnership by effluxion of time, if nothing is said, and the partners continue to carry on the business, they carry it on upon the same terms as those which were expressed in the articles, with this exception only, which is noticed by Lord Westbury, that clauses for expulsion, clauses in the nature of penalties, cannot be considered to be still subsisting since there has been no recognition nor plain expression of them. I have no such thing here. The stress of Mr. Miller's argument was that the articles of partnership being at an end, the continuing partner was under no obligation to purchase or to carry on the business. But if I were to admit that, it does not touch this case, because this case is one in which the continuing partner insisted upon his right to carry on the business under the articles. The evidence of the brother, Mr. William Bingley, is clear and complete, and not opposed to any sort of contradiction on the part of the plaintiff or the other parties to the suit. What he says is this: "My sister deputed me after my brother's death to ascertain the condition of affairs in the business which my brother had carried on with Mr. Hogg, and Mr. Hogg came to Leeds and saw me several times, at which he expressed his determination to carry on the business." And what was the right of Mrs. Bingley, the administratrix? To have the matter settled, to have the business wound-up, and everything that then existed settled and applied first in payment of the debts, and then in satisfaction of the several demands of the partners. But he who executed the articles of partnership, and who had been acting upon them up to the death of his partner, expressed his determination to carry on the business. Can that be referred to anything but to the articles? It was not an obligation but a right which he was claiming. That becomes still more clear if the account that has been proved on both sides is referred to. That account purports to be an account of the Airedale Brick and Tube Company. On the one side there are, as it is proper there should be, the liabilities of the concern. On the other side is the valuation made by this continuing partner, made by himself, of the fixed and moveable plant, and so on, "valued pursuant to the provisions of the partnership deed as a going concern." It is his own act. It does not rest there, because, having stated the amount of the valuation which

he made, he goes on to value the stock in trade and the book debts, and then, in accordance with the real meaning of the articles in the event which has happened, namely, the death of J. Bingley, he deducts from the valuation of the stock in trade $33\frac{1}{2}$ (or a fraction of some sort) per cent., and carries out the sum diminished by that deduction, and he does the same with the book debts off which he takes 20 per cent. Can anything be plainer than that? This was a transaction between these two persons—Hogg, the continuing partner, and W. Bingley, the agent of his sister—that the valuation was to be made under and in pursuance of the articles of partnership; and the account is so stated by him. Then comes this further statement on the last page of the account, in which J. Bingley's account is credited with capital at 2007*l.* 4*s.* 5*d.* That can be seen by the other accounts because there J. Bingley is credited with the gross amount of his capital. He is allowed interest upon that capital in the account, and then from it the various sums are deducted which have been drawn out by him from time to time bringing it down to that sum of 2007*l.* 4*s.* 5*d.* Then comes another item of which there is no trace in the preceding statement, and which must, of necessity, be taken from the books as the articles provide, "To two-thirds of the profit to date 4257*l.* 9*s.* 2*d.*" The account of itself furnishes no means by which that sum could be arrived at. Is it possible to read this paper, and to consider its contents and not to see that it is an assertion on the part of Mr. Hogg that he is entitled to carry on the business,—the administratrix of the deceased partner being deprived of her right to have the business sold and realised at once, and the money put into her pocket which she would be entitled to receive but for this demand on the part of the continuing partner that he shall have the benefit of that stipulation in the partnership articles, and be allowed to carry on the business upon credit? Then Mr. Bingley's affidavit proceeds further. He says, "On the 22nd July 1874, the said George Stelling Hogg came over to Leeds, and settled the accounts of the partnership with me. . . . That was done at the office of Simpson and Burrell, of Leeds, solicitors of the administratrix. The accounts were signed by the said George Stelling Hogg and by me on behalf of my sister." Then he verifies it, and continues "That account showed my brother's interest in the said business to be of the value of 6264*l.* 13*s.* 7*d.* In addition to that sum interest was due from the day of my brother's death. The said George Stelling Hogg was (at the time the said account was settled) in possession of the partnership estate, and had been so from the day of my brother's death. My sister had not, in any way, interfered in the business or been a party to its transactions in any sense, nor had I on her behalf. In fact, the said George Stelling Hogg carried on the said business solely on his own account from that time, and had the sole possession of the assets thereof. On the settlement of accounts before-mentioned the said George Stelling Hogg stated he should be unable to pay to my said sister as administratrix of my said brother the amount shown to be the value of my deceased brother's share by the instalments mentioned in the articles of partnership, and it was mutually arranged that the same should be paid by instalments of 150*l.* per month, and he subse-

quently paid by various instalments the sum of 1150*l.*" Nothing can be plainer than that: the statement of the account, the ascertaining under the hand of Hogg himself the sum for which he was accountable, a request on his part that he should not be pressed for present payment, and an agreement made that he should pay not by the instalments of the articles of partnership, but upon the terms there named. This then is a transaction concluded in the month of July 1874, Mr. J. Bingley having died in the month of February preceding. It is acted upon, it is not only a bargain clearly proved, but the goods are sold and delivered to Hogg. He is put into possession, or left in possession, upon his own estimate, not at the actual amount appearing in the books of the stock and the debts, nor of the other stock and moveable plant, but at the valuation which he makes, having first made the deduction to which he thought he was entitled in his character of purchaser, and, as I have said, the goods are sold and delivered and they remain in his possession and he carried on the business, the interests in which he bought by this plain contract, until his death which happens some time in March 1875. Then an attempt is made to show that this was an erroneous valuation, for that at the time there was great danger, and more than danger, that he would not be able to renew the lease of the ground out of which he dug the fireclay. Well, but he knew that perfectly well, no man knew it better, and the correspondence shows that he had been acquainted with the fact. What was operating upon his mind it is impossible for me to guess, or to conjecture, or infer in any way. He may have thought that he could have overcome the scruples of the lessor, he may have thought he could find another place more suitable for carrying on his business; but, whatever his imagination was in that respect, I find that he whose duty at his partner's death it was, if he was not bound by the articles of partnership, to wind-up the concern and to pay to the administratrix what was due to her was insisting upon the stipulation in the partnership articles, and upon having the benefit of it by contract between himself and the administratrix, and acting upon that contract by payment of sums which amount to 1150*l.* But what have I to do with the business as it was subsequently carried on or with the diminished amount of the proceeds of the moveable plant and other things when, he being dead, his administratrix after some time turns them into money by means of a sale. What has that to do with the case? He became by the contract master of this property. He dealt with it while he was alive in his own way and for his own benefit; and, after his death, when it comes to be realised at a loss, how can that by any possibility affect the rights of these parties with whom he has bargained, from whom he has bought, from whom he has received, the whole consideration for which he stipulated, and had it in fact for his own purposes. In my opinion the claim is plainly, distinctly, and clearly proved, and I can find no ground upon which it ought to be questioned, nor can I find any reason why I should hesitate to admit it as a proof against the estate.

Order accordingly.

Solicitors for M. Bingley, Torr and Co.

Solicitors for other parties, Flower and Nussey, agents for Berry and Robinson, Bradford.

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QUEEN'S BENCH DIVISION.

Nov. 9 and 12, 1875, and July 11, 1876.

METCALFE v. BRITANNIA IRONWORKS COMPANY. (a)

Delivery under charter-party—Liability for freight—Pro rata itineris.

By charter-party between plaintiff (the shipowner) and defendants (the charterers), the plaintiff agreed that his steamship should load a cargo of iron rails at an English port, and should there-with proceed to Taganrog, in the Sea of Azov, or so near thereto as she might safely get, and deliver the same afloat on being paid freight at a certain rate per ton delivered. The ship, laden accordingly, found on her arrival in December the Sea of Azov frozen over, and at Kertch, thirty miles off, the nearest place to Taganrog which she could reach before the following April, she unloaded, notwithstanding the protest of the consignees, and left the cargo at the Custom House, from which it was subsequently removed to its destination by railway at the consignees' expense.

In an action for freight,

Held, that this was not a delivery under the charter-party, and that (per Mellor and Quain, J.J.) the plaintiff, under the circumstances, could recover no freight at all.

But (per Cockburn, C.J.) that the plaintiff could recover freight *pro rata itineris*.

This was a case stated without pleadings.

The action was brought to recover 1491l. 16s. 3d., being 1080l. for freight on 900 tons of iron per steamship *Meredith*, at 24s. per ton, as per charter-party of the 7th Oct. 1873, and 411l. 16s. 3d. for freight on 299½ tons of iron, at 27s. 6d. per ton, as per charter-party of the 3rd Nov. 1873, and interest thereon.

1. By a charter-party, dated the 7th Oct. 1873, and made between the plaintiff (therein described as the chartered owner of the steamship *Meredith*, of the burthen of ⁹⁹⁰/₇₂ tons, register measurement, or thereabouts, then bound to London or Dunkirk from the Black Sea) and the defendants, it was agreed that the ship should with all convenient speed proceed to Middlesborough-on-Tees, and there load from the agents of the defendants a part of a cargo (say 900 or 1000 tons) of railway iron, and being so loaded should therewith proceed to Taganrog, or so near thereunto as she might safely get, and deliver the same afloat on being paid freight at the rate of 24s. per ton of 20 cwt. delivered in full of all port charges, pilotages, &c. (the act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, river, and steam navigation of whatever nature and kind soever during the said voyage always excepted). The freight to be paid as follows: one-third to be advanced on signing bills of lading if required, less 3 per cent. to cover all charges, and the balance in cash in London against certificate of right delivery of the cargo.

2. By the charter-party it was, amongst other things, agreed that the ship should have liberty to call at Havre to complete cargo for ports on the way, it being understood that she should not remain in Havre more than 72 hours.

3. The ship, after the date of the charter-party, arrived at Dunkirk, and there met with an accident

which necessitated her being repaired, for which purpose she went to Sunderland, and this delayed her arrival at Middlesborough for some time.

4. By a second charter-party, dated the 3rd Nov. 1873, and made between the same parties, it was agreed that the *Meredith* should, with all convenient speed, proceed to Middlesborough-on-Tees after repairs, and there load from the agents of the defendants about 800 tons of railway iron, in addition to 900 tons as per charter-party of the 7th Oct.; and being so loaded should therewith proceed to Taganrog, or near thereto as she might safely get, and deliver the same afloat, on being paid freight at the rate of 27s. 6d. per ton of 20 cwt., in the same manner as by the first charter.

5 and 6. Both charter-parties contained the following provisions:

Ship to have an absolute lien for all freight, dead freight, and demurrage.

To address to charterer's agents, Messrs. Berthold, Smith, and Co., Taganrog, paying 2 per cent. commission.

Captain to telegraph from Constantinople and Kertch his departure and weight of cargo to the agent of the Rostoff and Wladikowksee Railway Company, Taganrog, or in default he will have no claim for demurrage.

7. The *Meredith*, so soon as she was repaired, proceeded to Middlesborough-on-Tees and there loaded from the agents of the defendants 900 tons of railway iron under the first charter-party, and 299½ tons of railway iron under the second charter-party.

8. The freights payable under the two charter-parties respectively are the sums sought to be recovered, as above stated.

9. The *Meredith*, so soon as she was so loaded, proceeded on her voyage to Taganrog, and arrived at Kertch on the 17th Dec. 1873.

10. Upon arriving at Kertch the captain of the *Meredith* found—and it was the fact—that the Sea of Azov was then closed by ice, that the navigation of the port of Taganrog was effectually closed, and all the buoys, lightship, and other marks for navigation had been removed for the winter.

11. The captain thereupon proposed to discharge his cargo at Kertch, and made a protest at that place, of which the following are the material parts:

Protest.

Steamer *Meredith*.

Arrived in Kertch on the 17th Dec. 1873, with a cargo of railway iron (bars), consigned to the Rostoff and Wladikowksee Railway Company, I found that the Sea of Azov was closed by ice, and that the navigation of the port of Taganrog, where the ship had to deliver the cargo, was officially and to all purposes closed, and all the buoys, lightships, and other marks for the navigation of its intricate gulf were removed for the winter. Raising myself upon the charter-party, and pointedly to that part of it beginning with "Taganrog, or so near thereunto as she may safely get," and next to the part of it beginning with "the act of God," and ending with "all and every other accident, dangers of the sea, rivers, and steam navigation of whatever nature and kind soever during the said voyage always excepted," I determined to discharge the cargo at Kertch, as the nearest port to Taganrog to which the steamer could safely approach, all others being closed by ice, having given proper notice of such determination to the consignees of the steamer at Taganrog, Messrs. Berthold, Smith, and Co., by telegram, dated from Kertch the 18th Dec.

Acting on the aforesaid, I am discharging my cargo at this port of Kertch under protest, and at the expense and risk of the consignees or whom it may concern; as no documents for the reception of the same have been presented, consequently I hereby solemnly protest against such receivers of said cargo, holding them responsible for all detention, loss of time, extra expenses, fines of

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Custom House for late presentation of documents, and whatsoever other charges to which I may be exposed.
20th Dec. 1873.

12. On the 19th Dec. 1873, Messrs. Berthold, Smith, and Co., on behalf of the defendants, sent the following telegram, which was received by the captain before he had commenced the discharge of the cargo: "If you discharge your steamer will be held responsible all consequences infraction charter-party."

13. Kertch was, under the circumstances, as near to Taganrog as the *Meredith* could get (about thirty miles) so long as the Sea of Azov was closed by ice, which, according to the ordinary course of weather, would have been until the latter end of the month of April 1874.

14. As no bill of lading for the cargo was produced to the captain of the *Meredith* at Kertch, he, in order to protect the ship, landed the cargo at Kertch, and gave it into the custody of the Custom House authorities there.

15. By the bills of lading, signed by the captain, the cargo was made deliverable at the port of Taganrog, "all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted, unto the Rostoff and Wladikowkese Railway Company, freight and other conditions as per charter-party. Captain to apply to Messrs. Berthold, Smith, and Co., Taganrog."

16. After a part of the cargo had been landed one year, Deopik, a merchant at Kertch, claimed the cargo under a power of attorney from the Rostoff and Wladikowkese Railway Company.

17. When the whole cargo had been delivered to the Custom authorities at Kertch, Jean Deopik produced to them copies of the charter-parties and bill of lading for the cargo and his power of attorney; and thereupon the cargo was delivered to him by the Custom House authorities without payment of any freight, and notwithstanding the captain's claim to retain the cargo on behalf of the owner of the *Meredith* until the freight was paid, and Jean Deopik thereupon gave to the captain the following receipt for the cargo:

On the power of the charter-party and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the steamship *Meredith*, composed of 6578 bars of railway iron. This receipt to be the only one given, and all others to have no value.

Kertch, 15th, 27th Dec. 1873.

JEAN DEPIK.

The *Meredith* sailed from Kertch on the 29th Dec. 1873.

The cargo was in due course received by the said company, but the freight for the same has not been paid, pursuant to the said charter-parties or either of them.

The court is to have power to draw inferences of fact.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiff is to be entitled to be paid the chartered freight, or any and what amount for the carriage of the railway iron by the *Meredith* to Kertch.

Cohen, Q.C. and Beresford, argued for the plaintiff.

Watkin Williams, Q.C. and Hollams, for the defendants.

The arguments sufficiently appear from the written judgments of the court.

Cur. adv. vult.

July 11.—COCKBURN, C.J.—This is an action brought to recover a sum due for freight for the conveyance of a cargo of iron bars shipped under two charter-parties on board the plaintiff's vessel the *Meredith*, to be carried from Middlesborough-on-Tees to Taganrog on the Sea of Azov, "or so near thereto as the ship could safely get." The defendants were the charterers of the vessel. By the bills of lading, signed by the master as well as by the charterers, the iron was to be delivered at the port of Taganrog. It was consigned to the Rostoff and Wladikowkese Railway Company at the latter place. The cargo having been taken on board the ship started without delay on the voyage as agreed on and arrived on the 17th Dec. at Kertch, a port distant from Taganrog about thirty miles. On arriving at Kertch the master learned that the Sea of Azov was blocked up with ice, and the navigation suspended, the effect of which was that the further conveyance of the cargo to its destination was rendered impracticable till the ensuing spring the navigation being usually closed till the end of April. Relying on the terms of the charter-party which, as has been stated, provided that the ship should proceed to Taganrog, "or so near thereto as she could safely get," the master, finding that he could get no nearer to Taganrog than Kertch, conceived that he was entitled to land the cargo at the latter place, and proceeded accordingly to discharge and land it. In so doing he acted in direct defiance of the opposition of the agents of the charterers at Taganrog to whom he had notified what he was about to do; and who, having thus become aware of it, gave him express notice not to land the cargo at Kertch, and that if he did so he would be held liable under the charter-party. There being no one to receive the cargo the master placed it under the charge of the Custom House authorities. From the latter it was claimed by an agent of the Rostoff and Wladikowkese Railway Company, the consignees; and on the production of the charter-parties and bills of lading possession was delivered to their agent by the authorities, notwithstanding a claim by the master that it should be retained till his freight was paid. Upon taking possession the agent of the consignees who must be presumed to have had full authority for the purpose, delivered to the master, no doubt, by the direction of the authorities, a receipt in these terms: "On the power of the charter-party and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the s.s. *Meredith* composed of 6578 bars of railway iron. This receipt to be the only one given and all others to have no value. Kertch, 15th—27th Dec. 1873." Upon these facts I entirely concur in thinking that the plaintiff is not entitled to recover the full freight. The case of *Schulzi v. Derry* (4 E. & B. 873) established that when a charter-party speaks of a vessel bound to a particular port discharging "as near as she can get" to such port this must be taken to mean some place "within the ambit" of the port, and Kertch certainly cannot be said to be within the ambit of the port of Taganrog. I also concur in thinking that the receipt given by the agent of the consignees does not amount to an admission of the "right delivery" of the cargo. It amounts to no more than an admission of the delivery of the cargo at Kertch which is not a "right delivery."

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of it so as to entitle the owner to the full freight. But it appears to me that the acceptance of the cargo by the consignees and the receipt thus given by their authorised agent are very material facts in determining the further question with which we have to deal, viz., whether the plaintiff, the shipowner, is here entitled to freight *pro rata itineris*. I agree that according to the terms of an ordinary charter-party or bill of lading the whole voyage for which the freight is agreed to be paid must be accomplished before any freight becomes payable, and I agree that the master cannot, by wrongfully stopping short of the place of destination, compel the owner of the goods to take them, and pay the freight even for the part of the voyage performed any more than the charterer on the other hand can insist on having the cargo delivered at an intermediate place so as to deprive the shipowner of the opportunity of earning his full freight. If he desires to have his goods short of their original destination, unless some arrangement is come to between them he must satisfy the shipowner for the entire freight as fixed by the charter-party. But it is obvious that while such is the absolute right of each of the parties to the charter this right may be varied or waived; and that while the shipowner may be willing to forego his right to earn the entire freight on being paid a rateable part for so much of the voyage as has been performed, the goods owner, on the other hand, may be willing to take the goods at an intermediate place and to waive the conveyance of the goods to their original destination, paying a proportionate part only of the freight, all claim to the residue being abandoned; and such an arrangement in substitution of the original contract may not only be expressed but may also be implied from the circumstances and the conduct of the parties as was done in the case of the *Sobolomsten* (L. Rep. 1 A. & E. 293), and ought to be so implied where justice and equity require it. Where an expressed arrangement has been come to, of course, no difficulty exists. The case in which the question whether such an arrangement is to be implied usually arises is where the ship becomes disabled by some *vis major*, and it becomes necessary to land the cargo at an intermediate port where there are no means of sending it on, and it is there taken possession of by the owner or sold by the master for the benefit of those concerned. Nothing could apparently be more unjust than that having had the benefit of the conveyance of the cargo so far on its way the owner if he has derived benefit so far should be released from the obligation of paying a proportionate part of the freight. No doubt under such circumstances it becomes necessary for the master if he desires to earn the freight either to repair his ship or to procure another in which to send on the cargo. But it may be that the ship cannot be repaired, and that no other ship can be procured or not without such a delay as would be fatal to the goods or to the adventure. Under these circumstances the owner of the goods is not bound to take to them if unwilling to do so. If they are not worth paying the freight upon he may refuse to accept them, but if he accept and dispose of them ought not we to imply an undertaking on his part to pay for the conveyance of them so far as it has gone? Such was the view taken by Lord Mansfield and the Court of King's Bench in conformity with the rule laid down by

the old authorities on maritime commercial law in the well-known case of *Luke v. Lyde* (2 Burr. 882; 1 W. Bl. 190). There a cargo of salt fish having been shipped on account of the defendant, a merchant in England, on board the plaintiff's ship to be conveyed from Newfoundland to Lisbon, the ship when within a few days' sail of Lisbon had been taken by a French privateer, but had afterwards been recaptured and brought to England, whereupon the defendant claimed and obtained possession of the cargo. An action of *assumpsit* having been brought by the owners of the ship to recover freight *pro rata*, Lord Mansfield in an elaborate judgment after referring to the old authorities on maritime law decided in favour of the plaintiffs; not upon any fiction of a substituted contract or of a dispensation of part of the voyage originally agreed on, but on the broad principle of maritime law, that the voyage having been interrupted without any fault of the shipowner, the merchant who has had the benefit of partial conveyance if he takes the goods must pay freight *pro rata*. In so holding the Court of King's Bench appears to me I must say to have decided according to justice and good sense. In the subsequent case of *Baillis v. Mogdighiani* (Park on Ins. c. II., 8th ed. p. 116), a ship bound from Nevis to Bristol had been taken by a French ship, and condemned in a French prize court, but the sentence of condemnation was afterwards reversed and restitution ordered. In the meantime, however, the ship and cargo had been sold. The merchants received the proceeds and paid freight to the master *pro rata itineris*; and the goods having been insured they brought an action against the insurers to recover the amount of freight so paid. It was held that they could not recover, but Lord Mansfield said: "As between the owners of the ship and cargo in case of a total loss no freight is due, but as between them no loss is total where part of the property is saved, and the owner takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro rata itineris*. The subsequent case of *Cook v. Jennings* (7 T. Rep. 381) might at first sight appear to conflict with the foregoing authorities inasmuch as the ship having been wrecked on the voyage, but the goods having been saved, the merchant who had taken possession of them refused to pay freight, and the action having been brought to recover it *pro rata* it was held that the action would not lie. But the decision turned on the form of the action. The plaintiff having sued on the charter-party which was under seal had declared in covenant, and as on reference to the charter-party it appeared that the freight was payable on the right delivery of the cargo at the port of destination, it was held that until this condition had been complied with no freight became payable under the charter, and that the contract being under seal no implied *assumpsit* could be raised. Lawrence, J. puts the case on the right ground: "I agree," he says, "with the plaintiffs' counsel that whether the contract be by parol or under seal the operation of the law on it is equally the same. When a ship is driven on shore it is the duty of the master either to repair his ship or to procure another; and having performed the voyage he is then entitled to his freight, but he is not entitled to the whole freight unless he performs the

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whole voyage, except in cases where the owners of the goods prevent him, nor is he entitled *pro ratâ* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties, but here the plaintiff has resorted to the original agreement under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action." The case of *Hunter v. Prinsep* (10 East 378) is also an authority which at first sight may appear to conflict with that of *Luke v. Lyde*. A vessel bound from Honduras to London having been captured and recaptured and taken by the recaptors into St. Kitts was there wrecked, but the cargo was saved. The master, acting *bonâ fide* for the advantage of all concerned, but without orders or authority from the owner of the cargo and apparently without any necessity arising from inability to forward the goods, having obtained an order from the Vice-Admiralty Court of the island which order that court had no power to make, sold the cargo. The plaintiff, the owner of the cargo, having brought an action for money had and received against the shipowner to recover the amount of the proceeds, the defendants sought to set off the amount of freight *pro ratâ*. But Lord Ellenborough, delivering the judgment of the Court of King's Bench, held that inasmuch as by the terms of the charter-party which was under seal, the freight was to be paid in particular modes and proportions "on a right and true delivery of the cargo," no freight had become payable under the charter-party; and that as the sale of the goods by the master which had been made without the assent of the plaintiff and without necessity, was unlawful, and the conveyance of the goods to their destination had thus been rendered impossible by the tortious act of the master, the plaintiff, the freighter, could not be taken to have dispensed with the further conveyance of the goods according to the terms of the original contract. It was more difficult to deal with the argument urged on behalf of the defendants that by bringing an action to recover the proceeds of the sale the plaintiff would receive the equivalent of the goods, and therefore virtually the goods themselves and consequently became liable for the *pro ratâ* freight as much as if he had received possession of the goods themselves on the spot. Nor in my opinion was any satisfactory answer given. It was not enough, as it seems to me, to say that the sale was tortious on the part of the master. By waiving the tort and suing in assumpsit for the proceeds of the sale the plaintiff became liable—certainly in point of justice, and as it seems to me in law—to the claim of the defendants for partial freight by way of set off, just as much as if he had taken to the goods themselves and sold them where they were. Lord Ellenborough, it is true, puts the matter on such a footing as would render it impossible ever to imply a dispensation by a freighter of performance of part of a voyage. "The general property in the goods," he says, "is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight"—by which the Chief Justice evidently means the entire freight—"or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has

a right to the possession:" (10 East, p. 394). It is to be observed, however, that Lord Ellenborough does not seem to have had present to his mind the possibility of a case in which partial freight could be earned. In the case before him the ship had been taken out of her course as the result of her capture, and had been taken into St. Kitts by the recaptors. It is difficult to see how any freight could have been earned. The case of *Luke v. Lyde* does not seem to have been dealt with by the court. In the later case of *Vlierboom v. Chapman* (11 M. & W. 230), however, the question of *pro ratâ* freight presented itself as the point for decision, and a similar judgment was given under still more striking circumstances. A cargo of rice having been shipped at Batavia to be delivered at Rotterdam, and the ship having been compelled by a hurricane to put into the Mauritius, the rice was found to have been damaged, and to be in a state of rapid putrefaction, and it was therefore, as a matter of necessity, sold by the master; of course without the knowledge of the owner, whom at that distance it was, under the circumstances, impossible to consult. An action having been brought against the shipowner by the freighters to recover the proceeds of the sale, the defendant, though the action was in assumpsit, was held not to be entitled to set off the freight *pro ratâ*. I confess myself wholly unable to follow the reasoning of the court. It seems to have been admitted that as the goods must otherwise have perished the master had authority, as agent of the shippers, to sell. Nevertheless it was held that his thus dealing with the goods as agent for the freighters, although it might amount to an acceptance of the cargo by the latter, did not operate on their part as a dispensation of the conveyance of the goods to their destination; because, as the shipowner was not in a condition to carry it, it could not be supposed that the freighters would dispense with the performance. Here, again, no notice is taken of the case of *Luke v. Lyde*, in which, as I have before said, Lord Mansfield and the Court of King's Bench put the right to recover freight *pro ratâ* not on any dispensation by the freighters or new contract in substitution for the charter-party or bill of lading, but on the principle of maritime commercial law that the merchant, if he takes the goods short of their destination, when the shipowner, without any default on his part, but through the operation of a *vis major* is prevented from carrying them on is bound, having had the benefit of their carriage so far, to pay freight *pro ratâ*. The argument of Lord Ellenborough, that where the shipowner is unable to forward the cargo, and so to earn the freight, the right of the shipper to the possession of it at once arises without any corresponding right in the shipowner to freight *pro ratâ* may hold where the circumstances give the master no authority to dispose of the goods. But it obviously becomes a very different thing where the ship having become disabled and the goods damaged, the duty is cast upon the master to dispose of the cargo in the interest of the owner of it. The legal position of the master of a vessel disabled from carrying on the cargo at an intermediate port may be stated thus: If he desires to earn the entire freight he must cause the ship to be repaired or send on the cargo in another vessel. But if he chooses to forego the freight he is not bound to do either. The ship may not be worth repairing, the expense

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of hiring another ship may be greater than the freight to be earned. Having done his best to protect his goods he may leave them to be dealt with by the owners, the only consequence being that he forfeits the freight. But it may be that the master has no option, that the ship is incapable of being repaired, and that no other can be procured, while the circumstances are such as to render it certain that it will not be worth the while of the owner of the goods either owing to the locality or the distance at which they are found or owing to their damaged condition to send out a ship to bring them on, or it may be that the goods are perishable, and would become worthless by any delay. Under such circumstances, if the goods-owner cannot be communicated with, and his instructions taken within such time as the master can reasonably be expected to wait, the latter, as the servant and representative of the shipowner, has cast upon him the duty of acting for the goods-owner and disposing of the cargo to the best advantage. This obligation is tacitly implied in the charter-party or bill of lading, and, like every obligation to do a thing, involves an authority from the party to whose benefit the obligation enures to do the thing which is the subject-matter of the obligation. Where, therefore, the master, in disposing of the cargo acts *bonâ fide* and with reasonable judgment and discretion the goods-owner will be bound. The law, as thus laid down by Lord Stowell in the case of *The Gratiudine* (3 Rob. Adm. 240), has since been universally acquiesced in. This being so, the position of Lord Ellenborough, that where the goods are not about to be carried on, possession may be demanded by the freighter, and if the demand be not yielded to will be wrongfully withheld appears inapplicable to the case of a master so circumstanced; and that of Parke, B., that the shipowner, not being able to carry or send on the goods, it cannot be supposed that the shipowner would waive the further conveyance of them seems equally so where the master is acting as the agent of both parties, and doing that which is most conducive to their common advantage. If the master under these circumstances becomes to use the words of Willes, J., in *Notora v. Henderson* (L. Rep. 7 Q. B. 230), the "agent of necessity" of the shipper he becomes so as the servant of the shipowner, and by virtue of the original contract which therefore must be taken to be still subsisting, though the goods cannot be carried on. If the law thus casts on him the duty of acting as agent for the shipper, it does not take from him the character of agent for the shipowner, or the duty of looking to the interest of the latter as well as to that of the former. If he becomes clothed with the character of agent for the goods owner, he acquires authority to do what the latter if on the spot might do, viz., dispense with the further transport of the goods. It is, moreover, clear that cases may occur in which it would be for the manifest advantage of the freighter that the goods should be sold and the freight deducted; as for instance, where the goods being at an intermediate port, are found to have become so damaged that if carried on to their destination they will be worthless when they reach it, as was the case in *Notora v. Henderson* (L. Rep. 5 Q. B. 346). That case is an express authority for saying that the master may not carry on a damaged cargo for the purpose of earning the freight where the necessary

effect will be the destruction or deterioration of the goods. In such case, at all events, where the damage cannot be arrested at a reasonable expense of time or money, it becomes the duty of the master to sell; but it is obviously only equitable that if the master as the agent of the shipowner is prevented in the interest of the shipper from earning the entire freight at the expense of the cargo, the shipper in consideration of the benefit he thus secures, shall at least pay the freight for so much of the voyage as shall have been performed. The cases on which I have been commenting, if in point, are of course binding on us, and can only be reviewed, as I hope they will be if the occasion should arise, in a Court of Appeal. But they do not go the length of overruling *Luke v. Lyde*, all they do is to establish that where the master takes upon himself to sell the cargo without express authority from the shipper, though he may be perfectly justified in so doing as the agent of the latter by the circumstances in which he is placed, the shipowner cannot recover the *pro rata* freight. They do not touch the case in which the goods come to the hands of the owner short of their destination, and the owner has derived benefit from their conveyance so far, which is what has occurred in the case before us. In deciding a question of English law foreign law is, of course, of no authority. Nevertheless, as in a matter of commercial law, it is of importance that the rules of commercial nations shall as far as possible be the same, it may not be unimportant to see what is the state of the Continental law on this subject. The law will be found in the French Code de Commerce, Article 296; in the Italian Codice di Commercio, Article 403; in the Spanish Code, Articles 777 and 778; in the Code of the Netherlands, Article 478; in the Prussian Code, Articles 1701-6; in the Russian Code, Article 747; in the German Code, Articles 632-3. The rule in all these is the same, namely, that the master of a disabled ship is bound, if his ship cannot be repaired, to procure if possible another to carry on the goods. If both are impossible, he may then abandon the goods to the owners, and will be entitled to his freight *pro rata*, or as it is termed in the German law, the distance freight. The German law has, however, this qualification, that the freight payable shall not exceed the value of the goods. In the present instance, the charterers having had the cargo brought from the Tees to within thirty miles of Taganrog, nothing could be more unjust than that the shipowner should receive nothing for the conveyance of it so far. And the principle of the decisions in *Luke v. Lyde* appear to me distinctly applicable. But besides this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it may properly be inferred. Being prevented by the state of the navigation from taking the cargo on to its destination, the master was justified in landing and warehousing it at Kertch, provided he thereby put the charterers to no extra expense. He was not bound to wait with his ship with the iron on board till the navigation should be open, a period of four months. All that could be required of him would be that he should bring on or forward the cargo as soon as the navigation should be again open. In the meantime he was at liberty to seek other new employment for his ship in the interest of his owner. The charterers could have no right

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to exact from him a useless inactivity of several months; nor, if this be so, can it make any difference that the charterers in fact objected to the landing of the cargo. Their objection might have made all the difference if the cargo could have been brought on, but as that was impossible, no prejudice could result to them if not called upon to defray the extra expense. And even if put to such expense, they would always have had their cross claim against the shipowner on the freight. The next important fact which occurs is that the cargo having been landed the consignees come forward and claim it. But they were not entitled to have it delivered to them till it had been brought to Taganrog, unless it was abandoned by the master or on the navigation being again opened he refused to bring it on or to forward it, they could not insist upon delivery short of the port of destination without paying the entire freight except by arrangement of the shipowner or the master as his agent. Without paying the entire freight, or coming to such an arrangement, the consignees must have waited four months for the iron rails, which, being wanted for the construction of a railway, it was important to them to obtain without any delay. When, under these circumstances, I find the consignees asking for the cargo, and the master compelled to give them possession of it, I cannot suppose that the master intended to forego, on the part of his owner, his claim to freight, or that the consignees, in accepting the iron at Kertch, were receiving it free from all claim of freight. The master might be glad to be relieved from all further difficulty as to forwarding the iron, the consignees would be glad to have present possession, so that they might send it by land carriage to Taganrog, instead of waiting four months to receive it by sea. The question of amount of freight payable, whether the whole or part, they left to be settled between shipowners and charterers in England. The master evidently thought he had earned the entire freight, for he believed that, having brought the cargo "as near as the ship could get" to the port of destination, he had done all he was bound by the charter-party to do. It is true that in landing the cargo under the mistaken impression the master had no intention of taking it on to Taganrog; but it appears that while he was in the course of landing the iron at Kertch the consignees applied for it, and it was delivered up to them, they giving a receipt for it, the master on the other hand insisting on payment of his freight. It seems to me that under these circumstances the consignees, who had no right to have the iron carried on to Taganrog till the navigation was again open, must be taken to have accepted it subject to the claim for freight *pro rata*. It is clear that the master had no intention of giving up the cargo without receiving his freight, for he protested against its being given up to the consignees by the authorities without the freight being paid. And inasmuch as the consignees could not claim to have the cargo brought on to Taganrog till the navigation should be open, it is by no means certain that if the cargo had not been delivered over to the consignees, the shipowner on learning what had occurred, would not in order strictly to fulfil the terms of the charter and prevent all questions as to the payment of the entire freight, have provided a vessel to take the iron on when the navigation was re-opened. And this would have

been the more likely to happen if the consignees instead of demanding present delivery of the iron, had protested against its being left at Kertch, and had insisted on its being brought on to Taganrog when the navigation should admit of it. It is highly probable that the plaintiff would then have availed himself of the intervening period, and would have made his arrangements for bringing on the cargo. Of this *tempus penitentie* he was, as it seems to me, prematurely and unduly deprived by the act of the consignees, in obtaining the possession of the iron from the custom house authorities. It must be borne in mind, as a material fact in this case, and one which distinguishes it from the cases of *Hunter v. Princep*, and *Vlierboom v. Chapman*, that the master did nothing in the way of disposing of the cargo, or of abandoning it so as to give up his lien on it for the freight. The cargo was given up to the consignees by the custom house authorities, against the will of the master, and notwithstanding his protest. The consignees could, therefore, as it seems to me, only take possession subject to the rights of the captain and his owner, one of these rights being, unless clearly abandoned, that of forwarding the cargo when the time came, and so earning the entire freight. Here again, it is by no means certain that if the lien for freight claimed by the master had not been disregarded, and the cargo handed over to the consignees, the owner would not in due time have sent it on to its destination. Under these circumstances, the case of *Luke v. Lyde*, which as far as I am aware has never been overruled, and which is binding upon us, appears to me to apply. In my opinion, though the charterers' agents protested against the landing of the cargo, yet the consignees, who as to the receipt of the cargo must be treated as the agents of the charterers, must be taken to have dispensed with the conveyance of the iron between Kertch and Taganrog, and to have accepted it, subject to the right of the shipowner to freight for so much of the voyage as had been performed. I think, therefore, that to that extent our judgment should be for the plaintiff. But my learned brothers think otherwise, and judgment must therefore be entered for the defendants.

QUAIN, J. (delivering the judgment of Mellor, J. and himself.)—It is unnecessary to recapitulate the facts of the special case which has been fully stated by the Lord Chief Justice. Under the circumstances the plaintiff contends: first, that he is entitled to be paid full freight as on a performance of the whole voyage, or if not full freight, that he is entitled to be paid *pro rata itineris* up to Kertch. In the first place, we think that the master was quite mistaken in supposing that a delivery at Kertch was a delivery so near to Taganrog as he could safely get. According to the judgment of this court in *Schilizzi v. Derru*, the meaning of those words is that the ship must get within the ambit of the port, although she may not be able to enter it. There is no pretence for saying that Kertch is within the ambit of the port of Taganrog. It was next contended that the condition of the charter-party, on the performance of which the full freight was made payable, had been complied with. By the terms of the charter-party the freight was to be paid one-third on signing the bills of lading, and the balance in cash in London against certificate of right delivery of the cargo. It was argued that

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the receipt given by the consignees' agents, and set out in paragraph 17 of the case, was such a certificate. But we are of opinion, assuming that the consignees or their agents were the proper persons to give the certificate required by the charter-party, that the receipt is not a certificate of right delivery of the cargo within the terms of the charter-party, especially as against the present defendants, the charterers, who expressly protested against the discharge of the cargo at Kertch. It is merely an acknowledgment of having received the cargo, and is not the certificate of right delivery required by the charter-party. It was further contended for the plaintiff, that as the consignees had taken possession of the cargo at Kertch as described in paragraph 17, the whole freight was payable. The case of *London and North-Western Railway Company v. Bartlett*, (7 H. & N. 400) was cited in support of this proposition. In that case it was held that the carrier of goods consigned to a particular place, may deliver them at any other place that the consignee and the carrier may agree upon, and that in such case the carrier would be entitled to his full freight. So also in the case of *Cork Distilleries Company v. Great Southern and Western Railway Company* (L. Rep. 7 H. L. 269), it was held by the House of Lords that where goods are delivered to a carrier to be carried to a certain person, at a certain place, the consignees may demand the goods of the carrier at another place, and the carrier will be justified in delivering the goods on payment of the full freight. But in these cases the carrier was ready and willing to carry the goods to their destination and earn his full freight, and refrained from doing so at the express request of the consignees. In the present case, on the contrary, the master discharged the cargo at Kertch without any request from the consignees, and against the express protest of the charterers, and refused to carry it further to its port of destination; and it was not till after this refusal and when the goods may be said to have been abandoned by the master, that the consignees took possession of them as holders of the bills of lading. We think, therefore, that the cases cited have no application to the present case. It is said in paragraph 19 of the case that the cargo was "in due course" received by the railway company. But we cannot construe the language as intended to contradict or qualify the express statement in paragraph 17 describing the manner in which the cargo was received by the company. It remains to consider the question whether the plaintiff is entitled to freight *pro rata itineris* having carried the goods to Kertch. Claims of this kind usually arise in cases of disabled ships unable by the accidents of the seas to complete their voyage; and we are not aware of any case like the present where the claim has arisen from the default of the master in refusing to proceed to his port of destination. The rule on the subject was laid down by Dr. Lushington in the case of *The Sobolomsten* (L. Rep. 1 A. & E. 297), as follows: "To justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with." And the learned judge cites the case of *Vlierboom v. Chapman*, from the judgment in which case the rule is extracted in the words above quoted.

This case is founded on the earlier case of *Hunter v. Prinsep*. In that case Lord Ellenborough says that the shipowner has no right to any freight unless the goods are forwarded to their destination, "unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject. If the shipowner will not forward them the freighter is entitled to them without paying anything. . . ." He continues, "The general property in the goods is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight, or is going on to earn it." Applying these principles to the facts of the case before us, we feel bound to decide that in this case the claim for freight *pro rata* cannot be supported. This action is against the charterers on the charter-party; and so far from their having voluntarily accepted the goods at Kertch, and dispensed with the further carriage of the goods to their port of destination, they gave the master express notice on the 19th Dec., and before he had commenced to discharge the cargo (paragraph 12), that if he discharged the cargo at Kertch, that is to say left it at Kertch without any intention of carrying it further, he would be held responsible for an infraction of the charter-party. It is impossible, therefore, as against the present defendants, to infer that they dispensed with the further carriage of the goods to Taganrog. The case, as far as the present defendants are concerned is like *Liddard v. Lopes* (10 East. 526), where a similar notice was given by the owners of the cargo, and it was held that no new contract to pay freight *pro rata* could be presumed against the merchant. But assuming that defendants would be bound in this action by a voluntary acceptance of the goods by the consignees at an intermediate port, and a dispensation by them of the further carriage (a point about which we entertain considerable doubt, especially after the protest of the defendants' agents), we are of opinion that there has been no such acceptance in this case. In fact the present case is one in which the master by an unfortunate mistake has left the goods at an intermediate port and refused to carry them on to their port of destination, and it was not till after such refusal that the agent of the consignees took possession of them as holders of the bills of lading. They had no other course to pursue if they wished to preserve their own property. It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession; and that by reason of the consignees so taking possession he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight, for he had neither earned any freight nor was he going to earn it; and he, having declared that he discharged the cargo at Kertch, and did not intend to carry it further, the parties had a right to take him at his word, and act on that declaration, and treat it as a breach of the charter-party, and to take possession of the cargo which the master had so abandoned: (See on this last point the *Danube Railway Company v. Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; *Frost v. Knight*, L. Rep. 7 Ex. 111, and the cases there cited.) The case, therefore, seems to come

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within the third rule laid down by Dr. Lushington in the case of *The Soblomsten*, viz., that no freight is payable if the owner of cargo against his will is compelled to take the cargo at an intermediate port. It seems to us that the duty of the master was plain in the absence of any fresh arrangement between the parties, either to wait at Kertch till the navigation was open and then proceed on his voyage, or to land and warehouse the goods at Kertch, and return and take them on by his own or another ship when the navigation was open. For these reasons we are of opinion that the plaintiff is not entitled to recover any freight in this case, and that our judgment must be for the defendants. We may observe in conclusion that the special case before us gives no information as to what ultimately became of the cargo of the *Meredith*. We are not told if it was ever forwarded to Taganrog either by the charterers or the consignees, nor how the transaction has been arranged, if it ever has been arranged, between the parties. We are, therefore, entirely ignorant whether in the result the present defendants, the freighters, ever derived any benefit or advantage whatever from the carriage of the cargo to Kertch. We cannot infer necessarily that they must have done so, for many cases are conceivable in which the leaving the cargo at an intermediate port might be of no benefit, but on the contrary cause a serious loss to the freighters. In the jurisprudence of France and Germany the claim for freight *pro rata itineris* is not based on any such technical ground as a new contract to be inferred from a voluntary acceptance of the goods in such a way as to amount to a dispensation of their further carriage, but seems to be founded merely on the equity and reasonableness of the thing that the shipowner who has carried the goods a part of the way of which the freighter has had the benefit should be proportionately indemnified: (See Code de Commerce, Art. 294-296, and Valin's Commentary on the Ordonnance de la Marine, Liv. III. Lit. III., Art. 9.) The German Code, Art. 633, expressly provides that in calculating the amount of that indemnity the question is not one of distance merely, but that the circumstances of the case on both sides in relation to the performed and unperformed part of the journey, including the value of the goods at the intermediate port, must be taken into consideration: (German Commercial Code, Arts. 632, 633, and Mackower's Commentary on the German Code, Note 123). Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had in the result derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favour of a shipowner who had carried the cargo to within thirty miles of its destination, and of which part performance the defendants had the benefit, some of that "larger equity" alluded to by Lord Tenterden as exercised by Courts of Admiralty in similar cases: (Abbott on Shipping, 11th edit. 1867, pp. 402-3.) Lord Tenterden cites with approbation the judgment of Sir Wm. Scott in the case of *The Friends* (Edw. Ad. Rep. 247-8), in which that learned judge says: "This court sits no more than courts of common law do to make contracts between parties, but as a court

exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." Sir R. Phillimore in the case of the *Teutonia* (L. Rep. A. & E. p. 421), after citing this judgment, adds that this jurisdiction is not confined to prize cases, but that it is a part of the general power which the court always possessed. However, as the point to which we have last adverted is not expressly raised by the case, we give no opinion on the subject.

Judgment for the defendants.

Solicitors for the plaintiff, C. C. Ellis and Co.
Solicitors for defendants, Hollams, Son, and Co.

Nov. 14 & 21, 1876.

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Construction of will—Remainder—Contingency. Testator devised land to his grandson in tail, and in case he died without issue, then to his three grand-daughters in tail; and in case all of them should die without leaving issue, leaving their father or mother surviving, then he devised the premises to the said father or mother for life; and from and after their several deceases, and the decease of the survivor of them, he devised the premises to plaintiff's vendor in fee.

The grandson died without issue but survived all the grand daughters, who all died without issue, but survived their father and mother. Plaintiff brought ejectment against the testator's heir who had taken possession of the premises on the grandson's death.

Held that, the intention of the testator being clear, the ultimate bequest was not contingent upon the father or mother's surviving the testator's grand-daughters; and that the plaintiff was entitled to succeed.

THIS was a special case, by order upon the facts admitted by the defendants to be correctly stated in the following statement of claim:

1. John Ashmore died on the 28th Feb., A.D. 1821, seised in fee of a freehold farm at Sharnford, Leicestershire, of about eighty-three acres in extent.

2. By his will, dated 26th April 1819, duly executed the said John Ashmore devised all his hereditaments and real estate whatsoever, situate at Sharnford aforesaid, subject to certain annuities and charges unto his two grandsons, William Smith and John Ashmore Smith, for their lives as tenants in common, and after their decease, to the use and behoof of the first son of the body of the said William Smith, and of the body of the said John Ashmore Smith, lawfully to be begotten and the heirs male of his body, of such first son lawfully issuing, and for default of such issue, then to the said second, third, fourth, fifth, and every other son and sons of the body of the said William Smith, and of the said John Ashmore Smith, lawfully begotten, severally, successively, and in remainder one after another as they should be in priority of birth and seniority of age, and the heirs male of the body of such respective son and sons lawfully issuing, and so that as the elder of such sons, and the heirs male of his body, should be always preferred, and take before the

(a) Reported by M. W. McKELLEN, Barrister-at-Law.

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younger of the same sons and the heirs male of his body. But in case either of his said grandsons William Smith or John Ashmore Smith, should depart this life without leaving such lawful issue of his body. Then he (testator) devised all the part or share of his said real estate, hereditaments, and premises intended for him unto the survivor of them. And in case both his said grandsons should depart this life without leaving such lawful issue as aforesaid, then he (testator) devised all the said hereditaments unto his three grand-daughters, Elizabeth Murcott, Ann Murcott, and Caroline Dorothy Ashmore Murcott, and to the heirs of their respective bodies lawfully issuing, to take as tenants in common: but in case either or any of his said grand-daughters should depart this life without leaving lawful issue of her, or their body or bodies, then he (testator) gave the part or share intended for her or them so dying, unto the survivors or survivor of them, and to the heirs of her body lawfully issuing. And in case all his said three grand-daughters should depart this life without leaving lawful issue as aforesaid, leaving their said father and mother or either of them her surviving, then he (testator) gave and devised the said real estate and premises unto the said William Murcott and Ann his wife, and to the survivor of them for and during the terms of their respective natural lives, and the life of the longer liver of them, and from and after their several deceases and the decease of the survivor of them, he gave and devised the said real estate and premises unto Thomas Murcott (brother of the said William Murcott), and to John Ashmore (son of his (testator's) nephew, Thomas Ashmore), and to Thomas Gilbert the younger and to their respective heirs and assigns for ever, to take as tenants in common and not as joint tenants.

3. The said William Smith and John Ashmore Smith survived the testator, and upon his death entered into possession of, and took the rents and profits of the said farm.

4. The said William Smith died on the 12th March 1837, having had lawful issue of a son (still-born), in the lifetime of the said William Smith, and a daughter the above-named defendant Sophia Pridmore.

5. The said John Ashmore Smith, after the death of the said William Smith, entered into the possession of, and took the rents and profits of the whole of the said farm, and died unmarried on the 4th April 1874.

6. Elizabeth Murcott died on the 25th Nov. 1821, unmarried, and Ann Murcott died unmarried on the 24th Nov. 1823.

7. Ann Murcott, the mother of the above Elizabeth and Ann, died on the 5th May 1821, and William Murcott the father of the same, died on the 21st May 1827.

8. Caroline Dorothy Ashmore Murcott married one George Townsend by whom she had issue, one child only, to wit George Henry Townsend. The said Caroline died on the 8th June 1851, and the said George Henry died unmarried some time in the year 1870.

9. John Ashmore died intestate in May 1869, and his eldest son and heir Thomas Charles Ashmore, by deed dated the 8th Jan. 1872, sold and conveyed his residuary interest in one third of the said farm to the plaintiff.

10. The defendant Joseph Cross was let into

possession of the said farm by the said John Ashmore Smith, and the other defendants allege that the said Joseph Cross has since the death of the said John Ashmore Smith become their tenant of the same.

11. The defendants have respectively refused to allow the plaintiff to enter into possession of the said land, and the rents and profits for the one-third to which he claims to be entitled, and have kept him and still keep him out of the possession and enjoyment of the same.

(1.) The plaintiff therefore asks to be put in possession of all that one undivided third part of all the said farm more particularly described in the writ in this action, and also 150l, being one-third of the meane profits of the said farm and land from the death of the said John Ashmore Smith until possession is secured.

(2.) The plaintiff also prays such further and other relief as the nature of the case may entitle him to.

A. Wills, Q.C. (with him *Willis*) argued for the plaintiff.—The question to be decided is whether the words of the will, "And in case all his said three grand-daughters should depart this life without leaving lawful issue as aforesaid, leaving their said father and mother, or either of them, her surviving," create a contingency dependent upon the survival of the father or mother, which is the contention of the defendants; or whether the expression, notwithstanding the untechnical or ungrammatical construction of the will, does not sufficiently carry out the undoubted intention of the testator to make the subsequent bequests operative even in the event which has happened of the non-survival of either of the parents after the death of the tenants for life. This clause may as well be read as if the words about leaving these parents surviving were left out. The rule as laid down by Jarman is in the following words (3rd edit., p. 764): "The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed, import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if, or when he shall attain that age, then to him in fee, this is construed as conferring on A. a vested estate in fee simple, subject to the prior chattel interest given to the trustees, and, consequently on A.'s death, under the prescribed age, the property descends to his heir at law; though it is quite clear that a devise to A; if or when he shall attain the age of twenty-one years, standing isolated and detached from the context would confer a contingent interest only." [*Cockburn, C.J.*—Why should not this bequest be read as if it were, in case the grand-daughters should die without issue, and their father or mother should then be living, a life interest shall go to those parents; but if the grand-daughters survive their parents, then upon their deaths the ulterior bequests shall operate?] It may be well to allude to *Davis v. Norton*, 2 P. Wms. 390, which at first sight seems opposed to this contention, but may

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be clearly distinguished from the clause in this will on account of the words "as aforesaid," which are to be found there. The material words are, after a devise of lands to testator's sons and the heirs of his body, if his said son should die without issue of his body, and his (the testator's) wife should survive his said son, then the wife should enjoy the premises for her life, and, after her decease, that the premises should be enjoyed by the testator's sister for her life, and after her decease (the testator's son being dead without issue as aforesaid), then the testator devised the premises to the plaintiff's lessor, who claimed them against the testator's heir. The testator's wife died before his son, and it was held that the devise to the plaintiff's lessor was contingent upon the testator's son being dead without issue as aforesaid, viz., his wife then living.

Joshua Williams, Q.C. (with him Woodroffe), for the defendants.—On the face of this will the plaintiff takes only a contingent interest upon the death of William and Ann Marcott, provided their three daughters had died before them; upon the event which has happened, the death of the granddaughters after their father and mother, the estate went to the testator's heir, through whom the defendants' claim. "When a contingent particular estate" (1 Jarman, 3rd edit. p. 788) "is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations. Thus where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorise a distinction between them." *Moody v. Walters* (16 Ves. 283) and other cases are cited, in all of which devises similar to this are taken to be merely contingent. The exceptions appear at the bottom of the same page, "Instances in which a contingency has been restricted to the immediate estate are of two kinds. First, where the words of contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others." And p. 789, "Secondly, the contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." The present case does not come within either of these descriptions of instances, as appears from the rule concerning them laid down by Wood, V.C. in *Madison v. Chapman* (4 K. & J. 709, at p. 719), "I apprehend the true way of testing limitations of that nature is this: Can the words which in form import contingency be read as equivalent to 'subject to the interests previously limited?' . . . "That is an intelligible principle of construction;

but in order to its application the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, "and if at the death of B., A. shall have died under the age of twenty-one;" or "and if at the death of B., A. shall have died without leaving children, then to C. in fee;" here in either case room is left for contingency. The condition of A.'s dying in the first case under twenty-one, and in the second without leaving children, is an event which may or may not have happened when the life estates in A. and B. are determined; and until it has happened the limitation over is contingent, not merely in appearance but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply." [COCKBURN, C.J.—In that I entirely agree with the Vice-Chancellor; but although the father or mother's estate would be contingent, are the ulterior bequests necessarily so?] Yes certainly; Ferne says, (Contingent Remainders and Executory Devises, p. 235) "The construction in these cases, as to the restriction of the contingency to the estate first hinged upon it, appears to depend on the testator's apparent intention not to extend it further. For wherever there is no apparent distinction in view in this respect between such estate and those which follow it, the contingency it seems will equally affect the whole ulterior train of limitations."

Horton v. Whittaker, 1 T. Rep. 346;

Doe d. Watson v. Shippard, Doug. 75;

Cattley v. Vincent, 15 Beav. 198;

Egerton v. Massey, 3 C. B. N. S. 338;

Tolderoy v. Colt, 1 T. & C. 627;

Gray v. Golding, 6 Jur. N. S. 474.

A. Will's Q.C. in reply.

Cur. adv. vult.

Nov. 21.—LUSH, J. delivered the judgment of the court (Cockburn, C.J., Mallor and Lush, JJ.).—The contention on the part of the defendants was that the devise of the estate for life to William Marcott and his wife was a contingent remainder, and that as that estate failed by their death in the life time of the tenants in tail, the ulterior limitations, being made dependent on the same contingency, failed also, and consequently the reversion passed to the heir-at-law of the testator as upon an intestacy. No doubt the life estate in question is limited in terms of contingency, terms which literally construed make the happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift. But we are to look not at the form, but the substance of the devise, and we are of opinion that the testator intended the ultimate devises to take whether William Marcott and his wife outlived their daughters and their issue or not, and that there is nothing in the language he has used which obliges us to hold that that intention cannot be carried into effect. One of the rules of contention laid down in *Powell on Devises* (3rd edit., by Jarman, p. 217) is, "Where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be not a contingent gift conditioned to take effect in these events, but a devise immediately vested, the possession of which is necessarily dependent on the event in question."

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This rule, which is deduced by the learned author from the cases which he quotes, could not have been more accurately framed to meet this case if it had been framed for the purpose, and it is one which commends itself to common sense. The testator gives an estate for life to the father and mother of his grand-daughters, if they should survive the grand-daughters, and their issue, to whom he had previously given an estate tail. The event described as the one on the happening of which the gift is to take effect is precisely that on which they are to enter into possession. The gift being of a life estate only, what is expressed as a contingency is only that which would be necessarily implied if the devise were in the most absolute form. To hold that the ultimate remainder failed because the tenants for life did not outlive the estate tail, and therefore did not enter into possession of their life estate, would, as it appears to us, defeat the plain intent of the testator. It is unnecessary to comment on the authorities cited by the learned author in support of his proposition. Cases of this description are only useful as affording so many illustrations of the principle, and as guides to its application. Variations of expression are not to be regarded as substantial distinctions, and when the intention of the will is plain and no rigid rule of law prevents effect being given to it, our duty is so to construe it, or to carry out that intent. We are, therefore, of opinion that the estate for life was a vested and not a contingent interest, and that our judgment must be for the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff, *Rogerson and Ford*, for *Wills and Newey*, Birmingham.

Solicitors for defendants, *Robinson and Preston*, for *Pilgrim and Preston*, Hinckley.

Nov. 7 and 21, 1876.

ROBINSON v. PRICE. (a)

General average—Donkey engine—Spars and cargo.

The plaintiff's ship sailed from Quebec to London with a cargo of timber, of which the defendants owned part. There was on board, although it was not the common practice to have such a thing with such a cargo, a donkey engine for loading and discharging, which might be used for pumping the ship; and there was sufficient coals on board, not only for the ordinary purposes of the ship, but also for pumping under ordinary circumstances.

The ship sprang a leak, and the crew having become worn out by pumping, the master was obliged to use the engine for that purpose in order to preserve the ship and cargo. The coals were insufficient to continue the working of the engine, and the master used for fuel some of the spars of the ship, and part of the cargo, until he procured a supply of coal from a passing steamship. The master did what was proper and necessary for the preservation of ship and cargo, and if he had not burnt the spars and cargo, the ship would probably have been lost.

Held that these circumstances constituted a general average loss, and that the plaintiff was entitled

to contribution from the defendants in respect thereof.

This was an action brought to recover money alleged to be payable by the defendants to the plaintiff for general average. It had been agreed by the parties that the action should depend upon the opinion of the court upon the following special case:—

1. The plaintiff is the owner of the ship *John Baring*.

2. The defendants are merchants, and were the owners and consignees of a portion of the cargo hereinafter mentioned.

3. The *John Baring* is a ship of 547 tons registered tonnage. Her ordinary crew is twelve hands all told. On the 19th August 1873, she sailed from Quebec for London with a cargo of timber, and a crew of thirteen hands all told.

4. The *John Baring* then was and for two and a half years previously had been furnished with a donkey-engine adapted for the loading and discharge of cargo and ballast, and also for pumping the vessel as hereinafter mentioned. She had ordinary ship's pumps fitted with a fly wheel, to be worked by hand in the ordinary way, or, if necessary, they could be connected with the donkey-engine by means of the wheel and of a chain messenger which was provided on board for that purpose, and so could be worked by the donkey-engine.

5. It is now (1876) a common practice for vessels in the timber trade to carry donkey-engines. In August 1873, it was not the common practice to fit such vessels with donkey-engines, though it was not infrequently done.

6. At the time of sailing, the ship had five tons of coal on board, which was a sufficient supply of fuel for all purposes of the ship while at sea (other than pumping), for a much longer voyage than that from Quebec to London.

7. From the 1st to the 11th Sept. the ship encountered very heavy weather, and strained a good deal, and was pumped frequently. On the morning of the 11th the ship, making a very heavy plunge, sprang a leak, and, although the pumps were diligently attended to, the water, on the morning of the 12th, was found to be gaining. During the night of the 12th the watch was kept constantly at the pumps, and at 7 a.m. on the 13th, the weather still being very bad, the crew being worn out with pumping, and the water still gaining, the master connected the donkey-engine with the pumps, and so worked the pumps by means of the donkey-engine. The pumps were kept constantly going by steam during the 13th and 14th, the weather all the time being bad, and all efforts being scarcely sufficient to keep the ship free.

8. On the 14th, there being no prospect of stopping the leak, or of getting the ship into a place of safety for some time, and it being impossible to keep her afloat without having the pumps worked by the donkey-engine, the master, seeing that the supply of coals on board would, under the circumstances, be insufficient, used some of the ship's spare spars and a portion of the cargo, together with coal, to keep up the fire of the donkey-engine in order to keep the pumps going. On the 15th, 16th, and 17th Sept. the ship encountered very severe weather, and laboured heavily all the time, and it was only by keeping the pumps going constantly by steam that the

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

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leak could be kept under, and for this purpose all the spare spars having been used up, further portions of the cargo were necessarily used for fuel. On the 18th Sept. the leak seemed to be gaining on the pumps, but by means of great efforts on the part of the master and crew of the ship she was kept afloat until the 20th Sept., when she fell in with a steamship, and procured from her a supply of coals sufficient to keep the donkey-engine working, until, on the following day, the 21st, the ship was safely docked in the Thames.

9. The course and measures adopted by the master under the above circumstances, were proper and necessary for the preservation of the ship and cargo. If he had not burned the said spars and cargo the vessel and cargo would, in all probability, have been lost.

10. The said ship was sufficiently equipped and manned for the said voyage according to the ordinary practice in equipping and manning such vessels for such a voyage, and but for the leak she would have had sufficient pumping power on board without using the donkey-engine. As it was, she had not (without using the donkey-engine) sufficient pumping power to deal with the water which she actually made, and she had not on board enough coal, or enough fuel, or other materials belonging to the ship to enable her to use the donkey-engine to the extent to which it became in fact necessary to use it.

The questions for the opinion of the court were: First, Whether the loss incurred by the burning of the ship's spare spars is a general average loss; and secondly, Whether the loss incurred by the burning of portions of the cargo under the circumstances stated is a general average loss.

Should the court answer both these questions in the affirmative, then it was agreed the judgment was to be entered for the plaintiff for the sum of 25*l.* 1*s.* 7*d.*, together with costs of suit. Should the court answer the first question in the affirmative and the other in the negative, judgment was to be entered for the plaintiff for 6*l.* 11*s.* 10*d.* Should the court answer the second question in the affirmative and the other in the negative, judgment was to be entered for the plaintiff for 19*l.* 2*s.* 9*d.* Should the court answer both the questions in the negative, then judgment was to be entered for the defendants, with costs of suit.

Cohen, Q.C. (with him *Gainsford Bruce*) argued for the plaintiff.—The facts stated are sufficient to make this a general average loss, and this case is concluded by the authority of *Harrison v. The Bank of Australasia* (L. Rep. 7 Ex. 39); the facts of that case are exactly the same as in this, except that here it was not as there the common practice to fit such vessels with donkey engines. Baron Cleasby, at p. 51, dissented from the judgment of the court, mainly on the ground that the loss incurred was, what it cannot be here, the necessary expenses of navigating the ship. In *Wilson v. The Bank of Victoria* (L. T. Rep. 2 Q. B. 203) fuel for the working of an auxiliary screw was not considered to be within the rule as to general average; but it was so put on the ground that it was not an extraordinary disbursement, and it was expressly distinguished from a case like the present. Blackburn, J., said at the conclusion of his written judgment (p. 313): "It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary

in its amount, but is incurred to procure some service extraordinary in its nature." The cases go to show that there is no necessity for the danger to be sudden to constitute general average; the facts here satisfy all the conditions required:

Birkley v. Pressgrave, 1 East. 230;
Arnould on Marine Insurance (1st edit.) p. 895;
2 Phillips on Insurance, 1299;
Plummer v. Wildman, 3 M. & S. 482;
Johnson v. Chapman, 19 C. B., N. S., 563;
Stewart v. West India and Pacific Steamship Company, L. T. Rep. 8 Q. B. 362;
Brencke's Principles of Indemnity, p. 171.

French (with him *Benjamin*, Q.C.), argued for the defendant.—Although it is found here that it was unusual at the time to carry a donkey engine in a ship under these circumstances, yet the cases show that a master, if he has an exceptional equipment, must supply the necessary material for it. Part of the implied contract between the shipper and the shipowner is that the owner is to supply everything which may be required to work the ship, and a donkey engine without fuel is not an assistance to the equipment but the contrary, and the master would certainly have supplied himself with coals in this case and before starting on his voyage if his cargo had not been timber. Even if a sacrifice be proper, we must look back to see if it might not have been prevented; here it was the fault of the owner in not having supplied sufficient coal.

Parsons on Shipping, p. 411;
Daniels v. Harris, L. Rep. 10, C. P. 1.

Here there was no emergency, and the coal was not finished when the spars and cargo were used for fuel. The master might have put into some port for coal, and he burnt these articles merely to preserve his coals in case of emergency. According to Phillips' Law of Insurance, sect. 1270, "In order to constitute a basis for a contribution for an expense or sacrifice, it must be occasioned by an apparently imminent peril."

Cohen, Q.C., in reply.—The following paragraph (sect. 1271) of Phillips qualifies that which has just been quoted, "in this respect it is usually considered sufficient if it appeared to the master or other party having charge of the subject matter to require the sacrifice, and the same is made in good faith." It does not appear that mention was made in the bill of lading of the donkey engine, and the result might be different if the owner had held out to the skipper the fact of such an engine being on board as an inducement to the contract. [LUSH, J.—There is no finding as to the sufficiency of fuel on board for ordinary pumping purposes.] That fact can be ascertained.

Our. adv. vult.

Nov. 21.—LUSH, J. delivered the judgment of the court (Mellor and Lush, JJ.).—The circumstances under which the ship's spars and the cargo were used as fuel for the donkey engine satisfy all the conditions of a general average claim. The peril was imminent, the sacrifice was voluntary, in the sense of being an act of will on the part of the master, it was in the emergency necessary in order to save the ship from sinking, and was, of course, made with a view to the safety of the whole adventure, ship, freight, and cargo; *prima facie*, therefore, the case of the plaintiff is made out. But it was objected that as the ship was furnished with a donkey engine adapted and intended in case of need for pumping as well as for loading and discharging the cargo, the owner was bound

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to provide sufficient fuel for its use; that if this had been done the resort to the spars and cargo would not have been required, that it was not done, and therefore the use of the spars and cargo was not a necessity brought about by the perils of the sea, but a necessity occasioned by his own default. Although we cannot accede to the proposition in its terms, we entirely accede to the principle which underlies it. We think that a shipper of cargo is entitled in time of peril to the benefit not only of the best services of the crew in order to save his goods, but of the use of all the appliances for that purpose, with which the ship is provided. It follows that where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reasonable supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shown to be prudent to provide against, under these conditions. If he fails to do so, he cannot call upon the owners to contribute towards that reasonable supply. That would be to make them pay for that for which he ought to have provided at his expense. If under such circumstances the opportunity occurs during a time of peril of buying coals from passing steamer, we think it clear that he would not charge their cost as an extraordinary expenditure entitling him to general average. The statement of the case not being as explicit as it might have been upon this point, we thought it right to send it back to the learned counsel who settled it between the parties to find from the evidence, he had taken one way or the other upon this question. He has returned it to us with a statement as follows, "I find that the *John Baring* when she left Quebec had on board a reasonable supply of coal for the donkey engine for pumping purposes." This finding is conclusive against the defendants. The *prima facie* claim to general average contribution is not displaced by any default on the part of the owner, and our judgment must be for the plaintiff.

Judgment for plaintiff.

Solicitor for the plaintiff, *H. C. Coote*, for *Tinley, Adamson, and Adamson*, North Shields.

Solicitors for the defendants, *Argles and Rawlins*.

Friday, Jan. 12.

Ex parte MINTO. (a)

Inquiry under Merchant Shipping Acts—Prohibition.

When an inquiry is instituted under the Merchant Shipping Acts into the conduct of a captain, the court may proceed with the inquiry, although the Board of Trade have no charge to make against the captain.

THIS was an application for a writ of prohibition to Joseph York, Esq., stipendiary magistrate of South Shields, to prohibit him from proceeding further in an inquiry regarding the stranding of the ship *Brazilian* on the Goodwin Sands, in the month of Dec. 1876, and the conduct of Mr. Minto the captain of the ship.

The inquiry was held under the Merchant

Shipping Acts 1854 and 1876, and the rules made by the Lord Chancellor under the authority of the latter Act.

By the Merchant Shipping Act 1854, s. 33, it is enacted as follows:

If it appear to such officer or person as aforesaid [appointed by the Board of Trade] that a formal investigation is requisite or expedient, or if the Board of Trade so directs, he shall apply to any two justices, or to a stipendiary magistrate, to hear the case, and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction, or order, or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power; and, upon the conclusion of the case, the said justices or magistrate shall send a report to the Board of Trade, containing a full statement of the case, and of their or his opinion thereon, accompanied by such report or extracts from the evidence, and such observations (if any) as they or he may think fit.

By sect. 32 the Merchant Shipping Act of 1876 it is enacted as follows:

In the following cases:

(1) Whenever any ship on or near the coasts of the United Kingdom, or any British ship elsewhere, has been stranded or damaged, and any witness, if found at any place in the United Kingdom; or

(2) Whenever a British ship has been lost, or is supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea, or was last heard of.

The Board of Trade (without prejudice to any other powers) may, if they think fit, cause an enquiry to be made, or formal investigation to be held, and all the provisions of the Merchant Shipping Acts 1854 to 1876 shall apply to any such inquiry or investigation as if it had been made or held under the eighth part of the Merchant Shipping Act 1854.

By sect. 9 of the Act of 1876 the Lord Chancellor has authority to make rules to carry into effect the provisions of the Act with respect to a court of survey, and the following rules made under that section are material.

Proceedings in court.

14. The proceedings shall commence with the examination of the master, officers, and any other person who was on board at the happening of the casualty, and who can give material evidence in regard thereto.

15. On the completion of their examination the Board of Trade shall state in writing whether they have any, and if so what, charge to make against any person, and against whom.

16. Where the person against whom a charge is made in these rules called the defendant is in court, or before the court, the Board of Trade may make him a party to the proceedings by handing to him a copy of the charge.

17. Where the defendant is not in court, or before the court, the judge may, on the application of the Board of Trade, cause a summons to be served upon him in the form No. 2 in the appendix.

18. When the defendant has become a party to the proceedings, or when the time allowed for his appearance has expired, and he has not appeared, the Board of Trade shall produce any further witnesses whom they may wish to examine.

19. The defendant shall then produce any witnesses whom he may wish to examine.

20. The judge may then allow any further witnesses to be examined before him.

21. When the evidence is concluded, the defendant and any parties who may have appeared shall first be heard, and afterwards the Board of Trade.

22. The judge may adjourn the court from time to time, and from place to place, as may be most convenient.

(a) Reported by J. M. LALR, Esq., Barrister-at-Law.

23. The judge may deliver the decision of the court either *videlicet*, or in writing; and, if in writing, it may be sent or delivered to the respective parties, and it shall not be necessary to hold a court merely for the purpose of giving the decision.

The examination of the captain on behalf of the Board of Trade having been completed, the solicitor of the Board handed to the captain a written "discharge" as follows:

The Brazilian.

After a careful consideration of the evidence taken in this inquiry into the stranding of the above named vessel, I have decided not to formulate any charge against you in connection therewith.

H. HAMILL.

The captain not putting in any further appearance was recalled by the stipendiary magistrate.

Milvain for the captain applied for a prohibition to restrain the stipendiary from proceeding further, and argued that, as the official representative of the Board of Trade had formally declined to proceed, the stipendiary magistrate was *functus officio*.

The COURT (Mellor and Lush, J.J.) refused the application, pointing out that, upon the construction of the statute and rules suggested on behalf of the applicant, the stipendiary magistrate would be completely subordinate to the Board of Trade.

Solicitors for the applicant, Oliver and Botterell.

Application refused.

Wednesday, Jan. 17.

TURNER v. GREAT WESTERN RAILWAY COMPANY (a).

County Court, procedure on appeal from—Whether by case or motion—"Right of appeal"—9 & 10 Vict. c. 95, s. 58—13 & 14 Vict. c. 61, s. 1—30 & 31 Vict. c. 142, s. 13—38 & 39 Vict. c. 50, s. 6—County Court Rules, Order XXI.

By 9 & 10 Vict. c. 95, s. 58, a County Court had jurisdiction to try any action where the debt claimed was not more than 20l., and by sect. 89 of the same Act, the judgment of the County Court was final. By 13 & 14 Vict. c. 61, s. 1, the jurisdiction of the County Court was extended to the recovery of debts not exceeding 50l.; and by sects. 14, 15, of the same Act, either party in any cause of the amount to which jurisdiction is given by the County Courts by that Act may appeal to a superior court in the form of a case agreed on by the parties.

By 30 & 31 Vict. c. 142, s. 13, "an appeal was allowed in actions in which an appeal was not then allowed, if the judge should think it reasonable and proper that such appeal should be allowed."

By 38 & 39 Vict. c. 50, s. 6, "in any cause tried in any County Court, in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling of the County Court judge to appeal by motion to the court to which such appeal lies, instead of by special case."

Held, that a party obtaining leave to appeal has a right of appeal within 38 & 39 Vict. c. 50, s. 6.

THIS was an appeal against the ruling of the late Warwick Cole, Esq., Judge of the Birmingham County Court in an action against the Great Western Railway Company for damages in an amount below 20l., for delay in delivery of goods. The County Court judge had given leave to appeal, but the case for the respondents could not be

supported on the merits, and the only question argued was whether the appellants had a "right of appeal" within the meaning of the 6th section of the County Court Act, 1875.

The following sections of the County Court Acts are material.

39 & 40 Vict. c. 50, s. 6:

In any cause, suit, or proceeding other than a proceeding in Bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the judge at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit, and if the court to which appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers; and at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceedings, and he shall, at the expense of any person or persons being party or parties in any such cause, suit, or proceeding requiring the same for the purpose of appeal furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion, and at the hearing of such appeal.

9 & 10 Vict. c. 95, s. 58:

All pleas of personal actions where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise, may be holden in the County Court without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this Act and according to the provisions of this Act. . . .

9 & 10 Vict. c. 95, s. 89:

Every order and judgment of any court holden under this Act, except as herein provided, shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him, entitling either the plaintiff or the defendant to the judgment of the court, and shall also, in every case whatever, have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings.

13 & 14 Vict. c. 61, s. 14:

By sect. 1, the jurisdiction of the County Court is extended to the recovery of any debt, damage, or demand not exceeding the sum of 50l.

If either party in any cause of the amount to which jurisdiction is given to the County Courts by this Act shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster . . . provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security to be approved by the clerk of the court for the costs of the appeal whatever be the event of the appeal, and for the amount of the judgment if he be the defendant, and the appeal be dismissed.

Such appeal shall be in the form of a case agreed on by both parties or their attorneys, and if they cannot agree the judge of the County Court, upon being applied to by them or their attorneys, shall settle the case, and sign it; and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought.

30 & 31 Vict. c. 142, s. 13:

With the leave of the judge, an appeal shall be allowed in all actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal shall be allowed."

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DARGAN v. DAVIES.

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Bosanquet, for the respondents, the plaintiffs below.—The appellants never had any "right of appeal" within the meaning of the 6th section of the County Court Act 1875, being only able to appeal by leave of the judge. [LUSH, J.—In what way, then, can an appeal be brought in a case where it is brought by leave?] The appellant must proceed by special case under 13 & 14 Vict. c. 61, s. 14. [LUSH, J.—There is great inconvenience in two co-existing modes of appeal, and it seems likely that the old procedure under that Act is repealed by implication.] 13 & 14 Vict. c. 61, s. 14, is not expressly repealed, and must, therefore, be taken to be subsisting. Moreover, in County Court Rules, Order XXIX., it is expressly treated as subsisting. [MELLOR, J.—It is clear that the framers of the County Court Rules were of opinion that the old procedure was still in force, as an alternative procedure.]

Webster, for the appellants, the defendants below, was not called upon to argue on this point.

The Court (Mellor and Lush, JJ.) gave judgment for the appellants.

Judgment for the appellants.

Solicitors for the appellants, *Nelson and Nelson*.
Solicitor for the respondents, *H. Tyrrell*.

Wednesday, Jan. 17, 1877.

DARGAN v. DAVIES. (a)

Impounding—Neglect to supply impounded animals with provender—Whether pound-keeper or party impounding liable to penalty—12 & 13 Vict. c. 92, s. 5.

By 12 & 13 Vict. c. 92, s. 5, "every person who shall impound or cause to be impounded any animal, and shall neglect to provide such animal with food and water, is liable to a penalty of 20s."

Held (upon a case stated by justices who had dismissed an information against the keeper of a common pound under this section), that the section did not apply to the keeper of the pound, but to the party bringing the animal to the pound.

THIS was a case stated under 20 & 21 Vict. c. 43, by John Lort Stokes, Vice-Admiral, and Peter Phelps Clerks, two of the justices of the peace for the county of Pembroke, and the following are the material parts of such case:

An information had been preferred by Thomas Dargan, the appellant, against Martha Davies, the respondent, under 12 & 13 Vict. c. 92, charging that the respondent did impound forty-eight sheep in the common pound on the 6th Jan. 1876, and on that and the two following days did unlawfully neglect to provide and supply the said sheep with a sufficient quantity of fit and wholesome food and water contrary to that statute. The justices had dismissed the information with costs. It was proved that one D. Williams, between 10 a.m. and 11 a.m. on the 6th Jan. 1876, impounded forty-two sheep, which he had theretofore seized damage feasant. They were confined until their release as follows: thirty-four were taken out at midday on the following Friday, and the remaining eight on the next Tuesday. During the whole time the thirty-four sheep were so confined the said D. Williams did not provide any of the forty-two with food or water, but after the

release of the thirty-four the remaining eight were about 7 a.m. on Saturday the 8th Jan. provided with hay. The respondent was at the time of the said sheep being so impounded and confined the keeper of the pound, but she did not provide or supply the sheep with any food or water or in any way interfere beyond receiving and keeping them in such pound until their release. The key of such pound was in the sole possession of the respondent during this period, and she in her capacity of pound-keeper had the sole control over such pound.

The justices having dismissed the information on the ground that 12 & 13 Vict. c. 92, s. 5 "did not, under these circumstances, apply to or include the respondent, but to the person or persons who delivered or caused to be delivered the said sheep into her custody," the question for the opinion of this court was "whether under the above circumstances the said information was legally and properly dismissed."

Morton Smith referred to the Acts *in pari materia* (being 5 & 6 Will. 4, c. 59, s. 4; 17 & 18 Vict. c. 60, s. 1), and argued that the section in question extended to the respondent.

No counsel appeared for the respondent.

MELLOR, J.—This case has been extremely well argued by Mr. Smith, but I have come to the conclusion that the keeper of the pound is not within the terms of 12 & 13 Vict. c. 92, s. 5. That section provides that "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of 20s." It appears to me that this section applies to the real actor, to the person who delivers the animal to the pound-keeper, and not to the pound-keeper himself. The Legislature has made no special provision as to the keeper of the pound, and, from the absence of such a provision, the Legislature must be taken to have considered that the imposition of the 20s. penalty on the person employing the keeper of the pound was sufficient to ensure the object in view. The providing of food and water for twelve hours is left to such person, and if such person omits to provide the food and water during such twelve hours, any person of a benevolent mind may, by the 6th section, enter the pound, supply the food and water, and recover the cost of the food and water from the owner of the animal.

LUSH, J.—I also am of opinion that these statutes contain no words to embrace the keeper of the pound within their sanction. The recital contained in the preamble of the Act 17 & 18 Vict. c. 60, is very strongly in favour of the respondent. From that preamble it appears that the history of the law is as follows: First, by 5 & 6 Will. 4, c. 59, every person impounding any animal was required to supply such animal daily with good and sufficient food and nourishment while impounded. By the same Act every such person so providing the animal with food and nourishment was authorised to recover from the owner of the animal not exceeding double the value of the food and nourishment supplied. Such person

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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was also at liberty, instead of proceeding for the value of the provender, to sell the animal after seven days from the time of the impounding. Then came the Act 12 & 13 Vict. c. 92, which repealed the Act 4 & 5 Will. 4, c. 59, and the 5th and 6th sections contained the provisions which my brother Mellor has referred to. Finally comes the Act 17 & 18 Vict. c. 60. This recites, after summarising the two previous Acts, that "it is doubtful whether the Act 12 & 13 Vict. c. 49, gives any remedy to the person impounding for the recovery of a compensation for the food and water supplied for any animal, and no power is given to sell the animal, although full provisions for these purposes were contained" in 5 & 6 Will. 4, c. 59. The Act then provides that every person who has impounded an animal, and supplied him with food and water, may recover double the value of the food and water supplied from the owner, or may, if he please, sell the animal and pay himself, rendering the overplus, if any, to the owner. I think the mention of the "person impounding," in this section, and the absence of any mention of the keeper of the pound, is conclusive to show that the keeper of the pound is not subject to the penalty imposed by 12 & 13 Vict. c. 92, s. 5.

Judgment for the respondent.

Solicitor for the appellant, A. Leslie.

EXCHEQUER DIVISION.

Saturday, Feb. 5, 1876.

(Before KELLY, C.B., and BRAMWELL and AMPHLETT, BB.)

MORGAN'S PATENT ANCHOR COMPANY (LIMITED) v. MORGAN. (a)

Deed—Recital of agreement to pay consideration money—Payment and receipt clause—Acknowledgment of payment—Consideration money not in fact paid—Action on deed for—Implied covenant to pay—Construction—Fraud—Relief in equity.
By deed under seal between the plaintiffs and the defendant, after reciting an agreement by the plaintiffs to transfer to the defendant their interest in certain inventions and letters patent for the sum of 1000l., it was witnessed that in pursuance of such agreement, and in consideration of 1000l. upon the execution, &c., paid by the defendant to the plaintiffs (the receipt of which the plaintiffs thereby acknowledged and therefrom discharged the defendant), the plaintiffs thereby granted and assigned the said inventions and letters patent to the defendant.

In an action on the deed by the plaintiffs subsequently to recover the 1000l. from the defendant, the first count of the declaration charged that in consideration of the plaintiffs executing a deed of assignment to the defendant of certain inventions and letters patent, the defendant promised that, upon the plaintiffs being ready and willing to deliver the said deed to the defendant, the defendant would accept the same, and pay the agreed consideration of 1000l.; that the plaintiffs were ready and willing, &c., but the defendant would not accept delivery of the said deed, and had not paid the 1000l.

The second count charged that, by an indenture between the plaintiffs and the defendant, it was

agreed that the plaintiffs should transfer to the defendant their interest, &c., in certain inventions and letters patent for the sum of 1000l.; that the plaintiffs thereupon assigned the said inventions, &c., to the defendant, but the defendant had not paid the 1000l. By his pleas to the first count the defendant denied the promise and breaches, and the readiness and willingness of the plaintiffs as alleged; and to the second count he pleaded that the indenture was not his deed, and that the plaintiffs did not assign the said inventions, &c.

At the trial it was proved that no consideration money was in fact paid or passed. The defendant contended that the deed contained no covenant or agreement to pay the 1000l.; and, secondly, that, by the recital of payment and receipt of the money, the plaintiffs were estopped from denying its payment.

Upon a motion to set aside the nonsuit directed by Kelly, C.B. at the trial, and to enter a verdict for the plaintiffs for 1000l., it was

Held by the Exchequer Division (Kelly, C.B. and Bramwell and Amphlett, BB.), dismissing the motion, that the deed contained no covenant to pay the 1000l., and that, in the face of the acknowledgment therein contained that the defendant had paid the money, it was impossible to imply such a covenant on his part, and that too on partial evidence.

Per Amphlett, B.—If a fraud had been committed on the plaintiffs, they would have no difficulty in getting relief in a court of equity.

THIS was an action by the plaintiff company to recover 1000l. from the defendant, which the plaintiffs alleged the defendant had by a certain deed covenanted or agreed to pay, but had failed to perform his covenant. The facts and circumstances of the case are as hereinafter stated.

The declaration in the first count charged that the plaintiffs were possessed of certain letters patent, &c. (hereinafter stated), and in consideration that the plaintiffs would execute a deed of assignment by them to the defendant of the said inventions and letters patent; the defendant promised the plaintiffs that, upon the plaintiffs being ready and willing to deliver to the defendant the said deed of assignment, he would accept delivery of the same, and pay to the plaintiffs 1000l., being the agreed consideration money for the said assignment. Averments that the plaintiffs were ready and willing, &c., whereof the defendant had notice, and that all conditions precedent were fulfilled, &c., yet the defendant would not accept delivery of the said deed, and had not paid the said 1000l.

The second count charged that by an indenture, dated the 6th July 1874, made between the plaintiffs of the first part and the defendant of the second part, it was agreed that the plaintiffs should transfer to the defendant all their interest and estate in certain inventions and letters patent for the sum of 1000l.; and the plaintiffs thereupon did grant and assign to the defendant, his executors, &c., the said inventions and letters patent. Averments that all conditions, &c., were performed, yet the defendant had not paid to the plaintiffs the said 1000l.

The third count contained the ordinary money count for money payable by the defendant to the plaintiffs for certain inventions and letters patent sold and delivered by the plaintiffs to the defendants, and on accounts stated.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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The defendant pleaded (1), to the first count, a denial of the promise; (2) to the same count, a denial of the alleged breaches; (3) to the same count, that the plaintiffs were not ready and willing to deliver, &c.; (4) to the second count, that the alleged indenture was not the defendant's deed; (5) to the same count, that the plaintiffs did not grant or assign the said inventions and letters patent to the defendant; (6) to the third count, never indebted.

Issue was taken and joined on all the said pleas.

At the trial, before Kelly, C.B., at the Middlesex sittings in Trinity Term 1875 (26th June), the execution by the parties (plaintiffs and defendant) of the deed of the 6th July 1874, mentioned in the second count of the declaration was proved. The deed contained the following recital :

And whereas the said company have agreed with the said J. W. Morgan to transfer to him all their estate and interest in the said inventions and letters patent for the sum of 1000*l*. Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of 1000*l*., upon the execution of these presents, paid by the said J. W. Morgan to the said company (the receipt whereof the said company do hereby acknowledge and therefrom discharge the said J. W. Morgan, his heirs, executors, administrators, and assigns), they, the said company, do hereby grant, &c.

It was proved also at the trial that no consideration money was in fact paid or passed between the parties.

Two objections were taken by the Solicitor-General (Sir H. Giffard, Q.C.) at the trial, on the part of the defendant. First, there was no covenant or agreement by the deed to pay 1000*l*.; and, secondly, that the plaintiffs were estopped by the recital in the deed from denying the payment of it.

A nonsuit was thereupon directed by the learned judge, and leave was reserved to the plaintiffs to move to set it aside, and to enter a verdict for them for 1000*l*.

Notice was, on the 4th Nov. 1875, accordingly given by the solicitors for the plaintiffs to the solicitor for the defendant, that a motion would be made to the Exchequer Division of the High Court to set aside the nonsuit directed by the learned Chief Baron, and to enter a verdict for the plaintiffs for 1000*l*., pursuant to leave reserved, and to enter judgment accordingly, on the grounds that there was evidence of a covenant or agreement by the defendant to pay to the plaintiffs 1000*l*.; and that the plaintiffs were not estopped from alleging the non-payment thereof, and that such estoppel, if any, should have been pleaded; and that the learned judge was wrong in directing a nonsuit; or to grant such other relief as the said Exchequer Division of the High Court may think fit; and now

McIntyre, Q.C. and W. C. Gully, on the part of the plaintiffs, argued in support of the said motion, and read the recital in the deed set out in the declaration. [BRAMWELL, B.—You say that that is a covenant to pay 1000*l*.?] Yes, if it be a covenant. There is no absolute covenant in so many words to pay. [AMPHLETT, B.—Is there any receipt indorsed on the deed?] There is; but one of the witnesses at the trial proved that the money was never paid. The declaration avers non-payment, and that is not traversed, and so therefore is admitted on the record; for if it be a material allegation on the record and is not traversed, then

we contend that it is admitted. The allegation is supported by the witness's evidence. The recital in the deed is we contend equivalent to a covenant by the defendant Morgan to pay the 1000*l*. [BRAMWELL, B.—There is a case mentioned in Bayley on Bills, 5th edit. p. 5, as cited by Lord Mansfield C.J., in two cases before him, and also by Lord Hardwicke, L.C., in *Simpson v. Vaughan* (2 Atk. 38), in which a man made a promissory note in these words: "I promise not to pay." Lord Maclesfield held that it was a good promissory note to pay, and that the word "not" was to be rejected. Now here the man says "I have paid," and you say that that is a covenant that he will pay. (See also Byles on Bills, 11th edit. p. 11).] The deed shows two distinct things: first, an agreement for the sale of the patents for 1000*l*.; and secondly, in another part of the deed, a statement that the 1000*l*. has been paid. The first recital taken alone is equivalent to a covenant or promise to pay; and upon our showing that the money has not been paid, then, notwithstanding the statement in the second recital that it had been paid, we may fall back upon the first recital. No particular or express form of words is necessary to constitute a covenant; but it may be implied from the general terms of the deed if an intention to do the act is therein plainly shown. Thus in *Aspdin v. Austin* (13 L. J., N.S., 155, Q.B.; 5 Q. B. 57; Lord Denman, C.J., in delivering the considered judgment of the Court of Queen's Bench, said, that where words of recital or reference manifested a clear intention that the parties would do a certain act, though they may have entered into no covenant to do it, the courts have thence implied a covenant to do the act, and sustained an action for its nonperformance as if the instrument had an express covenant to do it. Again, in *Courtney v. Taylor* (12 L. J., N. S., 330, C. P.; 7 Sc. N. R. 749; 6 M. & G. 851) Tindal, C.J., says: "I entirely agree that it is not necessary in order to charge a party with a covenant, that there should be express words of covenant or agreement, but that it is enough if the intention of the parties to create a covenant be apparent;" and Maule J., in the same case says, "Where a party unequivocally in a deed shows that he admits himself to be liable to pay money, a covenant that he will pay may be implied." (See also *Farrall v. Hilditch* and per Maule J., 5 C. B., N. S., 840.) These cases and dicta are strong authorities in favour of the plaintiffs here, and show that a covenant to pay may be implied. The subsequent statement that the 1000*l*. has been paid does not estop the plaintiffs from showing that it has not been paid. Had there been a distinct covenant to pay, and then an acknowledgment of payment, and we had sued on the covenant, that statement of acknowledgment would surely have been no estoppel. The defendant should have pleaded payment and estoppel, but he has not done so, but has simply denied the agreement to pay. The subsequent statement of payment cannot affect the present recital, which is equivalent to a covenant, unless issue had been taken as to payment. As to the receipt either in or on the deed, that is not conclusive. In "Davidson's Conveyancing," vol. i. p. 15, it is said "neither the receipt in the deed nor the indorsed one prevents the recipient showing in equity that the money has not been paid;" and, again, in vol. ii. (3rd edit.), p. 207, it

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is said, "The receipt, in whatever form, is of little value in itself, since, although it estops the recipient and those claiming under him from showing at law that the money has not been paid, yet there is no estoppel from showing at law that part of the money was returned, or in equity that it was not paid."

J. O. Griffiths, Q.C. (with him was the *Solicitor-General*, Sir H. Giffard, Q.C.), for the defendant, *contra*, was not called on.

KELLY, C.B.—It may be, for aught we know, that great fraud has been committed, but we must look at this deed and the issues joined on the record. There is a deed in which it is alleged that there is a covenant, and there is a declaration upon that covenant, and the deed is produced. It is said that a covenant has been entered into between the plaintiffs and the defendants. Now we find on referring to the deed, not only that there is not any covenant, or any words of covenant, or even anything that could, by any sort of inference or supposition to be derived from any other part of the deed, be taken to amount to a covenant or a promise to pay the money, but what we do find, on the contrary, is something absolutely inconsistent with a covenant or promise to pay—that is to say we find that the money which is alleged to have been covenanted by the deed to be paid (no such covenant, be it remembered, being to be found in terms in the deed) is actually therein stated and acknowledged by the plaintiffs to have been paid to them by the defendant. Now we cannot set at naught that which we find under the seal of the parties, and which has not, as it might have, been altered by a court of equity. The deed then containing no covenant to the effect contended for by the plaintiffs, but, on the contrary, containing statements and recitals absolutely inconsistent with such a covenant, are we to imply and infer the existence of such a covenant in the deed, and that, too, on parol evidence? I think that such a proceeding would be entirely unprecedented, and that the plaintiffs' motion should be dismissed.

BRAMWELL, B.—I am quite of the same opinion, and really think that the case is excessively plain. The plaintiffs allege that there is in this deed a covenant by the defendant to pay them 1000*l.* for the letters patent. It is certainly not there in so many words, but they say that it is to be implied; and the materials from which it is to be implied are, they say, these—namely, that the defendant had agreed to pay the 1000*l.*, and said that he had paid it, which in short and in effect amounts to this, that a covenant to pay money is to be implied because a man says he has already paid it! It has been very ingeniously argued, and more especially by Mr. Gully, that the proper way to read and interpret this deed is to read the two recitals or statements upon which this case rests separately and apart from each other. First, he says, there is the recital of the defendant's agreement to pay this money, which, it is contended by the plaintiffs, amounted to a covenant that he will pay it. There is then the subsequent recital or statement that the money has been paid. Now, that unquestionably is an admission that the defendant has paid it. But, says Mr. Gully, neither that second statement, nor the indorsed receipt, can estop the plaintiffs from showing, as he says the fact is, that the money was not in fact paid, and, that

being so, the plaintiffs may then fall back upon the first recital, which is equivalent, they say, to a distinct covenant to pay, and the defendants should have pleaded payment and estoppel. Now, that is all very well, but the contention cannot be supported. The allegations or statements in the deed cannot be so separated; for if we are to draw any inferences or implications from the deed, we must draw them from the entire document, and not from one part of it only. It is not as though there were two plainly distinct and independent statements—viz., one saying "I will pay this money," and the other saying "I have paid this money." Here, I think, the document taken altogether, is clear upon the face of it, and means that the defendant has paid the money already, from which it is not possible to imply a covenant that he will pay it.

AMPHLETT, B.—I am of the same opinion entirely, and I do not think that, in any case, I should have ventured to differ from my learned brethren upon a point of common law pleading with which I am not of course so familiar as they are. But I confess that I was at first rather struck by the argument that in such a case as this, where the deed of sale contains a receipt clause acknowledging the receipt of the purchase money, the plaintiffs would be without redress if the statement in that receipt clause were untrue—a state of things that seemed to me to be impossible. That, however, is not the question now before us. The question which we have to determine in the present case is, whether, as the deed stands, a court of law can say that there is by implication a covenant to pay a certain sum of money, when the same deed says that the money has been already paid? I do not think that it can. No doubt it would be good evidence that there was an agreement to pay the 1000*l.* If this case were in a court of equity, that court would not allow the parties to be bound by a statement in the deed that the money had been paid, if it turned out that that statement were untrue, for that would be a fraud. Now, it not unfrequently happens, particularly with regard to an acknowledgment of the receipt of money in the body of the deed, that the deed is signed before the money is handed over, and in all such cases the court of equity has considered, in consequence of that almost universal practice, that the receipt indorsed on the deed is of much greater importance as regards the question of fact whether the money has been paid or not, than the statement in the recital in the body of the deed. If, in the present case, there should be anything like fraud behind, the plaintiffs would have no difficulty in getting relief in another branch of the court.

Motion dismissed. Judgment for a nonsuit entered with costs.

Solicitors for plaintiffs, *Chester, Urquhart, Mayhew, and Holden*, agents for *Walker and Smith*, Chester; for the defendant, *T. O. Clarke*.

Tuesday, June 27, 1876.

(Before KELLY, C.B. and POLLOCK, B.)

MOULD AND ANOTHER v. ANDREWS AND OTHERS (a).
Ship belonging to several co-owners—Repairs to by order of the ship's husband—Cost of repairs apportioned between owners in proportion to their

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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shares in ship—Payment by some co-owners in cash, and by some by bill—Bill of one co-owner dishonoured—Liability of other co-owners for amount of—Principal and surety.

The four defendants and one B., were the owners, in certain shares between them, of a ship to which the plaintiffs by order of W., the ship's husband, and with the authority and consent of the defendants, did certain repairs, and upon the plaintiff's account for such repairs being sent in to the owners, it was arranged between W. and the plaintiffs, that it should be paid partly in cash (subject to discount) and partly in good bills, and that the total amount of the contract should be apportioned between the said several owners according and in proportion to their interest and the number of their respective shares in the said ship. The necessary calculation having been made by W., the account was then paid to the plaintiffs through W., partly by a cheque of the defendant, Andrews, payable to W.'s order, and indorsed by him for the amount of Andrews' proportion, partly by cash payments from each of the other three defendants for the amount of their respective proportions, and partly by a bill at six months, drawn by W. on and accepted by B., for the amount of B.'s proportion of the said account. B.'s bill being dishonoured at maturity, the plaintiffs brought this action against the defendants to recover from them, as joint owners of the ship, the amount of such dishonoured bill, in answer to which the defendants contended that the plaintiffs, by taking B.'s bill, and giving him time, had placed his co-debtors, the defendants, in a worse position, and necessarily postponed their remedy against B., and had consequently discharged the defendants; but it was

Held by the Exchequer Division (Kelly, C.B. and Pollock, B.), giving judgment in favour of the plaintiffs, and dismissing the defendants' motion to enter a verdict or a nonsuit, that the defendant was bound by the mode of payment adopted, and that that circumstance distinguished the case from that of principal and surety.

This was an action brought by the plaintiffs as executors of one Richard Hopper, deceased, to recover from the defendants, as joint owners of a vessel called the *Kildare*, the sum of 646l. 7s. 7d., the balance of account for work done by the deceased and by the plaintiffs, as a shipbuilder, in repairs to the said ship, under the circumstances as set forth in the statement of claim.

1 and 2. The plaintiffs are the executors of one Richard Hopper, deceased, and the defendants are joint owners of a vessel named the *Kildare*.

3. One Charles Weatherburn was, at the time when the repairs herein mentioned were ordered and executed, ship's husband of the said vessel *Kildare*, and on or about the 20th March 1875, as such ship's husband, and under the authority and with the knowledge and consent of the defendants, he instructed Richard Hopper, now deceased, to execute certain necessary repairs on the *Kildare*.

4. In pursuance of the instructions given as aforesaid the said Richard Hopper commenced to repair the *Kildare*, but died during the progress of the work, and the said repairs were completed by the plaintiffs as executors aforesaid. These repairs were completed on or about the 5th May 1875.

5. The amount charged by the plaintiffs for the said repairs was 1181l. 1s. An account showing

this charge was made out and presented in or about the month of May 1875, to the said Charles Weatherburn, as such ship's husband as aforesaid, and to the defendants, and no objection was then or has since been made by the defendants, or any of them, or by the said Charles Weatherburn, or by anyone on behalf of either of them, to the quality of the work or the fairness of the charge aforesaid.

6. After the account had been presented and approved as aforesaid, the said Charles Weatherburn, acting as ship's husband as aforesaid, proposed to the plaintiffs to pay the amount of charges aforesaid, partly in cash and partly by good bills, to which the plaintiffs assented. The plaintiffs thereafter received payment of the whole amount of their charges in cash and bills, allowing discount for the amount paid in cash.

7. One of the bills so received by the plaintiffs from the ship's husband as aforesaid was a bill of exchange for 646l. 7s. 7d., drawn by the said Chas. Weatherburn, acting as aforesaid, upon John Hensell Bruce, one of the owners of the *Kildare*, payable six months after the 11th May 1875, and accepted by the said John Hensell Bruce. At maturity the said bill was duly presented, but was dishonoured, and though the said John Hensell Bruce and the defendants had due notice of such dishonour, they did not pay and have not paid the said bill. The said sum of 646l. 7s. 7d. remains due to the plaintiffs in respect of the repairs in paragraph 4 mentioned.

8. The defendants refuse to pay the said 646l. 7s. 7d., whereby this action has been rendered necessary, and the plaintiffs as such executors claim the 646l. 7s. 7d. and interest thereon.

In his statement of defence the defendant Andrews alleged—First, that the defendants were not joint owners of the *Kildare*. Secondly, he denied the several allegations in paragraph 6 of the statement of claim, except the last thereof, which the defendant says is true. Thirdly, that the said bill of exchange for 646l. 7s. 7d., in paragraph 7 of the clause mentioned, was received by the plaintiffs from the said Chas. Weatherburn, and given by him to them in full satisfaction and discharge of the said 646l. 7s. 7d. therein mentioned, and not merely for and on account thereof. Fourthly, that the credit of six months mentioned in the said bill was given by the plaintiffs to the said John Hensell Bruce without the consent or authority of the defendant Andrews, and he submitted that, if even the said bill were given on account only and not in satisfaction, still that the said defendant was in the position of a surety only for the said John Hensell Bruce, and that he was discharged by such giving of time. Fifthly, that the said Chas. Weatherburn did not instruct the said R. Hopper, deceased, to execute, nor did the said R. Hopper and the plaintiffs jointly execute the said repairs for the defendants jointly, or on their joint credit. The said repairs were executed on the terms that they should be paid for by the defendants and the said Jno. Hensell Bruce and one Marian Sheriff severally and rateably, in proportion to their several interests in the said vessel, and that no one of them should be liable for the others or beyond the amount of such proportions as aforesaid. Sixthly, that the defendants and the said Jno. Hensell Bruce and Marian Sheriff paid their several proportions of the said account, or

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MOULD AND ANOTHER v. ANDREWS AND OTHERS.

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satisfied and discharged the same by giving bills in accord and satisfaction thereof respectively, and which the plaintiffs, as such executors aforesaid, received in such accord and satisfaction as aforesaid. Seventhly, he denied that the sum of 646*l.* 7*s.* 7*d.*, or any part part thereof, remained or was due to the plaintiffs as in the seventh paragraph of the claim mentioned.

In the event of the plaintiffs establishing an original joint liability of the defendants, which the defendant Andrews disputed, he in that event said as follows: Eighthly, after the accruing of the plaintiff's claim and before action, and after the death of the said R. Hopper, it was agreed by and between the defendants and the said Bruce and Sheriff, and the plaintiffs as executors as aforesaid, that each of the defendants and the said Bruce and Sheriff should pay in cash, subject to discount, or give bills in full for their several shares of the said account respectively rateably in proportion to their respective interests in the said vessel, and that in consideration thereof the plaintiffs, as executors as aforesaid, should receive such payment or bills respectively, in full satisfaction and discharge of their claim against the said defendants, and the said Bruce and Sheriff; and the defendants and the said Bruce and Sheriff accordingly then paid in cash, subject to discount, or gave bills for their said several shares as aforesaid, and the plaintiffs as such executors as aforesaid, then accepted and received the same in full satisfaction and discharge of their claim. Ninthly, in the alternative the defendant Andrews said that, after the accruing of the plaintiffs' claim and before action, and after the death of the said R. Hopper, it was agreed by and between the plaintiffs, as executors as aforesaid, and the defendant Andrews, that in consideration that he would draw and deliver to the plaintiffs a negotiable instrument (that is to say), a cheque on certain bankers, payable to the order of the plaintiffs, for the sum of 140*l.* 7*s.*, the plaintiffs should accept and receive the said cheque in full satisfaction and discharge of their claim against him; and he accordingly drew and delivered to the plaintiffs such cheque as aforesaid, and they then accepted and received the same in full satisfaction and discharge of their claim against him. Tenthly, he denied that the said C. Weatherburn and the defendants respectively had due notice of dishonour of the said bill, and that the same was duly presented for payment as alleged.

The defendant Armstrong in his statement of defence admitted the 1st, 3rd, 4th, and 5th, and denied the 6th and 7th paragraphs of the statement of claim, and alleged that each of the defendants was (as the plaintiffs well knew) an owner of certain shares in, and not one of several joint owners of, the *Kildare*, and that it was before action agreed between the plaintiffs and the said several owners of the said shares, that the plaintiffs' account should be apportioned between the said owners in proportion to the number of their shares; and each owner accordingly (except the said J. H. Bruce) paid his proportion of the said account, and the said J. H. Bruce paid his proportion by the said bill of exchange, and the defendant Andrews paid his proportion by a cheque, and the defendant Armstrong and the other owners each paid his proportion in cash; that the said bill of exchange and cheque were respectively received by the plaintiffs in full discharge and

satisfaction of all claims against the said Bruce and Andrews respectively; and that the original joint liability (if such ever existed) of the defendants, had been changed into a separate liability by reason of the matters hereinbefore alleged, and the separate liability of the defendant Armstrong had been discharged by the payment aforesaid, and that the defendant Armstrong was discharged from all liability by reason of the before mentioned discharge of the said Bruce and Andrews respectively; and that the plaintiff well knew of the relationship existing between the owners of the "*Kildare*," and that the defendant Armstrong (if liable at all beyond his said proportion) was liable as surety only, and the plaintiffs by taking the said bill and giving time to the said Bruce, without the knowledge and consent of the defendant Armstrong, thereby discharged the latter from all liability as surety.

The statements of defence of the other defendants, Blenkinsopp and Clarke, were substantially to the same effect as those of the defendants Andrews and Armstrong hereinbefore set forth.

The plaintiffs by their reply joined issue with the defendants upon their several defences.

At the trial before Mellor, J., at the Spring Assizes, 1875, for Northumberland, at Newcastle-upon-Tyne, the facts appeared to be substantially as stated in the plaintiffs' statement of claim. The manager of the plaintiffs also stated that when he took the defendant Andrews' cheque, he was not aware, and indorsed it without noticing, that the latter had inserted in the body of it the words "in full of Hugh Andrews' proportion of repairs," and that he (the manager) had no intention of taking the cheque "in full" of such proportion, or of discharging Andrews from all further liability.

A verdict was found for the plaintiffs for 646*l.* 7*s.* 7*d.*, and the learned judge directed that judgment should be entered for the plaintiffs for that amount and their costs, with leave to the defendants' counsel to move to enter the verdict for the defendants, or a nonsuit.

Herschell, Q.C. and *J. Edge*, for the defendant Andrews, moved to enter judgment or a nonsuit accordingly.

Little, Q.C. and *Hugh Shield*, appeared for the three other defendants.

M'Clymont, for the plaintiffs, appeared in opposition to the motion.

Herschell, Q.C., stated the facts of the case and the point relied on by the defendants at the trial. [*Kelly*, C.B.—Did it appear that the defendants knew of Bruce's bill being given and accepted by the plaintiffs?]

M'Clymont for the plaintiffs.—It was admitted that Weatherburn was their agent and ship's-husband, and that he had authority to arrange all matters relating to the payment of the repairs of the ship.

Herschell, Q.C.—It was admitted that the work was done on the employment of the defendants, and that the account was in the first case properly sent in to them. But the question is, assuming the original joint liability of the several defendants, whether or not the plaintiffs, by their conduct, have discharged them. The ship's-husband divided the total amount of the account into shares, proportioned to the interest of each part owner in the ship, and then handed to the plaintiffs bills and cheques for these separate

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amounts. The proportion of the defendant Andrews of the account so divided was 147l. 11s., and for that amount he gave to the plaintiffs his cheque, payable to the order of the plaintiffs "in full of Hugh Andrews's proportion of the costs of repairs to *Kildare*," and Andrews believed, that the plaintiff by accepting such cheque, discharged him from all further liability. The plaintiffs, or their manager, indorsed this cheque, and received the money, but they allege that they accepted it and paid it into their bank without noticing the peculiar form in which it was drawn, and that they never intended nor agreed to discharge the defendant Andrews from his joint liability. At the same time that Andrews gave his cheque, Bruce, another of the part owners, gave his bill at six months for his proportion of the repairs, amounting to 646l. 7s. 7d., which was dishonoured at maturity, and the amount of that bill is now claimed from the other joint owners, the four defendants in this action. It is submitted that the plaintiffs, under the circumstances, have discharged the defendants, because by giving time to one joint debtor they have placed the other joint debtors in a worse position. Had they insisted on cash, and had Bruce been unable to pay it, the defendant Andrews and the owners might have paid Bruce's proportion, and at once have sued him; but by the act of the plaintiffs the defendant's remedy against Bruce has been necessarily postponed. The question then is, Is it competent to the plaintiffs to postpone all remedy against one part owner, and yet retain all their rights against the other? The present case may be put as one of principal and surety, where the surety is discharged by time being given to the principal debtor without the assent of the surety. There is, I am bound to say, a case of *Keay v. Fenwick*, decided this week in the Court of Appeal, confirming the decision of the Court of Common Pleas (not reported), which I ought to mention, though it is, I fear, very much against the contention now urged on behalf of the present defendants. [KELLY, C.B.—That is a new case. Are there any older cases in point?]

M'Clymont.—It is submitted on the part of the plaintiffs that the cases of *Robinson v. Read* (9 B. & C. 449; 7 L. J., O. S., 236, K. B.), *Whitwell v. Perrin* (4 C. B., N. S., 412), and *Mitcheson v. Oliver* (5 E. & B. 443; 25 L. J. 39, Q.B.) are especially in point.

Herschell, Q.C.—The cases cited can, I think, be distinguished from the present one. There is, however, more difficulty in distinguishing *Keay v. Fenwick*. In that case the three defendants were part owners of a ship which the managing owner had sold without the knowledge of his co-owners, who, however, subsequently ratified the sale. The managing owner thereafter without the knowledge of his co-owners, gave bills at three, six, and nine months to the plaintiffs for commission in connection with the sale, which bills were dishonoured at maturity; and the defendants being thereupon sued by the plaintiffs, urged that, by taking the bills from one co-owner without the knowledge of the others, the plaintiffs had discharged the others, to which the plaintiffs replied that it was not a case of voluntary credit for the reason that in taking these bills they had taken all they could get, and the court, both below in the Common Pleas and on appeal decided in their favour. The only substantial distinction

which, as it appears to me, can be suggested is, that in the present case the plaintiffs might have had cash at first had they chosen to insist on it.

M'Clymont.—The plaintiffs were not only willing but anxious to take cash, and offered discount for it. The bills were given to the plaintiffs not by one part owner behind the back of the other, but by the ship's husband, acting as the common agent of all the owners, in the usual and ordinary course of his duty as such agent. If the present case differs at all from that of *Keay v. Fenwick* it is, I submit, in being a far stronger case in favour of the plaintiffs.

KELLY, C.B.—The defendants in the present case were I think clearly bound by the mode of payment adopted; and that, I think, distinguishes this case from that of principal and surety, and really takes the ground from under Mr. Herschell's feet. We are bound by the authority of the case in the Court of Appeal, which he has cited to us, and it is not necessary to go into the questions of detail. The defendants' motion to enter a verdict for them must therefore be dismissed, and the plaintiffs must have judgment with costs.

POLLOCK, B. concurred.

Judgment for the plaintiffs with costs.

Solicitor for the plaintiffs, *John Tucker*, agent for *T. W. Stewart*, Newcastle-upon-Tyne.

Solicitors for the defendant Andrews, *Williamson, Hill, and Co.*, agents for *Ingledeu and Daggett*, Newcastle-upon-Tyne.

Solicitor for the defendant Armstrong, *John Scott*, agent for *J. A. Busk*, Newcastle-upon-Tyne.

Solicitors for the defendant Blenkinsop, *Pyke, Irving, and Pyke*, agents for *J. G. and J. E. Joel*, Newcastle-upon-Tyne.

Solicitors for the defendant Clarke, *Pattison, Wigg, and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 30 and Dec. 5, 1876.

THE ROSARIO. (a)

Salvage—Distribution—Seaman—Assignment—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 182—Demurrer.

An assignment by a seaman of his right to salvage reward already acquired, is wholly void and inoperative by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 182, although such assignment is for valuable consideration, and is an action for distribution of salvage a defence setting up such an assignment is bad on demurrer.

DEMURRER.

This was an action for distribution of salvage brought by William Bennett and fifteen others, formerly part of the crew of the steamship *Navarino*, against Thomas Wilson, Sons, and Co., the owners of that vessel, in respect of services rendered to the steamship *Rosario*, of Glasgow.

The statement of claim set out the circumstances under which the services were rendered and the services of the plaintiffs, and alleged that the owners of the *Rosario* and of her cargo had paid to the defendants, and the defendants had accepted, the sum of 750l. for the services so rendered to

(a) Reported by J. P. ASPINALL and F. W. EAKES, Esqrs., Barristers-at-Law.

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the *Rosario*, but the defendants, though requested to do so, had refused to pay the plaintiffs their equitable portion of the said sum, and the plaintiffs claimed an equitable proportion of the said sum.

The statement of defence admitted the main facts of the statement of claim, but averred that the service was rendered without difficulty or danger to the plaintiffs, and was mainly performed by the *Navarino* herself by means of her steam power, and then continued:

3. The *Rosario*, after the performance of the said service, went to Scotland, and did not come within the jurisdiction of this court, and the defendants, who reside at Hull, did not and were unable to enforce the claim of themselves and the master and crew of the *Navarino* to salvage in respect of the said service.

4. The crew of the *Navarino* having made frequent applications to the defendants for the payment of their shares of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the *Rosario* as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for an immediate payment, and accordingly, by an indenture dated the 11th June 1875, between the several persons whose names are thereunto subscribed and seals are affixed of the one part, and the defendants of the other part, the said several persons parties thereto of the first part, including all the plaintiffs except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names in the fourth column of the said schedule, paid by the defendants to the said parties of the first part, each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or thereafter to be due, or paid, or awarded in respect of the salvage services set forth in the statement of claim, with power for the defendants to sue for, receive, and give receipts for the salvage, and to use the names of the said parties of the first part. The defendants crave leave to refer to the said indenture.

5. The sums so paid to the said plaintiffs respectively, other than George Short and Robert Burns, were as follows:

	£ s.		£ s.
William Bennett	1 0	Henry Brewer	1 0
John William Johnson ..	1 0	Daniel Levenson	1 0
George Tong	1 0	Henry Weatherston	1 0
Arthur Brook	0 10	James Dews	1 0
Alfred Cook	1 0	Charles Hope	1 0
Joseph Allen	1 0	Francis Loosemore	1 0
William Freeman	1 0	John Evison	1 0

6. In the month of March 1876, the *Rosario* being about to come within the jurisdiction of this court, her owners agreed to settle with the defendants for the said salvage, and paid the defendants in settlement thereof the sum of 750*l.* by a bill at three months' date.

7. In rendering the said service, the *Navarino* was delayed on her voyage, and consumed an extra quantity of coals, and her hawsers were injured, and a loss of about 100*l.* was thereby incurred by the defendants. The master of the *Navarino* having taken upon himself the responsibility of rendering the service, the defendants have paid him the sum of 125*l.* as his share of the salvage.

8. The defendants legally tendered to each of the plaintiffs, George Short and Robert Burns, the sum of 4*l.*, in respect of his share of the salvage, before this action was brought, but each of them respectively refused to accept such sums. The defendants have brought such sums into court ready to be paid to the said plaintiffs.

9. The defendants submit that the sum of 4*l.* so tendered to each of the said lastly named plaintiffs was and is sufficient, and that the other plaintiffs are bound by the said indenture, and that the sums paid to them respectively thereunder were reasonable and fair.

The plaintiffs demurred to the fourth and fifth paragraphs of the statement of defence, on the ground that such an agreement as therein set out

was wholly void and inoperative, under the provisions of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 182, which provides that "no seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

Nov. 30, 1876.—James P. Aspinall, for the plaintiffs, in support of the demurrer.—The two paragraphs demurred to amount to a statement that the plaintiffs have assigned their right to the salvage reward recovered in consideration of a sum of money paid to them. Such an agreement is bad under the Merchant Shipping Act 1854, s. 182. That section makes void any agreement by which a seaman abandons any right "he may have or obtain" in the nature of salvage, that is to say, avoids such agreements whether they relate to salvage already earned or to be earned. That this is the true construction of the section is shown by the Merchant Shipping Act Amendment Act 1862, s. 18, which provides that "the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships." That section applies to assignments or stipulations made prior to the rendering of the service and leaves untouched the provision of the 182nd section of the Merchant Shipping Act 1854, as to stipulations or assignments made after the rendering of the service. [Sir R. PHILLIMORE.—This question was considered to some extent in *The Pride of Canada*, which is best reported in the first volume of the Maritime Law Cases, p. 406 (see also 9 L. T. Rep. N. S. 546; B. & L. 208), and that case seems in favour of your contention.] If such an agreement is null and void, as there stated, it cannot be pleaded in bar to the plaintiffs' action, and the demurrer is good.

E. O. Clarkson, for the defendants, *contra*.—The statute provides only that an abandonment of salvage shall be inoperative. Here there is no abandonment, but only an assignment of a right for valuable consideration. This court has always had power to decide whether an agreement entered into under similar circumstances was equitable or not, and this is the real question in this case, and not whether the deed is wholly inoperative. The defendants were bound to plead the facts alleged in the 4th and 5th paragraphs, in order to show how they came to pay the money to the seamen, and these facts should remain on the record as showing those facts. Rejecting the demurrer will not preclude the court from going into the question of the propriety of the agreement hereafter. [Sir R. PHILLIMORE.—Is not there not a similar provision in the Naval Agency and Distribution Act 1864? Yes, sect. 15, but that provision expressly mentions assignments.

Aspinall in reply.—The 4th and 5th paragraphs of the defence taken together must mean that the sums there mentioned were paid in satisfaction

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THE ROSARIO.

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and discharge of the plaintiffs' claim. In answer to the defendant's contention that the section does not refer to assignments for valuable consideration, it is enough to say that the section covers all agreements and stipulations, and this would include an assignment; and it cannot be supposed that the Legislature would deal in a statute with agreements other than binding legal agreements, that is to say, agreements made for valuable consideration. Legislation for any other class of agreements would be useless.

Civ. adv. vult.

Dec. 5.—Sir R. PHILLIMORE.—This was a case of distribution of salvage, which a demurrer has been raised. The plaintiffs are the crew, and the defendants are the owners of the salvaging vessel. In the fourth article of the defence it is stated as follows: "The crew of the *Navarino* having made frequent applications to the defendants for the payment of their share of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the *Rosario* as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for immediate payment; and accordingly, by an indenture dated the 11th June 1875, between the several persons whose names are hereunto subscribed, &c., of the one part, and the defendants of the other part, including all the plaintiffs, except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names, &c. Then follow these words: "Each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or hereafter to be due or paid or awarded, in respect of the said salvage services set forth in the statement of claim." Then the next article sets out the names of the crew, and the sums opposite to their names, which they have received by way of purchase for the assignment of their right to salvage. These sums vary from 1*l.* to 10*s.* Now, the fourth and fifth paragraphs of the defence were demurred to on the ground that the agreement mentioned in the fourth paragraph is wholly void and inoperative under the 182nd section of the Merchant Shipping Act, 1854; and that the plaintiffs have not abandoned any right to recover from the defendants their due, equitable, and reasonable proportion of salvage reward. Now, this demurrer has been argued before the court, and well argued on both sides. The question for the court now to decide is whether, under the statute referred to, this ancient right to shares in salvage is or is not valid, despite any such agreement as above set out. The words of the Merchant Shipping Act of 1854, sect. 182, are: "Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative." It is contended by the defendants that this section is not applicable to the present case, or to this deed of assignment, because the agreement set out in the 4th paragraph of the statement of defence is not a stipulation by which the parties consented to

abandon any rights they might have in the nature of salvage, but is merely an assignment for a valuable consideration. But in construing the Act, I must look not only to the words, but the general purpose of the Act, which is well stated in *The Pride of Canada*, by Dr. Lushington (1 Maritime Law Cases, O. S. 406), where he says: "The ancient law of the court in questions of this kind was undoubted, viz., that whenever any sum had been allotted by way of salvage, it was competent to any party dissatisfied with the distribution by owners or masters to apply to this court for an apportionment of that sum of money, and so jealous was the law that no man should be deprived of his fair share of this reward, that even before the passing of the Act of Parliament, to which I must presently advert (*The Merchant Shipping Act 1854*), it was a general doctrine in this court that no seaman could enter into a stipulation of an inequitable nature; and giving up his salvage would so have been deemed, according to all the authorities and principles laid down by Lord Stowell, and every other judge upon the subject, until recently the Legislature also entertained the same opinion, and considered it a matter of great importance, in a case of salvage, to give a just reward for the services performed, and a reward for risk of life, provided there was competency for so doing. The 182nd section of the Merchant Shipping Act is as follows: [He then read the section.] Here is the principle recognised, that if any agreement be made, it shall be null and void, and, I apprehend, upon the principles to which I have adverted." He then proceeds to advert to the subsequent statute, *The Merchant Shipping Act Amendment Act 1862* sect. 18. It is not necessary that I should consider the force of that section, for it is clearly inapplicable to the present case, being applicable only to sailors employed on board ships which, according to the terms of the agreement, are to be employed for salvage service. It is not however altogether without bearing upon the case to refer to *Prize Act* to show how jealous the law is to preserve seaman's rights. I refer to the 27 & 28 Vict. c. 24, s. 15, by which it is enacted that "any assignment sale or contract of or relating to any such money as aforesaid (shares of prize money), payable in respect of the services of any petty officer or seaman, non-commissioned officer of Marines, or marine, other than such as may be made or entered into under the authority of and in conformity with any order in council, shall be void." The Legislature in the section of the Merchant Shipping Act, which is applicable to the present case, sect. 182, to which I have already adverted, could not have intended to provide merely for the case of the abandonment of a right to salvage reward without any valuable consideration whatever; but it must have intended, looking to the general purpose of the Act, to protect seamen in the assignment of their rights, whether made before or after they acquire their right to reward. The section of the statute is in aid of the general law—in support of it, and not as a substitute for it. I think the demurrer must be sustained. The plaintiffs are entitled to costs. I grant leave to the defendants to amend their defence.

Solicitors for the plaintiff, *H. C. Coote*, agent for *A. E. Cowk*, Great Yarmouth; solicitors for the defendants, *Pritchard and Sons*.

ADM.]

THE INNISFAIL; THE SECRET.

[ADM.]

Monday, Dec. 18, 1876.

THE INNISFAIL; THE SECRET. (a)

Damage by collision—Inevitable accident—Costs. It is the practice of the Admiralty Court in case of inevitable accidents that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs.

THESE were causes of damage arising from the brig *Innisfail* having, it was alleged, given the brig *Secret* a foul berth, whilst the latter vessel was lying at anchor in the Downs on the 12th March 1876. The *Innisfail* subsequently dragged her anchors, one of them fouling the *Secret's* cable, and causing the latter vessel also to drag her anchors, until she came into close proximity with the three-masted schooner *Flirt*, with which vessel the *Secret* afterwards, and after the *Innisfail* had got clear of her, on a change taking place in the direction of the wind, which was described as a hurricane, came into collision, doing considerable damage. The *Innisfail* herself never touched the *Secret*.

A suit by the *Secret* against the *Innisfail* was instituted in the City of London Court, and was heard on the 27th April 1876, when the judge (Mr. Commissioner Kerr) found that the fouling of the anchor of the *Innisfail* with the cable of the *Secret* was the result of inevitable accident, and dismissed the suit with costs. From this decision the *Secret* appealed, and the appeal was heard on the 18th Dec. 1876. There being no record of the judgment of the court below, nor copy of the judge's or shorthand writer's notes of the evidence, excepting that of two witnesses, who had been examined before the Registrar of the City of London Court previously to the trial, the witnesses were again examined orally on both sides.

Milward, Q.C. and E. O. Clarkson for the appellant, contended that the *Innisfail* anchored so as to give the *Secret* a foul berth, and that her anchor fouled the cable of the *Secret* almost immediately.

Charles Hall and W. Phillimore, for the respondents, contended that the *Innisfail* anchored in a perfectly clear and good berth in a proper and seamanlike way, and that she was driven down on the *Secret* by the violence of the gale, and that it was not in her power to avoid the fouling of the anchor.

Sir ROBERT PHILLIMORE.—This is a case of collision between two vessels at anchor, which comes by way of appeal from the City of London Court, where the matter was inquired into in the presence of two nautical assessors, and the court, with their advice, came to the conclusion that the accident was inevitable. Now, the case comes before this court certainly in a very imperfect state. It was, to a certain extent, bettered by the evidence given *videlicet* to-day. There is only one single question I have to decide, and that is whether the *Innisfail* did or did not give the *Secret* a foul berth when she first came to anchor. This depends to a certain extent upon the credibility of the evidence produced before us on her behalf. I have conferred with the Elder Brethren, and they see no reason to disbelieve the statement of the witness

Moss, and if that be believed she did not give a foul berth. It can hardly be suggested that after she began to drive she could have done anything but what she did do with the violent gale blowing at the time. Under all the circumstances of the case, I hold that it was an inevitable accident, and I must dismiss the appeal. There remains in this case to say a few words with respect to the costs. There is no doubt at all that the costs of the appeal must be given to the respondent. The general rule in the Court of Admiralty has been where the decision is founded on the ground of inevitable accident, to leave both parties to pay their own costs. But unquestionably the court retains a discretionary power on the subject, and the principle which guides it is this—whether the inevitable accident was or was not of that character that it must be apparent, or ought to be apparent to those who brought the action against the defendant. Now in this case the charge against the respondent was the one originally taken up, and it failed. The court has no hesitation in coming to the conclusion that the charge could not be maintained upon the evidence, and that the contrary fact must have been apparent to those who brought the action. I think it falls under the principle to which I have adverted, that the parties must have known that they would have no chance of succeeding. I therefore shall not disturb the finding of the court below either upon the question of costs, or upon the principal question in the case. I wish it to be clearly understood that the usual rule in the Court of Admiralty is, when it comes to the conclusion that the accident is inevitable, to leave both parties to pay their own costs.

Solicitor for appellants, *Thomas Cooper*.

Solicitors for respondents, *Lowless and Co.*

THE suit, originally instituted in the Admiralty Division, by the *Flirt* against the *Secret*, was then heard.

W. Phillimore and Raikes, for plaintiffs, owners of the *Flirt*.

Milward, Q.C. and E. O. Clarkson, for defendants, owners of the *Secret*.

The evidence in the previous case was admitted as evidence in this one, and fresh witnesses were examined on behalf of the *Flirt*.

Sir R. PHILLIMORE.—The defence for the collision in this case is that it was inevitable, and that the master of the colliding vessel was guilty of no negligence in his navigation. It is quite true that the *Secret* had been giving a foul berth for two hours or more to the *Flirt*, but it must be remembered, and it has been admitted that she was driven into the *Flirt* by a cause which she could not resist. Some questions still remain. The first relates to the alleged duty of the *Secret* to take a tug, it appearing that there were tugs there. The question is, would it have been prudent for her to take a tug? This is one in answering which the court is mainly guided by the advice of the Trinity Masters. They think, and I see no reason to disagree with them, that the *Secret* having two anchors down, and being under the control and management of them, her master was justified in holding her with both anchors, and that he would have incurred considerable danger in slipping one and endeavour-

(a) Reported by J. F. ASPELL and F. W. RAIKES, Esqrs.,
Barristers-at-Law.

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ing to weigh the other. When the weather or tide altered he might have been able to shift his berth further off. Had there been no change in the wind the Trinity Masters do not think that there would have been any collision. With respect to the point made as to the bracing of the yards, the Trinity Masters are of opinion that the master braced them in a proper manner, and with regard to the last point, namely, the alleged duty of the *Secret* to starboard her helm, the Trinity Masters are of opinion that, as there was at that time no tide, an alteration of the helm would have had no effect. I must, therefore, pronounce that the collision was the result of inevitable accident, and both parties must pay their own costs.

Solicitors for plaintiffs, *Clarkson, Law, and Greenwell*.

Solicitor for defendants, *Thomas Cooper*.

ARCHES COURT OF CANTERBURY.

(Before the Right Hon. Lord PENZANCE, Dean of Arches.)

PARISHIONERS OF HATCHAM v. TOOTH. (a)

Mode of enforcing order of the Court of Arches—Nature and jurisdiction of that court—Public Worship Regulation Act.

A clergyman, who neglects to obey an order of the Court of Arches, will, upon application, be pronounced by that court to be contumacious and in contempt, and a direction will be given that the same be signified to the Queen in Chancery; whereupon a writ "De Contumace Capiendo" will issue for the arrest and detention in custody of such person, until he shall submit to the order of the court. The Court of Arches explained to be a purely ecclesiastical court.

The Public Worship Regulation Act deals only with matters of procedure, and does not in any respect enlarge the jurisdiction of the Court of Arches.

THE complainants in this case were the promoters of a suit against the Rev. Mr. Tooth, under the Public Worship Regulation Act, which resulted in an inhibition issuing from this court against him, in respect of the irregularities in his conduct of the Church services which his parishioners complained of. Mr. Tooth having disregarded this inhibition, the present application was made to the court to enforce its order.

A. J. Stephens, Q.C. (with him B. Shaw), for the promoters, said that Mr. Tooth was guilty of contempt of court, both by reason of his disobedience to the order of the court, and also by reason of the disrespectful language he had made use of with regard to it.

Mr. Tooth did not appear.

LORD PENZANCE.—The parishioners of St. James's, Hatcham, who have promoted this suit, have at length applied to this court to enforce upon Mr. Tooth obedience to the orders which it has made. It cannot be a matter of surprise that their patience should have been at last exhausted; the only wonder is that it should have endured so long. But from first to last the greatest consideration has been shown to Mr. Tooth in his irregularities and breaches of the law; and even up to the present moment no inhibition has been asked

for or issued against him in respect of those matters which, though they have been declared illegal by the Court of Appeal in the *Purchas* case, are the subject of appeal now pending in the case which arose at Folkestone. On all the points, therefore, in which Mr. Tooth's obedience is sought by the promoters of this suit to be enforced, the law has been already settled—no appeal is pending—and Mr. Tooth has not attempted, either in this court or by way of appeal, to uphold the legality of his proceedings. In this state of things the promoters of the suit require at the hands of the court the exercise of such powers as it possesses to enforce the decrees they have obtained, an application which the court has no discretion to refuse. But some misapprehension appears to exist as to what those powers are. It has been suggested that the 9th section of the Public Worship Act confers upon this court new powers for the enforcement of its decrees. This is an erroneous interpretation of the statute, the new powers given to the court being confined to proper facilities for a due hearing of the case under the new forms of procedure which that Act has introduced. The powers which this court possesses for the enforcement of its decrees are such, and such only, as it possesses as the Provincial Court of the Province of Canterbury. It need hardly be necessary to call to mind that the Provincial Court of the Archbishop is a purely ecclesiastical court; that as such it has no temporal or secular jurisdiction, and no inherent authority over the property or liberties of the Queen's subjects. And accordingly, from the most ancient times, the chief means at its disposal for enforcing obedience to its mandates consisted in a sentence of excommunication. The time, however, came when these sentences of excommunication were further enforced by the civil power by means of the King's writ *De Excommunicato Capiendo*. It is not necessary to refer particularly to the statutes on this subject. As time went on, it was thought desirable by the Legislature that the sentence of excommunication should, except in certain cases, be abolished and discontinued, and the statute of 53 Geo. 3, c. 127, accordingly provided that the judges of the ecclesiastical courts "whose lawful orders or decrees have not been obeyed" should in future pronounce the person disobeying them "contumacious and in contempt," and signify the same to the King in Chancery, and that thereupon a writ *De Contumace Capiendo* should issue against such persons, and they should be detained in custody until they made submission to the orders of the ecclesiastical court. The civil power has thus been brought in to the aid of ecclesiastical authority, and the declining efficacy of the sentence of excommunication has been supplemented by a power of imprisonment entirely foreign to the original jurisdiction of a purely ecclesiastical court. Applying these powers, as I am bound to do, I have no hesitation in pronouncing Mr. Tooth to be contumacious and in contempt, for disobeying the inhibition issued by this court; and I direct the same to be signified forthwith to the Queen in Chancery, with a view to his imprisonment. Under ordinary circumstances there would, in granting this application, be little more to say. But the circumstances are not ordinary; for the jurisdiction of this court has been openly denied, and mischievous delusions

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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ve been propagated as to its functions and authority. In the case of Mr. Ridsdale, the first high occurred since the Public Worship Regulation Act, I made some observations on this subject, and I still think it worth while, for the sake of others (however little Mr. Tooth may regard anything that falls from this court), to point out what those delusions consist. They consist primarily in the idea that this Court of Arches is secular and temporal court, and not a spiritual or ecclesiastical one. Those who take part with Mr. Tooth conceive, as I understand it, that the only courts which can properly take cognisance of any irregularities in his ministrations, are the ecclesiastical and not the temporal courts and this, they say, is founded on an existing right in the Church of England to govern herself in spiritual matters, including matters of ritual. The Public Worship Act, they say, was an innovation and invasion of this right by referring questions of ritual to a secular tribunal. It would be well if those who maintain these propositions were to read the statutes by which the ritual of the Church of England at the time of the Reformation was prescribed and enforced—I mean the statutes authorising and establishing the two successive Prayer Books of King Edward VI. and the Prayer Book of Queen Elizabeth, which regulated the ritual of the Reformed Church for the first hundred years after its establishment. They would there find that a clergyman departing in the performance of Divine service from the ritual prescribed in the Prayer Book was liable to be tried at the assizes by a judge and jury (the bishop if he pleased assisting him judge), and, if convicted three times, was liable to be imprisoned for life. The interposition therefore of a temporal court, if any such were in question, to enforce obedience in matters of ritual, would at least be no novelty; the novelty, if any, is in the claim to be exempt from it. But suppose this claim, for the sake of argument, be admitted, what, I may ask, are the ecclesiastical courts to whose judgment Mr. Tooth, and they who act and think with him, would be willing to defer? It is not to be presumed that Mr. Tooth proposes to settle for himself, as the minister of an Established Church, how the Divine services of that Church, which are intended to be uniform throughout the country, should be performed. If he arrogates to himself this right, every beneficed clergyman in the kingdom has it also, and there might be as many forms of worship in the Church as there are parishes in the land. But if he is not to settle the form of worship for himself, and he considers himself bound by the directions of the Prayer Book, who is it that in his opinion ought to determine what it is that the rubrics of the Prayer Book enjoin? What is the court that has the jurisdiction to which he is ready to render obedience? Is it the court of his bishop? If so, he must surely be aware that by the ecclesiastical law of this country, as well before the Reformation as since, an appeal from the bishop's court lies, and has always lain, to the court of the archbishop—this Court of Arches whose jurisdiction he now denies. And not only so, but he must be further aware that for a long series of years it has been the practice of the bishops to transfer suits commenced in the diocesan courts at once to this Court of Arches, by the well-known form of "letters of request," and thus save the expense and delay of two decisions in place of one.

To this very court, therefore, any proceedings against Mr. Tooth, had they been commenced in the court of his diocesan, might, and in all probability would, according to the ancient ecclesiastical laws of the realm, have come either by way of transfer or by appeal. If so, what question is there of a secular court, or an invasion of the rights of the Church? Let me make my meaning plain. Before the Public Worship Act passed, suits for restraining irregularity in ritual were commenced in the diocesan courts; they may be so still, though I often see the misstatement that these courts have been abolished. Such were the suits now well known against Mr. Mackonochie and Mr. Purchas. But these suits were no sooner commenced in the bishops' courts, than they were transferred, by the request in each case of the bishop, to this court, the court of the archbishop, to be here heard and determined. So that the jurisdiction of this court in matters of ritual is not only an ancient jurisdiction dating from time immemorial, as well before the Reformation as after it; but it is the jurisdiction, and the only jurisdiction, to which in modern times, and down to the moment when Mr. Tooth has chosen to deny its authority, all questions of ritual have been referred. Has, then, the Public Worship Act robbed this court of its claim to obedience in matters ecclesiastical? All that the Act has done is to arm it with new powers, and these only in the way of procedure. Can any reasonable man argue that the conferring of such powers as these, which did not alter or affect the jurisdiction of this court, annihilated that jurisdiction? The existence of these additional powers cannot secularise a court deriving authority solely from the archbishop of the province, and whose only secular feature is that of being presided over by a layman. But this again is no new thing: a series of distinguished judges who have presided here, in the last as well as the present century (and it needs not to inquire how much further back), testifies to the contrary, for they have without exception been laymen and lawyers. The chancellors or officials who preside in the bishops' courts are, with few exceptions, up to the present hour lawyers; and whatever objections may be felt by any to such an arrangement, it at least is no novelty, and has been the act of the ecclesiastical authorities themselves without any interference from the State. Mr. Tooth, therefore, denies the authority of the only existing courts in the kingdom which, subject to appeal, have any power to review and correct his proceedings; and I cannot consequently regard his claim to immunity from the judgments and orders of this court as anything short of a claim to be himself the judge of the ritual which the Prayer Book has prescribed. If so, there is nothing that I know of to prevent him from a still further approach to the ritual of the unreformed Church of Rome, if he can persuade himself that the language of the Prayer Book admits of it. With regard to the supposed libel on the court to which Dr. Stephens has referred, the court would, I think, be hypercritical if it saw in anything that he said a libel upon it. A court should not be over-zealous in vindicating itself against improper language or unjust charges. The true protection of all courts lies in the general estimation and respect in which they are held; and that estimation is not, I think, imperilled by anything which

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has fallen from Mr. Tooth. I have only to add that Mr. Tooth must pay the costs of this application.

Proctors for complainants, *Moore and Currey*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Nov. 14, 20, 21, and 24, 1876.

(Before JAMES, L. J., and BAGGILLAY and BRAMWELL, JJ. A.)

EAGLESFIELD v. MARQUIS OF LONDONDERRY. (a)

Company—Directors—False representation—Misdescription of railway stock—Bona fides—Delay in seeking redress.

In 1865 the plaintiffs agreed with S. to purchase of him 10,000l. Llanidloes No. 1 Preference Stock of the Cambrian Railways Company; and in the certificates which had been issued by the company to S., and which were forwarded by him to the secretary of the company for the purposes of the transfer, and in the deed of transfer to the plaintiffs, the stock was so described. Subsequently to the transfer certificates were issued by the company to the plaintiffs, stating that they were registered in the books of the company as the proprietors of 10,000l. Llanidloes No. 1 Preference Stock.

In 1869 the plaintiffs ascertained that, upon the true construction of the Acts of Parliament under which the stock was issued, the stock held by the plaintiffs was not Llanidloes No. 1 Preference Stock, as the directors believed when the stock was issued to S., and when it was transferred to the plaintiffs, but Llanidloes 1864 Stock, which proved to be almost worthless, whilst the Llanidloes No. 1 Preference Stock was valuable and saleable at par, or nearly so.

In 1874, the plaintiffs filed a bill against the company, the directors and the secretary, to make them jointly and severally liable to make good the loss sustained by the plaintiffs through the misrepresentation of the defendants. The bill alleged that the plaintiffs purchased the 10,000l. stock under the belief that it formed part of the Llanidloes No. 1 Preference Stock; but this allegation was not verified by affidavit, the plaintiffs only swearing that they purchased the stock under the belief that it would rank with the Llanidloes No. 1 Preference Stock:

Held (reversing the decision of Jessel, M.R.), that the defendants were not liable, inasmuch as they had made no misrepresentation by which the plaintiffs had been deceived.

Held also, that the plaintiffs' delay in seeking redress would have disentitled them to relief, even if they had been deceived.

THIS was an appeal from a decision of Jessel, M.R.

The hearing in the court below is reported in 34 L. T. Rep. N.S. 113, where the facts of the case are sufficiently stated.

The Master of the Rolls held that the directors,

the secretary, and the company were jointly and severally liable to make good the representation by transferring to the plaintiffs Llanidloes No. 1 Preference Stock in exchange for the stock which they held; or if unable to do so, to undo the transaction, and, so far as possible, replace the plaintiffs in the same position as they were in before the representation was made.

From this decision the directors, the secretary, and the company appealed.

Cotton, Q.C., Marten, Q.C., and Orakmell, for the directors.—We cannot be held liable, inasmuch as we made no wilful misrepresentation. This is in the nature of an action of deceit, and to make us personally liable it is necessary to fix us with "what is technically called the *scienter*," as Wood, V.C., says in *Henderson v. Lacom* (17 L. T. Rep. N. S. 527-9; L. Rep. 5 Eq. 249-262). We really believed that the stock would rank with the Llanidloes No. 1 Preference Stock, and the secretary's indorsement on the transfer is too remote to affect us. This case is not governed by the *Reese River Mining Company v. Smith* (L. Rep. 4 E. & L. 64), for that was a suit to set aside a contract on the ground of misrepresentation, while this is a suit to make us personally liable. *Barrowes v. Look* (10 Ves. 470), which the Master of the Rolls regarded as very unfavourable to us, merely shows that a trustee cannot escape liability on the ground that he has forgotten something; and the same remark applies to *Slam v. Croucher* (1 De G. F. & J. 518). In *Peek v. Gurney* (L. Rep. 6 E. & L. 412) there was a wilful misrepresentation of fact, and what Cairns, L.C., there said was that the defendants might be "absolved from any charge of a wilful design or motive to mislead or to defraud the public," while here we acted *bona fide* under the belief that the stock was what it was represented to be. They also cited

Freeman v. Cooke, 2 Ex. 654;

Ormerod v. Huth, 14 M. & W. 651;

Stephens v. De Medina, 4 Q. B. 422.

Fry Q.C., and Speed, for the secretary and the company.—The secretary cannot be held liable, for he merely acted as an officer of the company, and was bound to issue the certificates in the form directed. Nor is the company liable, for, though it would be liable if it had entered into a beneficial contract through the fraud of its agent, here there was no contract between the plaintiffs and the company. They cited

Mackay v. Colonial Bank of New Brunswick, 30 L. T. Rep. N. S. 180; L. Rep. 5 P. C. 594;

Swift v. Winterbotham, 28 L. T. Rep. N. S. 230; L. Rep. 8 Q. B. 244;

Swift v. Jansbury, 30 L. T. Rep. N. S. 31; L. Rep. 9 Q. B. 301;

New Brunswick and Canada Railway Company v. Congbeare, 6 L. T. Rep. N. S. 109; 9 H. of L. Cas. 711, 38;

Barwick v. English Joint Stock Bank, 16 L. T. Rep. N. S. 461; L. Rep. 2 Ex. 259;

Western Bank of Scotland v. Addie, L. Rep. 18a App. 145;

Re Bahia and San Francisco Railway Company, L. Rep. 3 Q. B. 584;

Hart v. Frontino Gold Mining Company, 22 L. T. Rep. N. S. 30; L. Rep. 5 Ex. 111;

Rashdall v. Ford, 14 L. T. Rep. N. S. 790; L. Rep. 2 Eq. 750;

Beattie v. Lord Ebury, 30 L. T. Rep. N. S. 321; L. Rep. 7 E. & L. 102.

Stones v. Marsh, 6 B. & C. 591;

Davis v. Governor of Bank of England, 2 Bing. 393.

(a) Reported by H. FRAS, Esq., Barrister-at-Law.

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Southgate, Q.C., Davey, Q.C., and Phear, for the respondents.—The certificates were untrue, and were not certificates of what was contained on the register. The certificates and the register did not coincide. They were untrue not only in letter, but in substance. The object of certificates is described by Cockburn, C.J. in *Re Bahia and San Francisco Railway Company* (L. Rep. 3 Q. B. 594), where he says: "The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title." [JAMES, L.J.—The plaintiffs never saw those certificates.] That is true; but it was the misrepresentation made by the directors in the certificates that caused the secretary to make the indorsement on the transfer which has prejudiced us. *Barry v. Croskey* (2 J. & H. 1), where it was held that directors of a company were not liable at the suit of a purchaser of shares from an allottee for a misrepresentation in the prospectus, proceeded upon the ground that the prospectus was not intended to induce persons to buy shares from shareholders, but to subscribe for shares originally, and cases of that kind have no application to the present case. In *Scott v. Dixon* (29 L. J. Ex. 62 n), directors were held liable because the prospectus had been left at a banker's in order to induce persons to buy shares. Even if the directors really believed that the stock would rank *pari passu* with the Llanidloes No. 1 Preference Stock, that would not justify them in saying that it was such stock. They had no reasonable grounds for so believing. They also referred to

Langridge v. Levy, 4 M. & W. 337;

Peck v. Gurney, L. Rep. 6 E. & J. 377, 412;

Haycraft v. Croassey, 2 East, 92.

No reply was called for.

JAMES, L.J.—I am of opinion in this case that the order of the Master of the Rolls cannot be sustained. The plaintiff alleges that the defendants, the directors and the secretary, made a misrepresentation to him, and that he was deceived by that misrepresentation. It is not necessary in the view I take of the case that we should distinguish between the respective liabilities of the secretary and of the directors and of the company, or go into any examination of the extent to which the misrepresentation, if any, is brought home so as to be accompanied with legal consequences to the defendants, or any of them; but there is a part of the case which is common to all, and which lies at the root of the plaintiff's contention, namely, that there was a misrepresentation made to him and that he was deceived by means of that misrepresentation. Of course, the misrepresentation must be one of fact and not of law as to the legal consequence of the true facts. Now, up to and at the time of the completion of the plaintiff's transaction with Savin, the only thing brought home to the company, the directors, or the secretary, is this: Savin being the possessor of certain stock in the defendant company as to which he had at that time no certificate at all, and as to which certain certificates were issued, but had never been shown or in any way communicated as certificates to the plain-

tiff, he (Savin) sells some stock to the plaintiff, and a transfer is sent to the company as a transfer of "10,000*l.* (say ten thousand pounds) of 5 per cent. Preference Stock, Llanidloes No. 1, Act 1860," that being the description in the body of the certificate, and there is written across that "Coupons for 10,000*l.* (preference 1860 stock) forwarded to the company's office by Mr. Savin, are held by me to meet this transfer." That was the whole representation which was directly or indirectly made by anybody on behalf of the company to Mr. Eaglesfield, and the only thing by which he could possibly have been misled. Now, the facts are these: There was a certain sum of 85,000*l.* No. 1 Preference Stock, referred to in the Act of 1864, sect. 15. That is the Cambrian Railways Act. That same Act had "reserved," upon the amalgamation of all the existing lines into the new aggregate, the power of issuing all the stocks, preference and other, which had not been previously issued by the dissolved companies themselves under the powers of their Acts, and among others there was a power in the Act of 1860 unexhausted to issue 25,000*l.*, of which 10,000*l.* had been issued, and 15,000*l.* still remained to be issued. With regard to that the Cambrian Railways Company took upon themselves to issue the sum of 15,000*l.*, and the directors say (and there is no reason to doubt it) that they were advised that the unissued Preference Stock of the Llanidloes could still be issued as having the same preference as the 10,000*l.* which had been issued, and, therefore, that it was entitled to be No. 1 preference stock of that line; and they say, further, that they were advised by their solicitor that the proper mode of describing that stock was "Llanidloes No. 1 5*l.* per cent. Preference Stock, issued under the Mid-Wales Railway (Extensions) Act 1860." Then what comes back to the secretary is a statement that Savin had sold to the plaintiff 10,000*l.* 5*l.* per cent. preference stock No. 1, Act 1860, and the secretary sends back to the person who had sent him in that transfer the receipt thus: "Coupons for 10,000*l.* preference 1860 stock forwarded to this company by Mr. Savin are now held by me to meet this transfer." The secretary was not making any representation beyond meaning it to apply to the 15,000*l.* which had been issued by the Cambrian Railways Company. The defendants swear they never had the slightest intention of making any misstatement, and that when they issued the certificate to Savin, which the plaintiffs have nothing to do with except so far as the substance is given in this document, and the extent to which it is given, they believed they were giving that which they honestly and fairly might give, as distinguishing the new stock of 15,000*l.* which they had issued. Now, in order to maintain the case of misrepresentation against them, it appears to me that the representation must be wilful and fraudulent. Whether the fraud is supposed to be a fraud in this court, as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit. It is very difficult to say that directors who acted in this way had any intention to deceive. But what appears to me conclusive of this matter is that the plaintiff himself has not suggested that he was in the slightest degree misled by that which he alleges now to have been a misrepresentation. He dealt with Savin. To

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what extent he knew the stock which Savin was getting as contractor, I do not know, and it is not very material; but the contention on the part of the plaintiff is that he was told in substance that he was getting part of the 85,000*l.* stock which was mentioned in a particular section of that Act; that that was what he thought he was getting, and that he did not get it. He never in so many words pretends that he did believe he was getting part of the 85,000*l.* stock. He does not say that he was deceived by the company telling him he was getting part of the 85,000*l.*, or that anybody told him so. He says he thought he was getting genuine No. 1 stock, that is to say, that he was getting stock which he believed, from the documents furnished to him, would take rank with and be for all practical purposes genuine No. 1 stock. If his contention were true, which, of course, was a desperate one, that they did in fact rank as No. 1 stock, then he was getting No. 1 genuine Preference Stock of the Llanidloes Railway; that is all he says he thought he was getting. The secretary of the defendant company, Mr. Lewis, in his affidavit, having referred to the sort of argumentative statement of deception which the plaintiff put forward in his first affidavit, says this: "I believe that no deception was practised on him by any person whatever, but that, on the contrary, he knew the nature of the stock he purchased of Mr. Savin." He does not in any way controvert that. The only way in which he meets that, which goes to the very root of his case, is this: "With reference to paragraph 20 of the affidavit of George Lewis, I repeat that I did not, when I purchased and took a transfer of the 10,000*l.* stock to which this suit relates, know or suspect that it was anything but genuine No. 1 stock." Now, if he had been told every word that had passed—if the whole resolution of the company had been read to him, and if the form of the certificate, and everything that occurred in the case had been known to him—he could still have sworn, with most perfect truthfulness, that he did not know or suspect that it was anything but genuine No. 1 preference stock. Of course he believed then, and for long afterwards that, notwithstanding the circumstances under which it was issued, it was genuine No. 1 preference stock, that is to say, that it would have a preference, and would take rank as being entitled to the first dividend, and if he suspected that, falling into the same mistakes as the directors had fallen into, he could still have sworn with perfect truth that he never knew or suspected that it was anything but genuine stock. In my opinion that is very far from making out the case that there was any deception practised upon him, or that he was deceived, or that there was any representation made to him by which he was deceived. Then there is this other point, that, according to his own account, both he and his solicitor knew everything about it in 1869. The very facts were told to him in 1869, and the doubt and difficulty was that, up to a certain period in 1869, the stock had been treated as genuine by the company, dividends had been paid upon it as genuine stock, everybody supposing that it was entitled to a preference. In 1869 the Acts of Parliament were more carefully looked into, especially with reference to the state into which the company had got, and then the solicitor for the company says: "I believe you

have got No. 1 preference stock really; but that it can only rank as stock issued under the Act of 1864." Then the plaintiff's solicitor writes back to ascertain what the facts are, and the facts are all communicated to him. He still goes on hoping that, notwithstanding all, these documents would give him No. 1 stock; and from 1869 to the filing of this bill in 1874 he keeps the stock in his hands, avails himself of all the rights of it, and then asks that the stock may be taken off his hands and value given for it, he having kept it all these years without making any claim. Upon that alone it would be impossible for him to maintain his suit to get other shares than those he was dealing with. However, I rest my decision upon the fact that he has failed to prove that which is the essence of the case, namely, that he was in any way deceived by anything said to him.

BAGGALLAY, J.A.—The facts of the case have been so fully and frequently alluded to in the course of the argument, and by the Lord Justice in his judgment, that I do not propose to refer to them again. As regards the alleged misrepresentation, the directors and secretary state in the 14th paragraph of their answer that they believe "that the 15,000*l.* preference stock would be and be treated as part of the No. 1 Llanidloes preference capital, and rank and stand upon the same footing in all respects as the 85,000*l.* Llanidloes No. 1 Preference Stock" there referred to, being the balance of the 25,000*l.* originally authorised to be raised as preference stock under the Mid-Wales Act of 1860, and which was authorised to be issued, notwithstanding the amalgamation of the companies by the Cambrian Act of 1864. Now, the plaintiffs, I believe, upon the evidence which is before us now—or rather the plaintiff Eaglesfield, who alone attended to the transaction—believed the same thing at that time. I am aware that the bill states a different belief, and is based upon a different belief to that which the directors and secretary say they were under. The belief under which the plaintiffs acted, as stated in the bill, is to be found in the 15th, 22nd, and 41st paragraphs. In paragraph 15 they say: "The 10,000*l.* stock so purchased by the plaintiffs as aforesaid from the said Thomas Savin was purchased by them from him at par and as being Llanidloes No. 1 stock, and it has never since been dealt with by them." In the previous 11th paragraph they had stated that the capital raised under the 15th section of the Cambrian Act of 1864 was in the after part of the bill referred to as Llanidloes No. 1 stock, that is, the 85,000*l.* So here we have an allegation on the bill that the plaintiffs believed that the stock they bought was part of the 85,000*l.* They put a similar statement in the 22nd paragraph, where they say that "they intended to, and believed that they had become the owners of 10,000*l.* Llanidloes No. 1 stock," that is, part of the 85,000*l.* stock. In the 41st paragraph they say that when they completed the transfer they believed it to be 10,000*l.*, part of the Llanidloes No. 1 Stock. Therefore we have these three several assertions, the truth of which was of the greatest possible importance to the plaintiffs. I am satisfied that those allegations in the bill are not supported by the evidence in the case, and for this reason, first of all, by reference to the affidavit made by the plaintiff Eaglesfield, and, secondly, by reference to the conduct of the

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plaintiff Eaglesfield. I am quite aware that in the course of the affidavit of the plaintiff there are several statements which, if taken by themselves, could hardly be consistent with anything, if they were honestly made or made without any reservation, pointing in the direction of supporting the allegations contained in the bill; but when I find the actual statement contained in the bill as to relief occurring in the precise form I have mentioned three several times, and not one of these passages affirmed by the statement in the affidavit, it becomes, I think, a very suspicious circumstance indeed. As regards the first of the three allegations—namely, that when they purchased they believed it was part of the particular stock, the paragraph in the bill between the two other paragraphs, both of which are verified by affidavit, is not verified. It becomes more important with regard to the 22nd paragraph of the bill, because they verify a statement in part, but omit to verify it as to what their belief was as to the allegation in the bill. The first portion of the statement, as to their not having had any suspicion about it until the proceedings in the Court of Chancery is verified by affidavit; but then they say in the bill that they had not become “as they intended to and believed that they had become, the owners of 10,000*l.* Llanidloes No. 1 Stock,” and that sentence is omitted in the affidavit. It is verified in general terms, but there is an omission of a verification of that passage. The statement in paragraph 41 also is unsupported by affidavit. The bill was framed upon a belief as to which Mr. Eaglesfield found that, as an honest man, he could not make an affidavit, and therefore a variety of statements are used, such as that “he negotiated upon that footing,” and that “he did not suspect,” and so forth, but which studiously abstain from saying he did so believe. If it stood upon that evidence alone the court would be justified in holding (the burden of proof being on the plaintiff to show that he had been deceived) that he has failed to prove his case. But when I regard his subsequent conduct this becomes still more clear. For it is clear, from the plaintiff's own evidence, that he became aware of this deception, as he calls it, five years and more before the bill was filed. I am not prepared to say that in an action for damages for misrepresentation the delay of five years in commencing the action would necessarily be a bar to the claim; but I do say that in proceedings against a company to set aside a contract on the ground of misrepresentation discovered by the party, the fact that no proceedings were taken to set the transaction aside for five years, would be fatal, and the plaintiff could not possibly succeed. If the plaintiffs were originally deceived, they were, at any rate, undeceived by the proceedings that took place before the Vice-Chancellor in 1870, and surely then was the time when complaint ought to have been made. There was nothing done for several years. They continue to conduct proceedings for the purpose of establishing their right to that which they originally believed they had. They take their chance of succeeding in establishing that this 10,000*l.* would be held to rank equally with the 85,000*l.*, as they originally thought it would, and it is only when they find that that which they thought would rank with the 85,000*l.* is not to rank with it that this case of misrepresentation by the defendants is set up for the first time. I am, therefore, of opinion that

both these appeals should be allowed, and the bill dismissed with costs.

BRAMWELL, J.A.—I am of the same opinion. The plaintiffs might have presented their case in one of two ways. They might have said that they knew they were getting a portion of this 15,000*l.* and no part of the 85,000*l.*, and have complained of the misrepresentation as to the nature and rights of what they got. They would then have met with this answer: that that was not a misrepresentation of any fact, but a misrepresentation, or rather a misconception, of a matter of law, in which they and the directors shared. The other way of presenting the case is the one which Mr. Davey told us they relied on—viz., that the plaintiffs supposed they were buying 10,000*l.* of the 85,000*l.* No. 1 Preference Stock, when in point of fact Savin had it not to sell, as the defendants all knew, and therefore a fraud was practised upon them, because Savin was proposing to sell a thing which he had not, and that to his knowledge and the knowledge of everybody else. The burden of proving that is undoubtedly on the plaintiffs. They must prove that they supposed, and had reason to suppose, that they were buying a portion of this 85,000*l.* If they could prove that, the rest would follow, because undoubtedly Savin knew he had it not, and the company and their officers must also have known that he had it not. In my opinion the plaintiff wholly fails to prove that. I doubt very much whether he has alleged it in such a way as to pin himself to it. It is a remarkable thing, the gingerly way (for I know no other word to use) in which he states what he thought it was he was buying: “I purchased from him (that is, Savin) 10,000*l.* of the Stock of the Cambrian Railways Company called Llanidloes No. 1 Preference, and which, in sect. 15 of the Cambrian Railways Act 1864, is called Llanidloes No. 1 Preference Capital.” It is consistent with that that he knew he was buying 10,000*l.* Stock, which was preference capital, and which was of the same quality as that which is called in sect. 15 No. 1 Preference Capital. A similar remark is applicable to the 15th and 41st paragraphs of the bill. To my mind it is very doubtful whether he states that he supposed he was buying a portion of the 85,000*l.* Stock, but it is absolutely certain that he does not swear to it, as has been pointed out already. To my mind it is impossible that he could have believed it, because he had had dealings with this company, and with Savin, before: he had made purchases of Savin, and knew his position, and in what way he had become possessed of this stock, and also was acquainted with the Act of Parliament. The story, therefore, to my mind, is impossible. The form of the transfer must have shown him that there was something peculiar about this, because there were certain words in it which were not strictly applicable, as it appears to me, to this No. 1 Preference Stock, as described by sect. 15 of the Act of 1864. Then, in addition to that, there was that which has been pointed out, and which to my mind is so forcible, that although the secretary in his affidavit has sworn that to his belief the plaintiff Eaglesfield knew well that he was not buying a portion of this 85,000*l.*, all Eaglesfield does, when his attention is particularly challenged on that matter, and when it was open to him, to have said in answer, “You are wrong, I did not know at all,” is to say, “I thought I was

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buying No. 1 Llanidloes 5 per Cent. Preference." Then there is another thing which has also been pointed out, and upon which I should say nothing (because I do not know that I add anything to what has been said before), except that in differing from the opinion of the judge in the court below, I think it is better not to give a mere acquiescing judgment. The other point is that the plaintiff allows five years to go by from the time, not when he found out merely that the statement had been made as to the rights of the stock he bought, but, if his case is a true one, from the time when he was informed that he had not had transferred to him that stock which he thought he was buying, that Savin had it not, and that the company ought not to have made any such statement concerning it. He allows five years to pass without complaint. In the year 1869, five years before the bill was filed, he must have known, if his case is true, that an actual fraud and deception had been practised upon him, or at all events that, by some strange mistake, while he thought he was buying one stock Savin thought he was buying another. If this case had gone before a jury to be dealt with as men of the world would deal with a charge of this description, I should say they would have scouted the notion that this gentleman had been in any way deceived. It may be that there has been a misrepresentation. As to that I say nothing at all. But if there has been a misrepresentation at all, it is not a misrepresentation that he was getting this stock, but a misrepresentation under a misconception, in which he shared, as to the rights of the new 15,000*l.* stock. But I am of opinion that the plaintiff has wholly failed to make out that he bought a portion of this 85,000*l.*, and thought he was getting it. To my mind he has not only not made that out, but I should say affirmatively that upon the evidence I am satisfied that he knew what he was buying, and got what he thought he was buying.

Appeal accordingly allowed with costs.

Solicitors for the appellants, *Milne, Biddle, and Mellor.*

Solicitors for the respondents, *Woodrooffe and Plaskitt.*

Friday, Nov. 10, 1876.

SALAMON v. SOPWITH (a).

Lease by trustees—Covenant for renewal at like rent—Specific performance.

Trustees of a messuage and premises, partly freehold and partly leasehold, for a term, of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, and covenanted to use their best endeavours to obtain a renewal of the lease, and thereupon to grant him a lease for a further term of seven years from the expiration of his tenancy, at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding twenty-one years.

Before the expiration of W.'s lease new trustees had been appointed, and the reversion in fee had become vested in other persons, who would not renew the lease on the old fine, the property having much increased in value:

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

Held (reversing the decision of Malins, V.C.), that the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease, and that the covenant did not bind the new trustees.

This was an appeal from a decision of Malins, V.C.

The hearing in the court below is reported *ante*, p. 463, where the facts of the case are fully set forth.

The Vice-Chancellor held that the trustees must use their best endeavours to obtain a renewal of the lease from the Ecclesiastical Commissioners, and that if they failed to obtain such renewal the plaintiff would be entitled to a further lease for seven years of the freehold portion of the property alone.

From this decision the trustees appealed.

J. Pearson, Q.C. and E. Cooper Willis for the appellants.—The trustees' power was to lease at a rack rent, and the property having increased in value they have no power to grant a renewal at the old rent: (*Lady Cavan v. Pulteney*, 2 Ves. jun. 544). It was evidently the intention of both parties that the lease should comprise the whole property, and the appellants cannot therefore be compelled to grant a further lease of the freehold part alone. [They were stopped by the court.]

Glasse, Q.C. and Locock Webb, Q.C. for the plaintiff.—The fact that the trustees must pay a larger fine for renewal is no reason why they should refuse to fulfil their covenant to renew our lease. At all events we are entitled to a further lease of the freehold part. They cited

Bringloe v. Goodson, 4 Bing. N. C. 726-35;

Barnes v. Wood, 21 L. T. Rep. N. S. 227; L. Rep. 8 Eq. 424.

Without calling for a reply,

JAMES, L.J., said he was of opinion that there was no ground whatever for the judgment of the Vice-Chancellor. At the time when the old trustees granted the lease all parties knew all the facts of the case, and who were to be bound by the covenant. There was no concealment. The trustees had power to grant a lease of the premises at a rack rent for any term not exceeding twenty-one years, and they agreed with the lessee to grant him a lease for twenty-one years; but when the matter was looked into it was found that they could not do so because they had only a term of fourteen years in them. They fancied they could get over this difficulty by entering into a covenant with the lessee that they, or some, or one of them, their or some or one of their executors, administrators, or assigns should and would use their and his best endeavours to obtain a renewal of the lease from the parties capable of granting the same, and that in case and so soon as they or he should have obtained such renewal, they or he should and would forthwith grant to the lessee, his executors, administrators, or assigns, a lease of the premises for the further term of seven years, commencing from the expiration of the term of fourteen years thereby granted, at the same rent and under and subject to the same covenants and agreements in all respects as were thereinbefore reserved and contained. It was contended that this meant that they were to procure a renewal at any expense. But they had only power to grant a lease at a rack rent, and had no power to covenant to grant at a future date a lease at a fixed rent, which might turn out, and here had turned out, to be much less

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han a rack rent. The question before the court, however, was whether trustees who entered into such a covenant could bind their successors in the office of trustee, and could bind the trust estate to lay out money in purchasing other property in order to fulfil the covenant. It was clear that they could not so bind the present trustees or the state. The order of the Vice-Chancellor must therefore be discharged, and the bill must be dismissed with costs.

BAGGALLAY, J.A., was of the same opinion. The only power the trustees had was over property forming part of the trust estate. They might have granted a lease of the premises, which were partly freehold and partly leasehold, for fourteen years. To enter into a covenant that they would use their best endeavours to obtain a renewal, and would then grant a lease for a further term of seven years, was practically entering into an agreement to grant a lease of the reversion, which they had no power to do. Therefore the trust estate was not bound by the covenant in question.

BRAMWELL, J.A., concurred.

JAMES, L.J., added that there was no ground for saying that the court would decree specific performance of part of the agreement, namely, of that part which related to the freehold portion of the premises.

Solicitor for the appellants, *John Burton*.

Solicitors for the respondents, *Spyer and Son*.

Tuesday, Nov. 14, 1876.

(Before JAMES L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Re THE BRADFORD TRAMWAYS COMPANY. (a)

Company—Winding-up—Parliamentary Deposit—Application of Deposit—Insolvency—Forfeiture to the Crown.

A private Act of Parliament incorporating a tramways company provided that, if within a certain time the undertaking should not be completed or half the capital paid up and expended on the works, the Parliamentary deposit, which had been paid into court in pursuance of the standing orders of the Houses of Parliament, should either be forfeited to the Crown, or in the discretion of the court, if the company was insolvent and had been ordered to be wound-up, should wholly or in part be applied as part of the assets of the company for the benefit of the creditors.

The works were never begun, a small portion of the capital only having been subscribed for, and the company was ordered to be wound-up on the ground that it was unable to pay its debts:

Held (reversing the decision of Malins, V.C.) that the court could not order the deposited fund to be applied as part of the assets of the company for the payment of its debts, until it was proved that there were debts which could not be paid by means of calls on the shareholders.

THIS was an appeal from a decision of Malins, V.C.

The hearing in the court below is reported in 34 L. T. Rep. N. S. 478, where the facts of the case are fully stated.

THE VICE-CHANCELLOR held that the company was insolvent within the meaning of the provision of

its Act of Parliament stated in the above head-note, and that the deposit ought to be applied in payment of debts and the costs of the winding-up in priority to any moneys to be received from future calls.

From this decision the Crown appealed.

Rigby, for the Crown.—The effect of the Vice-Chancellor's decision is to apply the deposited fund for the benefit of the shareholders, who may, by the application of the deposit to the payment of the debts of the company, escape any further calls. That is not what the Act says shall be done with the deposit; the Act provides that it shall be applied as assets for the benefit of the creditors.

Higgins, Q.C. and *Bradford*, for the official liquidators.—The Act says that the deposit shall be applied as assets for the benefit of the creditors, if the company is insolvent and has been ordered to be wound-up. That is just the present case, for here the company has been ordered to be wound-up on the ground of inability to pay its debts. The Act does not say that all the subscribed capital must be called up before resorting to the deposit for the payment of debts.

J. Pearson, Q.C. and *Maclaren*, for creditors of the company, supported the Vice-Chancellor's order.

Without calling for a reply.

JAMES, L.J., said: I am of opinion that the order of the Vice-Chancellor in this case cannot be sustained. The money in question is money deposited by promoters in pursuance of the standing orders of the Houses of Parliament in order to secure the carrying out of the works which they were applying to Parliament to sanction. The money never was the money of the company, never was the money of the shareholders, and the question is, has it in any way become the money of the shareholders? What the legislature said is that if these people, who have obtained authority from Parliament to do certain things, do not within a certain time complete the works, or pay up and expend upon the works half the capital, then the money deposited by the promoters is to be forfeited, and it is to be forfeited for the benefit, in the first instance, of the landowners and other persons who are entitled to compensation for injury to their property, and, subject to that, it is to be forfeited either for the benefit of the Crown or for the benefit of the creditors of the company; but there is nothing whatever to show that it was intended to be forfeited for the benefit of the shareholders of the company, and that seems to me to give a clue to the meaning of the Act. The money is to be forfeited and *prima facie* it is to go to the Crown, but if it is made to appear to the court that there are creditors of the company who are not paid, and whose debts cannot otherwise be paid, then it may, in the discretion of the court, be applied, so far as may be necessary, wholly or in part, for satisfying those creditors. It seems to me impossible to draw the line which the Vice-Chancellor has sought to draw between calls which were made before the winding-up and calls that will be made in the winding-up; they are all equally assets of the company, and are funds primarily and properly applicable to the payment of the creditors and of the costs of the winding-up; and it is only when those assets have been exhausted, in the payment of the debts of the company, that the court has any jurisdiction whatever to take that which otherwise would be the

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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money of the Crown from the Crown and give it to the liquidator or receiver of the company. I am, therefore, of opinion that the order of the Vice-Chancellor in this case ought to be discharged without prejudice to any application which the liquidators may make to the court when they can satisfy the court that they are unable to pay the debts, having used all the assets of the company that they can reasonably get.

BAGGALLAY, J.A.—I am of the same opinion. The order of the Vice-Chancellor can only be supported upon the assumption that it was an exercise of the discretion of the court within the powers conferred upon the court by the 18th section of the Act of Parliament; but that discretion can only be exercised in the event of the company being insolvent. As I follow the judgment of the Vice-Chancellor, he seemed to be of opinion in this case that there was evidence that the company was insolvent; and he would appear to have arrived at that conclusion from the allegation that the debts exceeded the amount of the assets in the hands of the liquidators, for I find in his judgment the following words: "The court is of opinion that the company is to be deemed insolvent when it was ordered to be wound-up upon the ground of insolvency, and that the deposit is liable for payment of the debts, including the costs of the winding-up, in priority to any moneys received from calls made or to be made subsequently to the winding-up." As the Lord Justice has already observed, I cannot see any distinction between calls made prior to, and those which may be made after, the winding-up, so far as regards their liability to the payment of the debts of the company. It appears to me, having a due regard to the provisions of the 18th section, that recourse can only be had to the fund in question for the benefit of the creditors, and not for the benefit of the shareholders of the company.

BRAMWELL, J.A.—I am entirely of the same opinion. The scheme of the 17th and 18th sections of the Act is that the promoters who deposit this money, and who are the originators of an abortive scheme—in this case so abortive that the tramway is not made, nor even half the capital subscribed—shall, if the scheme proves abortive, forfeit the deposit money, and shall never get it back, nor get the benefit of it in any way. Now, it is not forfeited strictly for the benefit of the Crown; the Crown has not any meritorious claim, but takes it as a sort of vacant property that must go to somebody, just as it takes a fine or anything else of that kind; but then, if there are unhappily creditors who cannot get paid out of the assets of the company, the Crown's right to the fund (the Crown having, as I said, no particular meritorious claim to it) may be put on one side for the benefit of those creditors who otherwise would remain unpaid, and who are not guilty or responsible; but the promoters, as I have said, are not to get it, nor are the shareholders who have done nothing to deserve it. It is all very well to talk of them as innocent persons, but they have trusted parties who have brought forward an abortive scheme. That being, to my mind, most clearly the scope and intention of the Act of Parliament, that is to say, that the promoters in the case supposed should not have the deposit, and that the Crown should take it if there is nobody else to take it (I leave out of consideration the payment of the compensation to landowners entitled), but that the

creditors should take it, if there are creditors who would otherwise be unpaid, it is manifest to my mind that it never was intended that it should under any circumstances be applied for the benefit of the shareholders. If it were to be so applied, this ludicrous consequence would follow: Suppose the shareholders had paid but very little upon their shares, which is perfectly possible, and suppose the debts of the company were less than the deposit money, the result would be that the liquidator would have to pay a dividend to the shareholders out of the forfeited deposit. Now, that being the intention of the Act of Parliament, and that consequence following if the deposit were applied for the benefit of the shareholders, it is manifest to my mind that this company is not insolvent within the meaning of the 18th section of the Act. And indeed if the insolvency intended by that section were what Mr. Higgins contends, a sort of not paying—not an inability to pay, not a want of funds wherewith to pay if they chose to collect them, but a not paying—it seems to me that the word "insolvent" might as well have been left out of the section, because when a company is ordered to be wound-up it is necessarily in that condition. It seems to me, therefore, that this company is not insolvent within the meaning of this clause. But assuming it to be insolvent, it is also manifest to my mind, with great submission to the learned Vice-Chancellor, that he should not have made an order having the effect of applying this forfeited sum of money to the creditors of the company until it had been ascertained, from inability to realise the assets of the company, that there was a necessity for so doing. That has not been ascertained. For aught we know, it may turn out that the shareholders of the company are solvent, and will pay up enough to satisfy all the creditors; and in that case, in my opinion, there would be no power and no right upon the part of the court to divert any of the money from the Crown; it would all go to the Crown.

Appeal accordingly allowed, the costs of the Crown on the appeal and in the court below to be paid out of the deposited fund.

Solicitors for the appellants, *Raven and Hare.*

Solicitors for the respondents, *Walter Webb; Ashurst, Morris, and Co.*

Saturday, Dec. 2, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Re ELIZABETH S. (an alleged lunatic). (a)

Lunacy—Petition for inquiry by stranger—Verdict of sanity—Petitioner indemnified by his solicitor—Costs—Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), s. 11.

On a petition presented by a neighbour, who was no relation to the alleged lunatic, an inquiry was, on the report of the medical visitor, directed and resulted in a verdict of sanity. After the verdict the petitioner obtained from his solicitor a letter indemnifying him against the costs of the petition.

The petitioner then presented a petition asking for payment of his costs out of the alleged lunatic's

(a) Reported by H. FRAS, Esq., Barrister-at-Law.

estate, and the alleged lunatic presented a cross petition for payment of all costs by the petitioner: The court refused to make any order on either petition, on the ground that, on the one hand, the inquiry had really been instituted by the petitioner's solicitor for his own profit, while, on the other hand, the medical visitor's report showed that an inquiry was justified.

LUNACY petition.

The facts were as follows:

In June 1876, a petition for an inquiry into the state of mind of Miss Elizabeth S., a wealthy lady of 77 years of age, was presented by a Mr. Redfearn, a next-door neighbour, but no relation of the alleged lunatic.

The court directed the medical visitor to report upon the case, and on his report that there was a case for inquiry, an order was made for an inquiry before a jury, which was held in Oct. 1876, and resulted in a verdict that Miss Elizabeth S. was of sound mind and capable of managing her own affairs.

Mr. Redfearn then presented a petition praying that his costs might be paid out of Miss S.'s estate under the 11th section of the Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), which empowers the court to order the costs of such an inquiry to be paid out of the estate of the alleged lunatic.

A cross petition was presented by Miss S. praying that Mr. Redfearn might be ordered to pay all her costs.

In support of the latter petition it was sought to prove that Redfearn was only a nominal petitioner, and that he had presented the petition in the interests of his solicitors, who on the 6th Oct. had given him a letter of indemnity from any cost in connection with the lunacy inquiry.

On the other hand, Redfearn deposed that he had acted *bonâ fide* in the belief that Miss S. was insane and ought to be better cared for; and that the letter of indemnity was given him after the inquiry, and not in pursuance of any previous bargain. He also stated that his petition had resulted in Miss S. being much better cared for than before.

W. W. Karslake, for the petitioner Redfearn.—The court has always been unwilling to deprive petitioners of their costs in cases of this kind. As *Turner, L.J.*, said in *Re F.* (2 De G. J. & Sm. 90), "The court ought not, in my opinion, to be astute in discovering grounds for depriving persons who commence proceedings in lunacy of their costs, if they had fair reasons for believing that the persons whose sanity is to be inquired into were in such a state as to require the intervention of the court to protect their persons and property." In this case the report of the medical visitor shows that we had fair reason for such a belief. He also cited

Re O., L. Rep. 10 Ch. 75.

Bagshawe, Q.C. and *G. C. Price*, for the alleged lunatic.—The petitioner is indemnified against the costs of the inquiry, and he is asking them, not for himself, but for his solicitors. To be entitled to costs under the 11th section of the Lunacy Regulation Act 1862, a petitioner must show that he was acting *bonâ fide* and at his own risk in presenting the petition. That was not so in this case. The petitioner was clearly a tool in the hands of his solicitors. We ought to be paid our costs by the petitioner, and the fact that they would fall on his

solicitors will not deter the court from making the order for which we pray, for in *Re Jones* (L. Rep. 6 Ch. 497) it was held that where a solicitor engages to indemnify the plaintiff in a suit, and has the control of the suit, he will be ordered to pay the defendants their costs of the suit when dismissed. They also cited

Cockle v. Whiting, 1 Russ & My. 43;

Attorney General v. Skinner's Company, Coop. Ch. Rep. 7.

Phear, who appeared for a sister of the alleged lunatic, was held to have no *locus standi*.

W. W. Karslake in reply.

JAMES, L.J.—It is important not to lay down any rule or establish any precedent which would, on the one hand, discourage applications to the court for the protection of persons who appear to be in a state of mind requiring protection, or which would, on the other hand, give too much encouragement to speculative petitions, which may be presented for the purpose of putting profits into the pockets of solicitors. In the present case we are of opinion that the petitioner ought not to be ordered to pay the costs of the inquiry, as the report of the medical visitor showed that the case was one which justified an inquiry. But, on the other hand, as the solicitor evidently started the thing with a view to his own profit, and induced the petitioner to allow his name to be used, we think that, as the solicitor took the chance of profit, he ought equally to take the chance of loss, and as his speculation has failed he must bear the loss. There will, therefore, be no order on either petition.

BAGGALLAY and *BRAMWELL, J.J.A.*, concurred.

Solicitors for the petitioner, *Pitman and Lane*, agents for *Auty and Son*, Sheffield.

Solicitors for the respondents, *Pilgrim and Phillips*, agents for *Smith, Hinde and Smith*, Sheffield; *Prior, Bigg, Church and Adams*.

Friday, Dec. 15, 1876.

(Before *JAMES, L.J.*, and *BAGGALLAY* and *BRETT, J.J.A.*)

Re DALGLEISH'S SETTLEMENT.(a)

Trustee of leaseholds—Intestacy—Death of trustee without legal personal representative—Vesting order—Reappointment of new trustees—Trustee Act 1850 (13 & 14 Vict. c. 60), ss. 15, 32, 34.

Where a sole or surviving trustee of leaseholds has died intestate, and has no legal personal representative, and a new trustee has been duly appointed in his place, the court has power under the 34th section of the Trustee Act 1850, to make a vesting order; and the court will, under the 32nd section, reappoint the trustee, who has already been duly appointed, for the sake of making a vesting order under the 34th section of the Act.

Decision of Jessel, M.R., reversed.

THIS was an appeal from a decision of the Master of the Rolls.

The facts were briefly as follow:

Under a settlement made in 1845 on the marriage of Mr. and Mrs. Dalgleish, certain leaseholds became vested in a sole trustee who had died and had left no legal personal representative. Two new trustees had been duly appointed under

(a) Reported by

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a power in the settlement, and a petition was presented before the Master of the Rolls asking that the leaseholds might be vested in them.

His Lordship refused to make the order, saying that the difficulty was that the 34th section of the Trustee Act 1850 enacted that the vesting order should have the same effect as if the person or persons who before such order were the trustees or trustee, if any, had duly executed all proper conveyances and assignments of the lands. Here there was no person in whom the leaseholds were vested; there was therefore no person who could execute a conveyance of the leaseholds, and a vesting order, which could have no greater effect than a conveyance, would be a mere nullity. What the court was asked to do was really to take upon itself the functions of the Probate Court, and grant limited administration of the intestate's estate without citing his next of kin. And his Lordship accordingly refused the application.

From this decision the petitioner appealed.

Graham Hastings, Q.C., for the appellant stated the facts. [*BAGGALLAY, J.A.*—Is not this point settled by our decision in *Re Bathons* (L. Rep. 2 Ch. D. 483)?] That decision virtually overruled the decision of the Master of the Rolls in the present case. But there is another point as to the reappointment of the trustees who have already been appointed under the power, and we ask for leave to amend the petition by praying that those gentlemen may be reappointed by the court, in order to give the court jurisdiction to make the vesting order. The Master of the Rolls seemed to disapprove of appointing as new trustees persons who had already been appointed.

JAMES, L.J.—I see no objection to such an appointment, and the order prayed for will be made on the production of an affidavit of their fitness. The matter must therefore be mentioned to us again, and on production of the affidavit the order prayed for will be made.

BAGGALLAY and BRETT, JJ.A., concurred.

Solicitors, Harrison.

Thursday, June 2, 1876.

(Before *JAMES and MELLISH, L.JJ.*, and *BAGGALLAY, J.A.*)

Ex parte FENNING; Re WILSON AND ARMSTRONG. (a)
Bankruptcy—Liquidation—Appointment of trustee more than six months after filing of petition—Bankruptcy Act 1869 (32 & 33 Vict. c. 71) ss. 6, 11, and 125, sub-sect. 7.

The Court of Bankruptcy will not order the registration of a resolution for liquidation and the appointment of a trustee passed more than six months after the filing of the petition, for the appointment of a trustee under a liquidation petition is equivalent to an adjudication of bankruptcy, which can only be made in respect of an act of bankruptcy committed within six months.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in bankruptcy.

The facts of the case were briefly as follows:

George Wilson and Walter Armstrong carried on business in partnership as woollen manufacturers in London, and also at Hawick, in Scotland, in partnership with C. J. Wilson and S. M. Wilson.

On the 12th July 1875 the Scotch firm was adjudicated bankrupt in Scotland, and on the same day separate adjudications were made against each of the partners except Armstrong, against whom a petition was filed in Scotland on the 10th Aug., under which he was adjudicated a bankrupt on the 17th Aug.

The estates of all the partners were sequestrated, and Mr. T. S. Lindsay was appointed trustee.

On the same 12th July, George Wilson and Walter Armstrong filed a petition for liquidation of their affairs by arrangement in the London Bankruptcy Court.

Under this petition the first meeting of the creditors was held on the 10th Aug., but was adjourned for six months in order to wait for the decision of the Scotch Courts upon the question whether the estate of the London firm belonged to the trustee in the Scotch bankruptcy or to the creditors of the London firm only.

On the 10th Feb. 1876, the adjourned meeting under the liquidation petition was held. None of the joint creditors of the firm attended, but the separate creditors of Armstrong passed resolutions in favour of a liquidation, for the appointment of a trustee, and granting the debtor his discharge.

Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy, held (affirming a decision of Mr. Registrar Keene) that all the estates of the partners, both joint and separate, were vested in the Scotch trustee, and that there was no estate for liquidation in the London Court of Bankruptcy, and he accordingly refused to register the resolutions.

Some of Armstrong's separate creditors appealed from this decision.

F. O. Orump and Northmore Lawrence, for the appellants.—The title of the trustee appointed by the separate creditors relates back to the filing of the liquidation petition, and has priority over the title of the Scotch trustee, which only dates from the 10th Aug., when the separate petition was filed in Scotland against Armstrong. [*JAMES, L.J.*—The 6th section of the Bankruptcy Act 1869 provides that no person shall be adjudged a bankrupt on any of the grounds mentioned in the section, unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication, and s. 125, sub-s. 7, makes the appointment of a trustee under a liquidation equivalent to the presentation of a petition in bankruptcy.] Section 11 makes the bankruptcy relate back to the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication. They cited

Ex parte Duignan; Re Bissell, 25 L. T. Rep. N. S. 286; L. Rep. 6 Ch. 605;

Ex parte Eyles; Re Edwards, L. Rep. 16 Eq. 99.

Finlay Knight (with him *Benjamin, Q.C.*), for the Scotch trustee, was not called upon.

JAMES, L.J.—When we look at the provisions of the Bankruptcy Act 1869, it becomes clear that the estate in this case is vested in the trustee in the Scotch bankruptcy. The Act has made proceedings in liquidation as far as possible like proceedings in bankruptcy. It gives the trustee in a liquidation the same rights as a trustee in bankruptcy, but it gives him no higher rights. By the 7th sub-section of the 125th section the appoint-

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ment of a trustee under a liquidation is made equivalent to the presentation of a petition in bankruptcy or an order of adjudication in bankruptcy. But by the 6th section of the act an order of adjudication in bankruptcy can only be made in respect of an act of bankruptcy committed within six months before the presentation of the petition for adjudication. Therefore, apart from all considerations which might make the court reluctant to interfere with the title of the Scotch trustee, the resolutions in question can have no power to vest any estate in the trustee appointed by them. The creditors chose to adjourn the meeting for six months, and it was then too late to appoint a trustee.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Appeal accordingly dismissed with costs.

Solicitor for the appellants, *W. A. Crump and Son.*

Solicitors for the respondent, *Stevens, Wilkinson and Harries.*

Thursday, Jan. 18.

(Before JAMES, L.J. and BRAMWELL and AMPHLETT, J.J.A.)

Ex parte BRIGSTOCKE; *Re* BRIGSTOCKE.(a)

Bankruptcy—Debtor's summons—Tender of petitioning creditor's debt and costs—Discretion of court as to making adjudication—Bankruptcy Act 1869 (32 & 33 Vict. c. 71) s. 2, sub-sect. 6, ss. 8, 9.

Where on the hearing of a bankruptcy petition founded upon a debtor's neglect to comply with a debtor's summons, a tender is made of the full amount of the petitioning creditor's debt and costs,

Semble, that the court has a discretionary power to refuse to make an adjudication, although the debt and the act of bankruptcy have been proved to its satisfaction.

This was an appeal from an order of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

On the 21st Oct. 1876, Messrs. Standen and Co. obtained a judgment in the Exchequer Division against one Augustus Brigstocke for a debt of 100*l.* and costs.

They then issued a debtor's summons against him for the judgment debt, and Brigstocke having failed to comply with it, they, on the 9th Dec., filed a petition for an adjudication of bankruptcy against him.

The petition came on for hearing on the 20th December. At the request of the debtor's solicitor the hearing was then adjourned till the following day, and on the adjourned hearing the debtor's solicitor stated that he was prepared to pay at once to the petitioning creditors 150*l.* for their debt and costs, and under those circumstances he contended that no adjudication ought to be made.

The Registrar nevertheless made an order adjudicating the debtor a bankrupt.

From this order the debtor appealed.

Winlow, Q.C. and Bucknell for the appellant.—The Registrar was not bound to make an adjudication, but had a discretion in the matter. The

act of bankruptcy committed by failure to comply with the debtor's summons was one upon which no creditors, except those who issued the debtor's summons, could obtain an adjudication: (*Ex parte Wier*; *Re Wier*, 25 L. T. Rep. N. S. 369; L. Rep. 6 Ch. 875.) It is true that in *Ex parte Boss*, *Re Whalley* (30 L. T. Rep. N. S. 474; L. Rep. 18 Eq. 375), Bacon, C.J. held that after a bankruptcy petition had been presented on the ground of a failure to comply with a debtor's summons, the petitioning creditor is not bound to accept payment, but is entitled to insist upon an adjudication upon proving his debt and the commission of the act of bankruptcy. But it would be very hard if a man, who may be perfectly solvent, must be adjudicated a bankrupt when he has *bond fide* disputed a debt which he was ready and willing to pay as soon as the court had decided that it was due. They referred to

The Bankruptcy Act 1869, ss. 7, 8, 9, 72.

J. A. Creed, for the respondents, the petitioning creditors.—The registrar was right in making the adjudication, all the requisites mentioned in the 8th section of the Act, having been proved. If the registrar had any discretion in the matter, he made a proper exercise of it, for the debtor failed to keep the understanding upon which the adjournment of the hearing from the 20th Dec. to the following day was consented to by the solicitor of the petitioning creditors, namely, that the debtor would be prepared on that day to make an arrangement to pay, not only the debt of the petitioning creditors, but also the debts of several other creditors for whom the same solicitor was acting.

At this stage their Lordships expressed a wish that the solicitor of the petitioning creditors should give evidence on this point. He was accordingly sworn, and, in answer to questions put to him by the court, he stated that he had consented to the adjournment only upon the faith of the above-mentioned understanding; and that, when the tender of the 150*l.* was made at the adjourned hearing, he refused to accept it on the ground that the other debts must also be paid.

Winlow, Q.C., in reply.

JAMES, L.J.—I am of opinion that the order of the registrar must remain. I will not say that there was an absolute obligation on the registrar to make an adjudication when the statutory requisites had been proved, but the debtor was ready and willing to pay the petitioning creditors' debt and costs. I can conceive a case in which, there being a *bond fide* dispute as to a debt, the alleged debtor might choose to attend before the registrar and resist the claim. Then suppose the registrar hears the case and comes to the conclusion that the creditor has established a debt, say, of 100*l.*, whereupon the debtor says, I will pay the 100*l.* and costs. In such a case I think it would be monstrously hard that a man should be made a bankrupt who had all along intended to pay the debt claimed, if it should be proved against him. It is not, however, necessary to decide that point now. Here the words of the Act of Parliament have been complied with; the requisites to an adjudication stated in the 8th section have been proved. The hearing of the petition was adjourned by consent for the purpose of an arrangement being made to pay not only the petitioning creditors' debt, but also the debts of other creditors, and that being so it was a breach of faith to use the adjournment for

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the purpose of making a tender of the petitioning creditors' debt only. There is, therefore, no equitable ground on which we can interfere with the legal right of the petitioning creditors.

BRAMWELL, J.A.—I am of the same opinion. I think the utmost we can say is that the registrar may, under certain circumstances, decline to make an adjudication when a tender has been made of the petitioning creditor's debt, in other words, that the registrar had a discretion. But in the present case I think the registrar was not bound to exercise his discretion, and refuse to make an adjudication, if he has such a discretion.

AMPHLETT, J.A.—I am of the same opinion. I have nothing to add except that our decision in this case must not be taken to mean that an adjudication must in all cases follow as a matter of course when the statutory requisites have been proved to exist. I can conceive such cases as the Lord Justice has referred to, in which the court might properly refuse to make an adjudication.

Appeal accordingly dismissed with costs.

Solicitor for the appellant, A. Leslie.

Solicitor for the respondents, G. B. Worman.

SITTINGS AT WESTMINSTER.

Thursday, Jan. 12.

(Before COCKBURN, C.J., BRETT, J.A., and AMPHLETT, J.A.)

BAKER AND ANOTHER v. OAKES AND ANOTHER. (a)

Costs—Order LV.—Application to judge after trial.

By Order LV., where any action is tried by a jury costs follow the event, "unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order."

Some time after a trial, in which plaintiffs obtained a verdict, the judge before whom the action was tried made an order on a summons taken out at chambers, that plaintiffs should pay their own costs subsequent to payment into court. No application was made at the trial:

Held, affirming the decision of the court below, that the application should have been made to a Divisional Court, and the judge had no jurisdiction to make the order.

APPEAL by the defendants from the decision of Kelly, C.B. and Cleasby, B., sitting for the Queen's Bench Division, reported ante p. 671, where the facts are stated.

Fullarton, for the defendants, used the same arguments as in the court below.

Geary, for the plaintiffs, was not called on.

COCKBURN, C.J.—I am of opinion that this appeal ought to be dismissed. The Judicature Acts, and the Orders and Rules made under them, among other things deal with the case of costs incidental to proceedings up to the time of trial and the returning of the verdict. There is a provision by which, while as a general rule costs are to abide the event, power is given to the judge at the trial to make an order respecting costs, when he thinks it right that there should be a departure from the general principles which are usually carried out by the Acts. There is also power given in the same Order—and it is an Order which by being made under the provisions of the Judicature

Acts, acquires the force of an Act of Parliament—to the court to make an order with reference to costs, so as to deprive the successful party of the costs to which he would otherwise be entitled. Now the question is, whether in the present case either of these courses has been pursued by the party who under the circumstances of the case unfortunately did not get the verdict. A witness made a slip, and unintentionally stated what was not the fact, and in consequence of that evidence the verdict passed for the plaintiffs, but the witness has since declared that he made a mistake, and if his evidence at the trial had been correctly given, the verdict as to the item to which that evidence related ought to have been the other way. As to the other sum (£1. 19s.), the verdict would stand, but then as to that, it appears that the defendants were misled by the particulars. There were grounds for an application for a new trial, and such an application was made, but in consequence of the sum for which the verdict was given being too small to entitle the defendant to a new trial, the application was refused. The question then arises what the defendants should do. No application had been made to the judge at the trial as to costs, but it was open to the defendants to apply to the court for an order. That course was not pursued; but they took out a summons before the judge at chambers to make an order, and the judge referred the matter to Huddleston, B., who had presided at the trial. The fact was overlooked that no application had been made to Huddleston, B., at the time of the trial. We have to decide, first, whether Huddleston, B., *quâ* judge at Nisi Prius, had jurisdiction to make the order. I am clearly of opinion that he had not, for, as the judge presiding at the trial, he was *functus officio*. The next question is, whether he had jurisdiction as a judge representing the court. It may be taken that the order was made by him as judge at chambers, and I am clearly of opinion that he had no such power, for the order says that where the application is not made to the judge at the trial, it is to be made to the court. Here there was an application to the court not to make an order in the exercise of original jurisdiction, but on appeal, and the court very properly decided that Huddleston, B., was acting *ultra vires* when he made the order. If an application were made to the court under Order LV., the court could deal with the matter, but the question is, can we deal with it now? I think not, for the case comes before us on appeal from the court below, and the decision of the court was right. We cannot make an order in the first instance ourselves; we can only say that the order now appealed against was right, without prejudice to an application to the court below under Order LV. The sections which were cited for the defendants do not apply here, but the special provision as to costs contained in Order LV. applies, and by that order the application must be made to the judge at the trial or to the court, but not to a judge at chambers. In the sections and rules by which jurisdiction is given to a judge at chambers, there is a special provision to that effect; but here it is provided that the judge at the trial or the court shall exercise jurisdiction, and if parties wish to vary the general rule as to costs, they must make an application for that purpose as provided by Order LV. The appeal will be dismissed.

BRETT, J.A.—In this case there has been a trial

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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by a jury, and the verdict was for the plaintiff for a small amount; an application for a new trial was made and was refused, so the case must be taken for the purposes of our decision as if the verdict was right. An application was afterwards made to Huddleston, B., in a peculiar way, to make an order as to costs. The application was not made at the trial, but was made afterwards in consequence of something which came to the knowledge of the defendants after the trial. The question now is whether Huddleston, B., had jurisdiction to make that order. It is suggested that he had jurisdiction in one of two ways, either because he was the judge who tried the case, or as deciding on a summons referred to him as judge at chambers. I think that he had not jurisdiction in either capacity. First, it is said, he had jurisdiction because he was the judge before whom the action was tried. Now the subject of costs is dealt with by Order LV., by which when an action is tried by a jury, costs are to follow the event; this gives costs to a successful plaintiff, but then the Order goes on, "unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court shall otherwise order." I think the case is not brought within that provision, for application was not made to the judge at the trial, and, therefore, a necessary condition is not fulfilled. But it is said that the judge could make an order enlarging the time by Order LVII., rule 6. It was argued that he was enabled to act under this rule, although an application was not made at the trial because the rule applies to a judge as well as to the court. But I think the phrase "a court or a judge" means the court sitting in banco or a judge at chambers. It never has been held to include a judge because he was the judge at the trial, where the application is made to him, neither as sitting in court nor as sitting at chambers. Therefore Order LVII. r. 6 does not enable Huddleston, B., to act, because he tried the case. Then it is said this last rule gave him power to enlarge the time for making the application. I cannot think that this is the true construction, for that would be to enable a judge to act, although the case was not within Order LV. Then it is said he had jurisdiction because he was the judge at chambers. If Order LV. contained the words "the court or a judge," this would be so, but the rules were drawn with great care, and I have no doubt that the words "or a judge" were advisedly omitted, because it was intended that the judge who tried the case should make an order at the time of the trial, when the facts were all fresh in his memory, and that if the general rule as to costs was to be varied after the trial, this was so important a matter that it ought to come before the court, and it was referred to the court advisedly. I think, therefore, that "the court" means a divisional court, and not a judge at chambers. But it is said that the Judicature Act 1873, has altered the law so as to give jurisdiction. I think that under sect. 39 of that Act a judge at chambers can do nothing which he could not have done before the Act, and such an order could not have been made at chambers before the Act, and therefore cannot now, for that section does not give jurisdiction. Then it is said that Order XLII. r. 22 applies, but no new fact has arisen here. Therefore Huddleston, B., had no authority in either or any capacity, and the order was pro-

perly set aside, and the judgment of the court below must be affirmed. We are asked to make an order ourselves, but we have no original jurisdiction, and can make no order except to decide that the decision was right.

AMPHLETT, J.A.—I am entirely of the same opinion.

Appeal dismissed with costs.

Solicitors for plaintiffs, *Abbott, Jenkins, and Abbott.*

Solicitors for defendants, *Hewitt and Alexander.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Thursday, Jan. 18.

RENNIE v. RATCLIFF.(a)

Prohibition—Jurisdiction of County Court—Cause of action—County Court Act 1867 (30 & 31 Vict. c. 142), s. 1.

Plaintiff brought an action in the County Court, within the district of which he carried on business, to recover a trade debt collected by the defendant at his place of business out of the district. The employment of the defendant by the plaintiff was by letter, written and posted within the district, but not answered by the defendant, who had never before the action been himself within the district. Upon a rule for a writ of prohibition to the County Court Judge, obtained by the defendant:

Held, that the cause of action or suit did not, in the words of sect. 1 of the County Court Act 1867, wholly or in part arise within the plaintiff's County Court district; and that the action could not be proceeded with.

THIS was an application on behalf of the defendant for a writ of prohibition to the County Court of Kent, holden at Canterbury.

It appeared from the defendant's affidavit, that he is an accountant, commission agent, and rent and debt collector, carrying on business at Chatham, out of the jurisdiction of the said County Court. He received the summons in this action, dated the 9th Sept. 1876, and marked "by leave of the registrar," and in obedience thereto he attended at the Canterbury County Court, on the 16th of Oct. 1876. When the case was called on, the defendant objected to the jurisdiction of the court, but his objection was overruled by the Deputy Judge who was then sitting; the defendant then withdrew and the case was adjourned.

On the 13th Nov. 1876, the day of adjournment, the defendant again attended at the Canterbury County Court, and again objected to the jurisdiction of the court. The Judge, who was then sitting, declined to entertain the objection which had been overruled by his deputy; and after hearing the plaintiff's case, the defendant taking no part in the matter and not being heard, the Judge gave judgment for the plaintiff for the whole sum claimed, £l. 15s. 9d., together with costs.

The plaintiff's case, as proved at the trial, was that he, being a draper at Canterbury, wrote to the defendant by post in 1874, requesting him to

(a) Reported by M. W. BELLAS, Esq., Barrister-at-Law.

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obtain payment of a debt due from one Brown, of 3*l.* 15*s.* 9*d.* to the plaintiff. The plaintiff wrote and received no answer to this letter, but the defendant, as he himself admitted, communicated with Brown, who lived out of the jurisdiction of the Canterbury County Court, and an arrangement was made by him with Brown's wife, at the defendant's office at Chatham, which was also out of the jurisdiction. According to this arrangement the amount of the debt was duly paid to defendants by instalments.

The defendants had previously transacted business for the plaintiff, the employment as in this case having been by letter; and their settlements had before always taken place between defendant and an agent of the plaintiff at the defendant's office. On this occasion the plaintiff's agent had not called as usual upon the defendant, and although ready to make the payment due to the plaintiff, the defendant defended this action, and objected to the jurisdiction of the court on principle.

The defendant had never transacted business, nor occupied an office, nor resided within the jurisdiction of the Canterbury County Court.

Byron for plaintiff, showed cause against the rule nisi for the writ of prohibition. This question of jurisdiction turns upon the words of the first section of the County Court Act 1867 (30 & 31 Vict. c. 142): "A plaint may be entered in the County Court, within the district of which the defendant, or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered, by leave of the judge or registrar, in the County Court, within the district of which the defendant, or one of the defendants, dwell or carried on business, at any time within six calendar months next before the time of action or suit brought, or with the like leave in the County Court in the district of which the cause of action or suit wholly or in part arose." The authority most nearly in point with the circumstances of this case seems to be *Taylor v. Nichols* (L. Rep. 1 C. P. Div. 242), where the defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea, where he resided. There was no statement as to the place from which the goods were sent; but after they had been received by the defendant, he wrote, in answer, to a letter written to him by the plaintiff's solicitor, in the City of London, demanding payment of the price, "I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim." Upon a rule for a prohibition to restrain the proceedings in an action brought in the Mayor's Court, this was held to be a sufficient admission of the debt to support an account stated, and to warrant the court in assuming that there was a cause of action arising within the jurisdiction of the Mayor's Court. [LUSH, J.—That case might have been an authority in your favour if the defendant had written to the plaintiff accepting his employment.] That would have been within the jurisdiction on the authority of *Evans v. Nicholson* (2) (32 L. T. Rep. 778), which cited *Dunlop v. Higgins* (1 H. L. Cas. 381).

Lyon for the defendant was not heard in support of the rule.

MELLOR, J.—The County Court judge has clearly no jurisdiction in this case.

LUSH, J.—I am of the same opinion.

Rule absolute.

Solicitors for the plaintiff, A. R. Steele.

Solicitors for the defendant, W. A. Willoughby.

Nov. 17, 1876, and Jan. 16, 1877.

RABBITS v. COX. (a)

Land-tax—Exemption—Site of a hospital—4 W. & M. c. 1, s. 5—38 Geo. 3, c. 5, s. 29—42 Geo. 3, c. 116, s.

Plaintiff was lessee of land which was the site of a hospital existing before the Land-Tax Acts 1692 and 1798, but removed by decree of the Court of Chancery in 1849, and then discharged from the charitable trust.

The Act of 1692 exempted all sites of hospitals, and by the Act of 1798, s. 29, all lands previously assessed were to be liable to be charged to land-tax, and no other lands, tenements, or hereditaments then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, should be charged to land-tax by that Act:

Held that the plaintiff was not exempt from the land-tax.

THIS was a special case stated for the opinion of this Court by consent of the parties, and pursuant to an order made under the 46th section of the Common Law Procedure Act 1852.

This was an action of trespass brought by the late Edward Harris Rabbits, and now continued by Mary Ann Rabbits, his executrix. The said Edward Harris Rabbits was the lessee of certain land and premises hereinafter mentioned, and this action was brought against the defendant who is the collector of land tax employed by the commissioners of land tax for St. George the Martyr, Southwark, for seizing the plaintiff's goods, and the case is stated for the purpose of obtaining the opinion of the court upon the question whether the plaintiff was liable under the circumstances set out in this case to be charged and assessed to land tax under 38 Geo. 3, c. 5, and 42 Geo. 3, c. 116.

1. In the commencement of the 17th century the wardens and commonalty of the mystery of fishmongers of the City of London, being a corporation commonly called "The Fishmongers Company," purchased the freehold of a plot of ground at Newington Butts, in the parishes of Newington and St. George the Martyr, Surrey.

2. On the 28th April 1615, Sir Thomas Hunt by his will of that date, gave to the said company 20*l.* a year to build an hospital containing houses for six poor men free of the company.

3. On the 18th Nov. 1616, the company received a sum of 50*l.* from one Robert Spence towards the erecting of twelve or more almshouses for the poor of the said company.

4. On the 26th May 1617, at a court of the said company, it was decided to lay out 400*l.* upon the erection of dwellings for twelve persons, including the purchase of the ground. Out of this money the plot of ground mentioned in paragraph 1 was purchased.

5. On the 2nd Oct. 1618, letters patent were obtained whereby James I., on the company's petition, granted licence to the then wardens of

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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he company to erect and establish in the parishes of Newington and St. George, in the county of Surrey, or one of them, one hospital or almshouse or the habitation and relief of so many poor people, men and women, free of the company, as the said wardens and assistants of the said company, and their successors, should seem fit, to be called St. Peter's Hospital, founded by the wardens and commonalty of the mystery of fishmongers in the City of London, in the parish of St. George in the county of Surrey; and the wardens and assistants of the said company for the time being were incorporated by the name of "The Governors of St. Peter's Hospital, founded by the wardens and commonalty of the mystery of fishmongers in the City of London, in the parish of St. George in the county of Surrey, and of the lands, possessions, revenues, and goods hereof," with power to use a common seal and to hold lands, &c., and to make laws and statutes for the government of the hospital.

On the 16th Nov. 1618, Wm. Hunt, Esq., son and heir of Sir Thomas, in accomplishment of his father's will, granted to "the governors of St. Peter's Hospital, &c." an annuity of 20*l.* to be employed as in the said Sir Thomas Hunt's will mentioned. This annuity was granted in lieu of the annuity left by Sir Thomas.

7. The governors of St. Peter's Hospital built on the land bought as aforesaid a hospital containing thirteen almshouses.

8. On the 23rd Nov. 1618, at a court of the company held on that day, it was ordered that there should be placed in the hospital at Christmas then next thirteen poor men and women, six of whom were to receive 2*s.* weekly.

9. Several other gifts have subsequently been made, under which the hospital has been maintained and increased.

10. Richard Edmonds, by his will, dated the 19th Dec. 1620, gave to the company a certain freehold tenement, in order that they might out of the rent, when sufficient had accumulated, build two almshouses to aljoin the almshouses of the said company, called St. Peter's Hospital. The testator afterwards corrected this devise by a codicil, giving the house to the Governors of St. Peter's Hospital, &c.

11. On the 9th Oct. 1626, these two almshouses were finished, and the almspeople were admitted into them and into another almshouse which had been then lately also erected by the Governors of St. Peter's Hospital.

12. Seven more almshouses were afterwards added to the hospital, which were erected by the governors at the expense of the company. The last mentioned ten almshouses were erected by the governors on the land purchased by the company, as mentioned in paragraph 1.

13. In 1636, the old hospital, as it has since been termed, containing the before-mentioned twenty-two almshouses, was completed, but it did not cover all the land purchased by the company as aforesaid.

14. On the 14th Aug. 1719, one James Hulbert by will gave all the residue of his personal estate to the company, to lay out so much thereof as they should think necessary for the erecting almshouses for the maintaining twenty poor men and women for ever, and the other part thereof was to go towards the maintenance of such poor persons and for keeping the said almshouses in repair, and

for defraying the charges and expenses of the trust. The said James Hulbert in his lifetime, by a letter addressed to the court of the company, expressed a wish that his intended almshouses should be erected on a piece of ground belonging to the company lying on the south side of St. Peter's Hospital, and that they should be governed by the same rules as were then in existence for governing such hospital. The piece of ground referred to was the remaining portion of the land purchased by the company as aforesaid, but which was not occupied by the old hospital.

15. From this bequest twenty additional almshouses were accordingly built, making the number forty-two, which were maintained by the governors and company till the removal of the hospital to Wandsworth.

16. In the year 1848 the company purchased the fee simple of a plot of ground at Wandsworth, the land tax of which was and is redeemed.

17. On the 27th July 1849, the Vice-Chancellor of England, by an order made in a suit instituted in the High Court of Chancery, on the information of her Majesty's Attorney-General, on the relation of John Money Wrench against the company, ordered that the company should be at liberty, at their own expense, to take down the said forty-two almshouses, and to erect an equal number of new almshouses in lieu thereof, upon the piece of ground belonging to the company at Wandsworth aforesaid, upon the terms of the company being allowed to appropriate to their own use the materials of the almshouses so to be taken down, and to appropriate and hold the site thereof discharged from the charitable trusts to which they were then subject as aforesaid.

18. The company accordingly took down the said forty-two almshouses, and erected an equal number of new almshouses in their stead upon the said ground at Wandsworth, which new almshouses have ever since been occupied and used for the purposes of the said charities.

19. When the land at Newington had been cleared under the authority of the order mentioned in paragraph 17, the plaintiff having entered into an agreement with the company for a building lease, erected a messuage on a portion thereof, and on the 8th March 1860 the said company demised such portion to the plaintiff with the said messuage erected thereon to him for the term of seventy-two years from the 29th Sept. 1858, at a peppercorn rent for the first year, and at a yearly rent of 12*s.* for the residue of the term.

20. The land included in such lease, situate in the parish of St. George, and now in the possession of the plaintiff, is a portion of the land purchased by the company as mentioned in paragraphs 1 and 4, and which from the year 1618 to 1850 was held for the uses and purposes before mentioned, and such land formed a portion of the site of the old hospital which was erected before 1636.

21. Neither the said land nor the buildings erected thereon were assessed to the land tax until the almshouses were pulled down after the making of the order of the High Court of Chancery as before mentioned.

22. In the year 1852, a building agreement was entered into by the said company with one Robert Davis Rea by which the said company agreed to grant to the said Robert Davis Rea a lease of the whole of the ground purchased by the company

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as stated in paragraphs 1 and 4 (including the land afterwards occupied by the said Edward Harris Rabbits), and the said land included in such building agreement was in the year 1854 assessed to the land tax at an annual value of 600*l*.

23. The said Robert Davis Rea paid the land tax upon such valuation for the year 1854, but such payment by the said Robert Davis Rea was not made with the knowledge or by the consent of the said company.

24. The plaintiff was first charged and assessed to the land tax for and in respect of the said land in his possession in the year 1860. He always refused to pay the land tax which has been made yearly since that year. In the month of June 1871, the defendant acting as the agent and collector of the commissioners seized on their behalf the plaintiff's goods for the purpose of enforcing payment of the sum of 227*l*. 5*s*. 10*d*., being the arrears of land tax alleged to be due up to that time. The heading of the land tax assessment is as follows :

"1860-61. In the parish tithing or place of St. George, south division, in the division of Southwark in the County of Surrey.

"An assessment made for granting an aid to Her Majesty by a land tax to be raised in Great Britain for the service of the year 1860, in pursuance of an Act passed in the 38th year of the reign of King George III. intituled 'an Act for granting an aid to His Majesty by a Land Tax to be raised in Great Britain for the service of the year 1798,' and of another Act passed in the 42nd year of the said king's reign, intituled 'An Act for consolidating the provisions of the several Acts passed for the redemption and sale of the land tax into one Act, and for making further provision for the redemption and sale thereof.'

Rentals.	Names of proprietors.	Names of occupiers.	Names or descriptions of estates or property.	Sums assessed and ascertained.	Sums assessed and not ascertained.
				£ s. d.	£ s. d.
600	Fishmonger's Co.	E. Rabbits	Repository Houses and	0 0 0	22 10 0
600	Mr. Rabbits	Mr. Rabbits	Warehouses	0 0 0	18 15 0

25. The difference between the sums of 125*l*. and 500*l*. represents the sum at which the commissioners assessed the annual value of the lands and houses now in the possession of the plaintiff over and above the rent reserved to the said company in respect thereof as hereinbefore stated.

26. The Act of 4 Will. & M. c. 1, which was passed in 1692, by sect. 25 provided that nothing therein contained should extend to charge any hospital for or in respect of the sites of the said hospital, and the 38 Geo. 3, c. 5, s. 29, enacted that all such lands belonging to any hospital, or almshouse, or settled to any charitable or pious use as were assessed in the fourth year of the reign of their late majesties King William and Queen Mary should be liable to be charged to land-tax, and that no other lands, tenements, or hereditaments, &c., then belonging to any hospital, or almshouse, or settled to any charitable or pious uses as aforesaid should be charged to land-tax by that Act.

27. Sect. 25 of the said Act 38 Geo. 3, c. 5, provides that nothing in that Act contained shall

extend to charge (*inter alia*) any hospital in England, Wales, or Berwick-upon-Tweed for or in respect of the sites of the said hospital, or any of the buildings within the walls or limits of the said hospital, or to charge any hospital or almshouse in England, Wales, or Berwick-upon-Tweed for or in respect only of any rents or revenues which on or before the said 25th March, 1693, were payable to the said hospital or almshouse, being to be received and disbursed for the immediate support and relief of the poor of the said hospital and almshouse only. And by sect. 26 it is provided that no tenants that hold and enjoy any lands, or houses, or other grant from the said hospitals or almshouses do claim or enjoy any freedom, exemption, or advantage by this Act; but that all the houses and lands which they so hold shall be rated and assessed for so much as they are yearly worth over and above the rents reserved and payable to the said hospitals or almshouses to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses.

The question for the opinion of the court is :

Whether the land in possession of the plaintiff is liable to be charged and assessed by the Land-Tax Commissioners to the land-tax.

If the court shall answer this question in the affirmative, judgment is to be entered for the defendant with costs.

If in the negative their judgment is to be entered for the plaintiff for 227*l*. 5*s*. 10*d*. with costs.

The *Solicitor-General* (Sir H. Giffard, Q.C., with him *Poland*), argued for the plaintiff.—The intention of the Legislature concerning the land-tax seems to have been to give to all existing hospitals the benefit of exemption as to the land they then occupied. Even when removed to other land, that benefit is continued by the improved price which the exemption would cause the land previously occupied to have produced for the proprietors in each case. The words of 38 Geo. 3, c. 5, s. 29, are sufficient to preclude the plaintiff's liability in this case.

E. Clarke (with him *Lyon*), for the defendant.—The case of *Lord Colchester v. Kewney* (L. Rep. 2 Ex. 253), was a decision of the Exchequer Chamber that no exemption attached to land devoted subsequently to the land-tax Acts to new hospitals. This very question was alluded to in the judgment of Willes, J., and the argument for exemption under such circumstances as these was said to be without basis as to its application to the point then before the court. Willes, J. said, at page 257, "First, as to the question of whether land used as a hospital at the time both Acts were passed, but since (as in the case of St. Thomas's Hospital) diverted to another purpose, must in its new use be taxed, it does not now call for decision. When it arises, it will probably be said on the part of the public, insisting upon its liability, that the reason for the exemption ceasing the exemption itself ceases: that it applied only so long as the land continued to be used in the state in which it then was. On the other hand it will be urged that the intention of the Act was to treat hospitals and other exempted institutions as having redeemed the land-tax, not only whilst they themselves used the land, but when they came to dispose of it. These would be the formulas which would have to be adopted as the expression

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of the two opposed views, but whichever view the court might adopt, it would not affect the present case, for it is obvious that no such considerations here arise."

The *Solicitor-General*, in reply.

Cur. adv. vult.

Jan. 16.—LUSH, J. delivered the written judgment of the court (Cockburn, C.J. and Lush, J.).—The question in this case is whether the site of an ancient hospital which was in existence before the passing of the Land Tax Act (38 Geo. 3, c. 5), and was, therefore, exempted from assessment to the land tax by the express provisions of that Act, still retains the exemption, although the hospital has been removed to another site, and the land has, by a decree of the Court of Chancery, been discharged from the charitable trusts. The history of the institution is stated in the case. It will be sufficient here to observe that the hospital was erected and chartered before the passing of the 4 Will. & Mary c. 1, that it was considerably enlarged in subsequent years, and that it was maintained until the year 1849, when a decree was made enabling the governors to take down the forty-two almshouses of which the charity then consisted, and to erect an equal number of houses upon another piece of ground which had been obtained for the purpose. This was done and the land, the site of the old foundation, was let to the plaintiff on a building lease. We took time after the argument to look into the Land Tax Acts, and we have come to the conclusion that the defendant's construction of them is the right one, and that the land has become and is chargeable to the land tax. The 38 Geo. 3, c. 5, made perpetual as regards the land tax by c. 60 of the same year, is in substance a re-enactment of the 4 Will. & Mary c. 1. But it is necessary to go back to the older statute in order to make the sections of the later Act intelligible. The 25th section of the Act of William and Mary provides that "nothing therein contained shall extend to charge any college or hall in either of the two universities or the colleges of Windsor, Eton, Winton, or Westminster, or the corporation of the governors of the charity for relief of poor widows and children of clergymen, or the college of Bromley, or any hospital for or in respect of the sites of the said colleges, halls, or hospitals, or to charge any of the houses or lands belonging to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas's and Bethlehem Hospital, or the said corporation of the governors for the relief of poor widows and children of clergymen, or the college of Bromley; nor to extend to charge any other hospitals or almshouses for or in respect only of any rents or revenues payable to the said hospitals or almshouses being to be received and disbursed or the immediate use and behoof of the poor in the said hospitals or almshouses only." The objects of this exemption are, first, the hospitals themselves; secondly, the houses or lands belonging to certain specified hospitals, and thirdly, the rents and revenues payable to any other hospital or the immediate use of the poor in them. By the next clause, sect. 26, the tenants of hospital lands are declared not exempt from chargeability so much as these lands are worth over and above the rents they pay. The 25th section of the present Act in like manner exempts these three classes of property, but with limitation as to the second and third class. It provides that nothing in the Act shall extend to charge "any hospital

for or in respect of the site of the said hospital or any of the buildings within the walls or limits of the same, or to charge any of the houses or lands which on or before the 25th March 1693 (the period when the 4 Will. & Mary was in force), and belong to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas, and Bethlehem Hospitals, or the corporation of governors of the charity for the relief of poor widows and children of clergymen, or the college of Bromley, or shall extend to charge any other hospitals or almshouses for or in respect of any rents or revenues, which on or before the said 25th March 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only." It will be observed that this Act, while it preserves the immunity of hospitals themselves, without regard to the date of their institution to the same extent as did the Act of Will. & Mary, limits the exemption as regards their sources of income to such lands, rents, and revenues as belonged to them on the 25th March 1693. The consequence is that hospitals erected since that period enjoy exemption from land tax as regards their sites, but not as regards any lands or rent which may belong to them as sources of income apart from the site of the hospitals themselves. And as regards ancient hospitals, viz., such as were in existence in 1693, if they have since acquired any additional lands not occupied as the site of the hospital itself, those lands are chargeable with the land tax. Hence the 42 Geo. 3, c. 116, contains provisions, which expressly enable governors of hospitals to redeem the land tax chargeable on the hospital lands. The 26th section of the Act in question, like the 26th section of the Act of Will. & Mary, makes the tenants chargeable for any excess of value over the rents they pay. The 27th section enacts that tenants who by the terms of their leases are bound to pay all taxes, shall be charged at the full value of their holdings. The 28th provides for settling disputes as to the lands which ought to be assessed, &c. Then comes the 29th, upon which a good deal of the argument was founded. It is in these terms "provided always, and be it further enacted that all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use as were assessed in the 4th year of the reign of King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid, and that no other lands, tenements, revenues, or rents, whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed, or assessed by virtue of this Act towards the said sum to be raised &c., anything herein contained to the contrary notwithstanding." This section, which it must be admitted is not happily framed, seems to us to be merely a corollary to the 25th section, and to be intended to emphasise the words of limitation we have just observed upon. For whereas that section says, that lands and rents, which were in 1693 exempted as belonging to a hospital, shall be still exempt, the 29th section adds what was necessarily implied, that all lands which were then assessed shall remain chargeable, and that lands which were not then assessed shall not be now assessed. It seems unnecessary to observe that both sections deal

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with hospital lands, lands belonging to or forming the site of an existing hospital. The land in question was the site of a hospital, and as such it was exempted by the express language of the 25th section until the erection of the new hospital on another site, when it became by virtue of the decree mentioned in the case, discharged from the charitable trust. So long as it was the site of a hospital, it was the subject of a special exemption conferred upon it in consideration of its eleemosynary character, but when it ceased to be so, it ceased to be within the 25th section, and fell under the general taxing clause. The act, as we have seen, does not exonerate all hospital lands. Why should it be supposed that the Legislature intended that lands once exempted from charge because they belonged to a hospital, should be for ever exempted though they cease to be hospital lands? There is not a word in the Act which shows an intention to perpetuate the immunity or to continue it longer than the land should be used for the special purpose in consideration of which the privilege was granted, nor can any reason be suggested why it should be. Our judgment is therefore for the defendant.

Judgment for defendant.

Solicitor for plaintiff: C. O. Humphreys.

Solicitors for defendant: Simpson and Palmer.

COMMON PLEAS DIVISION.

Tuesday, May 9, 1876.

MEYER AND OTHERS v. RALLI AND OTHERS. (a)

Judgment of foreign court—Sale of cargo ordered by foreign court—Constructive total loss—Suing and labouring clause—Marine insurance.

A cargo of rye shipped on an Austrian ship for carriage from Enos to Schiedam was insured by a policy warranted free from particular average. The ship was compelled by stress of weather to put into a French port. Part of the cargo suffered sea damage, and had to be in consequence sold at once. The remainder was warehoused. Afterwards, on the 21st Feb., the court, on the petition of the captain, ordered the sale of the remainder. Notice of abandonment was given to the insurers, the defendants, that in the opinion of experts the cargo could not be carried to Schiedam. The defendants refused to accept this notice, and on the 5th March the defendants, as insurers, summoned the captain before the court to have it decreed that there was no need to sell the said remainder. The court, after a further survey, reversed its former decision, and decided that the remainder was capable of being conveyed to Schiedam. Notice of this decision was given to the insured, together with notice that any course pursued with the cargo would be for their benefit, and on their responsibility. The remainder was not forwarded, but was warehoused until December, although it would have been possible to have forwarded it. The captain having forwarded considerable sums to meet the expenses caused directly and indirectly by the forced interruption of the voyage, was summoned before the French court, and on the 14th Sept. an order was made that the ship should be sold, and a statement of general and particular average of the ship and cargo drawn up, which was accord-

ingly done. On the 21st Dec. the court ordered the sale of the remainder of the cargo, on the ground that the weather was against its further preservation. On the 25th Jan. the court ordered the full amount of freight due upon the whole voyage from Enos to Schiedam to be charged on the proceeds of the cargo, and a statement of average was made out on this footing, and adopted by the court.

The said remainder of the cargo was sold on the 10th Jan. It was up to that date merchantable rye, and if carried to Schiedam at any time prior to its sale, would have fetched a price considerably more than the extra expenses properly incurred in respect of it and consequent upon the interruption of the voyage, including the cost of shipment to Schiedam. If the proportion of freight payable upon the said remainder under the above average statement was added to the aforesaid extra expenses, the amount would be more than what the remainder would have fetched at Schiedam.

Held, there was no constructive total loss of the cargo, the sale of the said remainder being rendered necessary by the delay and default of the captain, and not by the perils insured against.

Held, also, that it being found upon the special case that the judgment of the French court was clearly wrong in law, this court was not bound to treat it as correct, or give effect to it.

Castrique v. Imrie (23 L. T. Rep. N. S. 48; L. Rep. 4 H. of L. 414), considered.

Held, also, that the expenses which could be recovered under the "suing and labouring" clause were the expenses necessary to avert a total loss, and that they would be the expenses of unshipping the whole cargo and conveying it to the warehouse, separating that which could be carried on from the rest, and conditioning that which could then have been carried on.

This was a special case.

The facts and arguments sufficiently appear from the head-note and the judgments.

Cohen, Q.C. (McLeod with him), appeared for the plaintiffs.

Benjamin, Q.C. (Norman with him), appeared for the defendants.

The following authorities were cited or referred to during the argument:

Stringer v. English, &c., Marine Insurance Company, 22 L. T. Rep. N. S. 802; L. Rep. 4 Q. B. 676; L. Rep. 5 Q. B. 599;
Cammell v. Sewell, 3 H. & N. 617; 5 H. & N. 728; 27 L. J. 447, Ex.; 29 L. J. 350, Ex.;
Castrique v. Imrie, 23 L. T. Rep. N. S. 48; L. Rep. 4 H. L. 414; 39 L. J. 350, C. P.;
Farnworth v. Hyde, 12 L. T. Rep. N. S. 231; 18 C. B. N. S. 835; L. Rep. 2 C. P. 204; 34 L. J. 207, C. P.; 11 Jur. N. S. 349;
Rosetto v. Gurney, 11 C. B. 176; 39 L. J. 257, C. P.;
Messina v. Petrocchini, 28 L. T. Rep. N. S. 561; L. Rep. 4 P. C. 144; 41 L. J. 27, Priv. Co.;
Kidston v. The Empire Marine Insurance Company, 15 L. T. Rep. N. S. 12; L. Rep. C. P. 535;
Dent v. Smith, 20 L. T. Rep. N. S. 868; L. Rep. 4 Q. B. 414.

The judgment of the court was delivered by ARCHIBALD, J. The court consisted of Lord Coleridge, C.J., Grove and Archibald, JJ. It was a written judgment, and was as follows: This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye, valued at

(a) Reported by CYRIL DODD, Esq., Barrister at Law.

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2731*l.*, including 150*l.* advance, on a voyage from Enos to Schiedam, in the Austrian ship *Unico*, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of 2731*l.* The policy also contains the usual clause, that in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defence and safeguard and recovery of the said goods, merchandise, ship, &c., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute. On the 21st July 1865, the defendants had entered into a charter-party with one Faltata, of Venice, for the charter of the *Unico*, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn and carry it to Amsterdam or Schiedam direct, and had on the 2nd Nov. 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2343 English quarters, or 6800 hectolitres of rye, sound and in good order and well conditioned. The captain received at Enos 150*l.*, pursuant to the terms of the charter-party. He also signed a bill of lading. On the 8th Nov. the *Unico*, then laden with the said cargo in bulk, left Enos on the voyage. On the 14th Nov. the plaintiffs, through their agents, Messrs. Schroder and Bonniger in London, purchased from the defendants for 2735*l.* 8*s.* 6*d.*, the cargo in question, including freight and insurance to Schiedam, as per charter-party; and on the 21st Nov. the defendants handed to them the policy in question. During the months of November and December 1865, the *Unico*, on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo: and on the 14th Jan., after hoisting signals of distress, she was taken by a French fishing smack into the port of La Rochelle, in France. On her arrival there, the captain placed himself in the hands of Messrs. Admyvault and Seignette. Mons. Admyvault was the Austrian Consul, and his firm made all necessary advances of cash to the captain. Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first a portion, and eventually the whole of the cargo was landed and warehoused by order of the court. On the 10th Feb. 1866, a portion of the cargo, amounting to 5552 kilogrammes, was, by order of the Tribunal of Commerce, sold, and realised 8537*fr.* 65*c.* On the 21st Feb. 1866, on the petition of the captain, the court ordered the sale of the residue of the cargo by public auction. Immediately on receiving information of this order, on the 21st and 22nd Feb. 1866, Messrs. Schroder and Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that in the opinion of experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept. On the 5th March 1866, the defendants in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for a new survey to be ordered. The Tribunal of Commerce thereupon ordered that the sale of the rye should be provisionally

suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible by continuing the expedients of manipulation and ventilation to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination. On the 14th March, the surveyors having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well re-shipped and conveyed without any danger to Schiedam, recommending that, if not re-shipped very speedily, it should be subject to ventilation once a month until the moment of its being put on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said court, and notice of it was given to the plaintiffs on the 17th March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account, and on their responsibility. On the 11th May, 1866, the Captain of the *Unico*, applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight, and cargo. On the 6th June the Captain filed a petition in the Tribunal of Commerce, stating that he had been unable to effect a loan on bottomry, and asking the Tribunal to declare the ship unnavigable under Articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition. On the 21st June, 1866, Messrs. Admyvault and Seignette, who had made considerable advances to meet the several expenses caused directly and indirectly by the forced interruption of the voyage summoned the captain before the Tribunal of Commerce, to show cause why in default of payment to them of 20,000 francs within a fortnight from that date, they should not be authorised to sell for account of whom it might concern the said ship and the remainder of the cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th July, 1866, after service of the last mentioned summons, Captain Lucovich issued a summons to the underwriters, and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties. The summons of the 21st of June came on for hearing on the 14th of Sept. 1866, in the absence of the defendants or any person appearing on their behalf, when the Tribunal ordered the sale of the ship *Unico*, and a statement of general and particular average of the ship and her cargo to be drawn up, which was accordingly done. On the 22nd of Oct. Messrs. Michel et fils, having on behalf of the plaintiffs, made a claim for payment of 3780 francs for the advance freight paid to Captain Lucovich, and the Captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th Sept. 1866, and a summons to attend on all subsequent proceedings. The plaintiffs had not, prior to the 23rd of Oct., informed the master

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of the *Unico* that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to any of the proceedings. On the 21st Dec. 1866, the Tribunal of Commerce remanded to the 25th Jan. then next the decreeing respecting the statement of average; but nevertheless, on several grounds, among others that the state of the weather was unfavourable to its preservation, ordered the sale of the remainder of the cargo of the *Unico*, and the purchase-money was ordered to be paid over to Messrs. Admyvault and Seignette, to cover the advances made by them, which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required by the law—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On the 10th Jan., under the said order, the remainder of the cargo was sold by public sale at La Rochelle, and realised a net sum of 27,830fr. 30c. The total agreed freight of the cargo from Enos to Schiedam was 16,695fr. 95c. Of this, 3780fr. (150l. sterling) was, as already stated, advanced at Enos, leaving 12,915fr. 95c. unpaid. On the 25th Jan. the Tribunal of Commerce, by its judgment, declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advance to the captain on account of freight at Enos must contribute to general average, and referred back the statement to the average stater for the purpose of modifying the calculations therein; keeping in view, first the said judgment, secondly the sum realised by the sale of the rye, thirdly the various costs in the suit. The Tribunal also said that the average staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum realised by the sale of the cargo. The plaintiffs in this action were summoned through their agents, Messrs. P. Michel et fils, to appear in these proceedings, but they made default, and the judgment of the 25th Jan. was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the Procureur Imperial according to French procedure, but not received by the defendants. On the 24th May 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915fr. 95c. remaining due on account of freight, with interest from the 11th July 1866, to the time of payment, and ordered that sum, being, as stated in the judgment, secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyvault and Seignette as consignees. The said sum, together with 1000 francs damages and interest thereon from the 28th June 1867, together with an additional sum for costs subsequent to that date, was paid alternately at La Rochelle to Captain Lucovich after divers proceedings taken by him against the plaintiffs out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the first instance, dated the 7th Aug. 1867. It is stated in

paragraph 52 of the special case that, by the law of France, the Tribunal of Commerce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees, but that it is a court of first instance of inferior jurisdiction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which, if made, is usually decided in four or five weeks, and that no appeal was taken on the part of the plaintiffs. It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th Jan. 1867, was in March 1866 and in Jan. 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam, a price considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th Jan., under the said average statement is to be taken into account, and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March 1866 or Jan. 1867. The questions which arise in the case are: First, whether there was a constructive total loss of the cargo; Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the sue and labour clause. For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what, under the circumstances, was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances was not entitled to full freight upon the cargo landed there; but that by Article 296 of the Code de Commerce, he was bound to hire another vessel to carry on the cargo to its destination, and if unable to hire a vessel, was entitled to *pro rata* freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to its destination. The case also states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th Jan. was unmerchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination. It is quite clear, therefore, that if the captain had done his duty the portion of the cargo sold on the 10th Jan. 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle (*Rosseto v. Gurney*, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts, on this simple state of the case? In the view which we take, we

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do not consider it material, for the purpose of dealing with the question, whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle, prior to the order of the 21st Dec. 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments *in rem*, or in the nature of judgments *in rem*, and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th Jan. 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment *in rem*, and apart from the fact that the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (*Reynolds v. Fenton*, 3 C. B. 187), that they might have appeared and defended, there is this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before, that upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed. The remark that the defendants were no parties to the judgment equally applies to the judgment of the 7th Aug. 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyvault and Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the declaration that the residue of the cargo which was sold on the 10th Jan. 1867 should bear its entire proportion to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs. It is a matter of nicely how far a judgment of a competent foreign court *in rem*, or between the same parties, is examinable here. The authorities on the subject are all collected in Story's Conflict of Laws, §§ 547 *et seq.*, and in the notes to *Doe v. Oliver* (2 Sm. L. O. 751 7th edit.), and need not be referred to in detail. In the late case of *Schibsby v. Westernhols* (L. Rep. 6 Q. B. 155; 24 L. T. Rep. 93), the principle on which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a "court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it is a defence to the action:" (See *Schibsby v. Westernhols*.) This principle is also assumed and acted on in *Goddard v. Gray* (24 L. T. Rep. N. S. 89; L. Rep. 6 Q. B. 139), where the majority of the court held that the judgment was

binding, notwithstanding that it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on. In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (Article 607): "It is easy to understand that the defendant may be able to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law *fori rei judicatae*. To such an extent the doctrine is intelligible and practicable." In *Oastrique v. Imrie* (23 L. T. Rep. 348; L. Rep. 4 H. of L. 414), the House of Lords upheld a decree *in rem* of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that the foreign law being ascertained as a matter of fact in the case, the French court, with every honest endeavour to be right, was liable without any fault to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But in that case in delivering the opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (23 L. T. Rep. N. S. 348; L. Rep. 4 H. of L. 414), "we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law." And in the case *Becquet v. McCarthy* (2 B. & Ad., at p. 957), Lord Tenterden had said before, "we ought to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground," implying that if it clearly appeared to be wrong the court would not give effect to the judgment. Here the court expressly professes to proceed on the ground of French law; and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary, to use the words of Blackburn, J., clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Oastrique v. Imrie* (*sup.*) to have given effect to it; but it is a declaration of French law which is wrong. Under these circumstances we are of opinion that there is no rule of comity, and no principle on which we are called upon to give effect to such a judgment, and that *pro rata* freight only was payable on the cargo at La Rochelle. If then freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th Jan. 1867, would have realised at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss: (see *Rosetto v. Gurney*, *sup.*) We must, however, consider the effect of the order of the 21st Dec. 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case, constitute a total loss. Now, although the sale may have been valid and binding, and the plaintiff may thereby

have been deprived of the goods : (see *Cammell v. Sewell* (2 L. T. Rep. 799; 3 H. & N. 617; 5 H. & N. 728), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which, if forwarded at any time between the time of its landing at La Rochelle, and the time of its sale some twelve months after, would have realised at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent on the interruption of the voyage. Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty. But it was strenuously argued on behalf of the plaintiffs, that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied that right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz., that though acceptance of the notice had been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable. Being then of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question—whether the plaintiffs are entitled to recover anything, and how much, under the sue and labour clause? It was argued on behalf of the defendants, that at the time the rye was unshipped it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermentation from sea water, which if it had been allowed to go on would (and we feel constrained to draw this inference), in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo. It cannot be contended, since the case of *Kidston v. Empire Marine Assurance Company* (sup.), that the warranty "free from particular average" excludes the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of *Great Indian Peninsula Company v. Saunders* (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and *Booth v. Gair* (9 L. T. Rep. 386;

33 L. J. 99; 15 C. B., N. S., 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kidston v. Empire Marine Assurance Company* (sup.). A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation and to the separation of the sound part from that which was irreparably damaged. But, once conveyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation. We are of opinion, therefore, that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th Jan. 1867. As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *Mattheus*.

Solicitors for the defendants, *Markby, Tarry, and Stewart*.

Nov. 20, 1876, and Jan. 11, 1877.

DICKSON v. REUTER'S TELEGRAPH COMPANY (a)

Telegraph company, liability of—Telegram wrongly delivered—Consequent damage.

A telegraph company does not guarantee to mere receivers the accuracy of telegrams passing over its wires.

Playford v. United Kingdom Electric Telegraph Company (L. Rep. 4 Q. B. 706; 17 L. T. Rep. N. S. 243), followed.

DEMURRER to statement of claim, which stated in effect that the defendants by mistake delivered to the plaintiffs a telegram intended for another firm; and that the telegram was acted upon, whereby the plaintiffs incurred loss.

Watkin Williams, Q.C. and H. D. Greene, for the defendants, relied on

Playford v. United Kingdom Telegraph Company (ubi sup.).

Herschel, Q.C. and Buller, for the plaintiffs, argued that the company were liable, because, first, they made a statement, false to their knowledge, with intent that the plaintiffs should act upon it, and the plaintiffs did act upon it;

Cornfoot v. Fowke, 6 M. & W. 358;

secondly, they, though without fraud, misrepresented their authority to send the telegram to the plaintiff;

Collen v. Wright, 8 E. & B. 647;

Randall v. Trimen, 18 C. B. 786.

(a) Reported by S. HARR, Esq., Barrister-at-Law.

and, thirdly, their business was such that, if negligently carried on, it was dangerous to the public, and they did negligently carry it on.

W. Williams, Q.C., in reply.

Jan. 11, 1877.—The judgment of the court (Lord Coleridge, C.J. and Denman, J.) was delivered by DENMAN, J.—This was a demurrer to a statement of claim which alleged in substance as follows: The plaintiffs were merchants at Valparaiso, being a branch house of a firm carrying on business under a different style at Liverpool. The defendants, a telegraph company, with its chief offices in London, had agencies in Liverpool and elsewhere, including Monte Video, but not at Valparaiso. The defendants had a system of forwarding the messages of several senders in one packed telegram, each message being distinguished by a cypher known to the defendants and their agents and to the sender, which on receipt of the packed telegram were transmitted to their proper recipients. On the 26th Dec. 1874, the plaintiffs at Valparaiso received a message transmitted by the defendants from Monte Video, purporting to be an order from the plaintiffs' Liverpool firm for a large shipment of barley. No such message was in fact sent by the Liverpool firm, nor was the message sent intended for the plaintiffs. The misdelivery of the message was caused by the negligence of the defendants or their agents, and caused serious loss to the plaintiffs in consequence of the fall in the market for barley. Under these circumstances, it was contended by Mr. Herschel, in a very able and ingenious argument, that the defendants were responsible. We took time to consider, owing to the importance of the case; but, after referring to the cases cited by Mr. Herschel, we come to the conclusion that the case is in effect governed by the decision of *Playford v. United Kingdom Electric Telegraph Company*, and that our judgment must be for the defendants. In that case an action was brought against a telegraph company by the receiver of a telegraphic message, in which by a mistake of the defendants' clerk an offer of 28s. per ton had been changed into an apparent offer of 27s. per ton. The senders of the telegram having refused to accept the goods except at 28s., the intending vendors sued the telegraph company; but the Court of Queen's Bench held that, inasmuch as the only liability which could exist must be one arising out of some contract, and inasmuch as the only contract made by the company was one with the purchasers and not with the plaintiffs, the latter could have no right to recover against the defendants. Several American authorities were cited in support of the plaintiff's claim in that case, which were to the effect that either a contract with, or a duty towards, the receiver of a telegraphic message arises from the relation between the parties or the nature of the business; but the Court of Queen's Bench declined to recognise these authorities (see the judgment, p. 714), and held that the plaintiff, being a stranger to the contract with the company, could not maintain an action. In the present case, Mr. Herschel contended, first, that the defendants were liable because they had made a statement false to their knowledge, in the sense that they had the means of knowing its falsity, and that the plaintiffs, having acted on that statement to their loss, were entitled to recover damages. This appears to us to be equivalent to a contention that

a telegraph company, having no contract with any individual except the sender, must be supposed to guarantee towards all mankind the accuracy and care of all its servants in all parts of the globe whenever they deliver a message—to such an extent, at least, as that, if through the negligence of any of its servants at any stage of the transmission a message should be sent to the wrong person, that person, if he acted upon it to his detriment, would have an action. This seems to us to be a contention inconsistent with the law as laid down in *Bawlings v. Bell* (1 C. B. 951), and approved of in *Ormrod v. Huth* (14 M. & W. 651), in the Exchequer Chamber, “that an injury caused by a statement false in fact, but not so to the knowledge of the party making it, or made with intent to deceive, will not support an action” (see 2 Smith's Leading Cases, 7th edit. p. 87), nor do we think it would be reasonable to imply any such contract of indemnity from the nature of the dealing between the parties. Mr. Herschel next contended that the defendants were liable upon a suggested analogy between this case and that of *Colten v. Wright* (7 E. & B. 301; s. c. 8 E. & B. 647), and *Randell v. Trimen* (18 C. B. 786); but we can see no real analogy between those cases and the present. Those cases only decided that where an agent professes to have the authority of a principal to make a contract, having no such authority, he is liable to an action founded on his implied promise that he had the authority which he professed to have; in other words, that he was what he represented himself to be, viz., an agent having authority to contract as agent: (see 2 Smith's Leading Cases, 7th edit. p. 380.) But it is impossible to say that a telegraph company makes any such profession, or is an agent in any such sense, even where a message such as that in question is correctly forwarded. The telegraph company is at most a mere forwarder of messages, and is not bound to understand the object of the sender, and it would be wholly unreasonable to hold that, if the company forwarded a contract by the mistake of a servant for 25s., when the sender only despatched a contract for 28s., the company would be liable, on the ground that it professed to be an agent authorised to make a contract either for 25s. or at all. The company do not profess to carry on the business of agents to make contracts any more than the post office. This argument, therefore, fails. Mr. Herschel's third argument in favour of the liability of the defendants was substantially the same which prevailed in the American courts, but which was disposed of by the judgment in *Playford v. United Kingdom Electric Telegraph Company*. It was to the effect that the business carried on by the defendants was of such a nature as to require extreme accuracy, and, therefore, to involve the necessity of such a liability as that contended for. This appears to us to be the same thing, in other words, as to say that a guarantee of accuracy is to be implied, at least so far as to give anyone receiving a message a right of action, if damaged by the receipt of an inaccurate message owing to any negligence of any servant of the company at any stage of the transit, even though the recipient be not a contracting party with the company. This would, in our opinion, be imposing a liability upon telegraph companies inconsistent with the real understanding of mankind as to the duties they undertake and the liabilities they incur, and prac-

tically extending the primary undertaking of the company with the sender of a message into an implied undertaking with all mankind to guarantee everybody against the consequences of the delivery of a message to the wrong party, through any negligence of any one of its servants employed in the transmission of a message from the remotest part of the world. So to hold, we think, would be to overrule the limitation contained in the judgments above referred to in the cases of *Rawlings v. Bell* and *Ormrod v. Huth*, and to impose a liability greater than any which the law can imply either from the employment of the company or from the nature of the business carried on by it. It would also be inconsistent with the decisions in *Playford v. United Kingdom Telegraph Company* and *Alton v. Midland Railway Company* (19 C. B., N. S., 213; 12 L. T. Rep. N. S. 703), which confine the right of action for an injury resulting from a breach of duty arising out of a contract to the party with whom the defendant contracts. For these reasons, we are of opinion that the defendants are entitled to our judgment.

Solicitors for the plaintiff, *Eyre and Co.*

Solicitors for the defendants, *Johnson, Upton, and Co.*

Thursday, Jan. 11.

FREDERICI v. VAN DER ZEE. (a)

Practice—Writ specially indorsed—Signing judgment—Affidavit of plaintiff's attorney—Order III., r. 6—Order XIV., r. 1.

The affidavit calling upon a defendant to show cause why the plaintiff should not sign judgment upon a writ specially indorsed must be sworn by the plaintiff in person.

MOTION for a rule to set aside an order of a judge at chambers.

The plaintiff, a merchant residing at Smyrna, sold a cargo to the defendant, for the price of which this action was brought. The writ of summons was specially indorsed, and the plaintiff's attorney applied to a master for leave to sign judgment. The application was supported by an affidavit, which stated the attorney's belief as to the following facts:—The receipt of the cargo by the defendant, its price, that there had been some promise to pay, and that there was no defence to the action; but added that the deponent had no personal knowledge of the matter.

The master ordered judgment to be signed for part of the amount, believing that there was a defence to the rest; and the order was confirmed by Lush, J., in chambers, who considered that there should be a discretionary power in such cases.

J. C. Mathew, for the defendant.—The facts show that the plaintiff himself could not have sworn that he believed there was no defence to this action. There is no discretion given to the judge in these cases. I refer to sect. 50 of the Common Law Procedure Act 1854, the very language of which is here used. Upon that section it was decided, in the cases of *Herschfeld v. Clarke* (11 Ex., 712), and *Christopherson v. Lotinga* (15 C. B., N. S., 809; 9 L. T. Rep. N. S. 688), that the affidavit referred to in the section mentioned must be sworn by the party himself, and not by his attorney. *Kingsford v. Great-Western Railway*

(a) Reported by S. HARE, Esq., Barrister-at-Law.

Company (16 C. B., N. S., 761; 10 L. T. Rep. N. S. 722), which is against me, was the case of a company.

Bowen, for the plaintiff.—I would ask the court whether, in no case, however favourable, the affidavit might be made by a person other than the plaintiff. Suppose the case were a far better one than any affidavit of a plaintiff could make, such as an admission by the defendant of his liability, would not the court hold that judgment might be signed without an affidavit of the plaintiff? The words of the rule are that such an affidavit shall be sufficient, but not that nothing else shall be. It is intended to point out the usual course to be followed. Here the plaintiff is abroad, and cannot immediately swear the necessary affidavit. It is possible that delay may be fatal.

Mathew in reply.

GROVE, J.—I am of opinion that this rule should be made absolute. The words of Order XIV., r. 1, are, "Where the defendant appears on a writ of summons specially indorsed, under Order III., r. 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call upon the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs," &c. The question is not entirely whether in every case the affidavit must be made by the plaintiff in person. If, in order to save time, the defendant were to come before a judge and dispense with an affidavit, whether the judge would then have jurisdiction is a point upon which I give no opinion. That is not the present case. Here we have the plaintiff coming to ask the court to call upon the defendant to show cause; and, instead of making an affidavit himself, and verifying his own belief, he offers us the affidavit of his attorney, verifying the attorney's belief, in which affidavit the attorney says he has no personal knowledge of the matter. It is one thing for a man who knows all his rights, and has been a party to the disputed transaction, to make an affidavit, and another thing for an attorney to make an affidavit. If we act upon the affidavit of an attorney, why should we not act upon the affidavit of the managing clerk of an attorney? Even supposing the party making the affidavit acts *bona fide*, the principle is a bad one; for, notwithstanding his *bona fides*, he may make his affidavit upon the false representation of other parties. This is not a proceeding of common right, but a summary proceeding to prevent delay in an undefended action. The Legislature intended to place some limit upon its exercise, and therefore requires the plaintiff to pledge his own belief that there is no defence. That is the essence of the rule. Inconveniences may arise; but their effect can be only to take the case out of the reason of the special remedy, and to throw it back upon the ordinary remedy. The plaintiff must run the risk of a prosecution for perjury before he can obtain the privilege. It may be inconvenient, if, as in this instance, the plaintiff is abroad; on the other hand, if an affidavit by an attorney or his clerk were admitted, an opening for perjury might be made. It is a case of balance of inconveniences. They would be greater in the last case. An affidavit by the plaintiff himself is necessary, and it must verify the cause of action.

and swear that the plaintiff believes there is no defence. Upon that affidavit judgment is not final, but only calls upon the plaintiff to show cause. As to the question of waiver, we must turn to the words of the rule, and construe them according to their plain literal sense. Ord. XIV., r. 1, proceeds, "And the court or judge may, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defence to the action on the merits, or disclose such facts as the court or judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly." The words of this part of the rule are "defendant, by affidavit or otherwise;" and if the Legislature intended to use in the previous part of the rule a similar form of words, "plaintiff, by affidavit or otherwise," it should have done so. The cases cited of *Herschfeld v. Clarke*, and *Christopherson v. Lotinga* support this view, and decide that in somewhat similar cases the party himself must make an affidavit. Though not exactly similar, they are sufficiently applicable to guide me in giving my judgment. Counsel argued that an affidavit by the plaintiff could not be made when the action is brought by a corporation. Perhaps the words of the rule are inapplicable to such a case. The case of *Kingsford v. Great Western Railway Company* was one of a corporation; and their officer was permitted to make the affidavit.

DENMAN, J.—I am of the same opinion. Order XIV., r. 1, contains a power entirely new in favour of plaintiffs who can state on oath their beliefs that the causes instituted by them are substantially undefended. It is one which in my opinion ought to be strictly confined to cases which the words are apt to meet. It would be beside the question to speculate as to whether larger powers should have been given. We must construe the words before us. It appears to me that, without doing absolute violence, we could not stretch the rule to cover the present case. It would be most dangerous if we were to decide that we could alter rules because we do not think they meet the convenience of the parties before us. We must not legislate, but follow the statute.

Rule absolute. Costs to be costs in the cause.

Solicitors for the plaintiff, *Freshfield and Williams*.

Solicitors for the defendant, *Simpson and Cullingford*.

Thursday, Jan. 11.

NORRIS v. BEAZLEY. (a)

Practice—Pleading—Rejoinder—Order XXIV., r. 2—Order XIX., r. 18—Order XIX., r. 4—Appeal from chambers—Time—Order LVII., r. 6.

Application for leave to rejoin specially, when the Court in the exercise of its discretion considered a rejoinder unnecessary, refused.

THIS was a motion under Order XXIV., r. 2, for leave to rejoin specially. Leave had, in the first instance, been given by a master, but it had been rescinded by Pollock, B.

The action was upon a bill of exchange. The statement of claim alleged that in May 1876 the defendant agreed to purchase from the plaintiff

(a) Reported by B. HALL, Esq., Barrister-at-Law.

the steamship *Marie*, then lying at Bilbao, for the sum of 3500*l.*, and that the bill sued upon was for 500*l.*, part of that amount.

The defence set up was that Beazley was only a trustee for the Niger Company, and that the purchase of the ship was induced by fraudulent concealment and warranty. It also alleged that neither the defendant, nor any person on his behalf, saw her. A counter-claim for consequential damages was added on the ground of misrepresentation.

The plaintiff replied that the ship was inspected by one Capper, a member of the defendant's own company, and joined issue upon the defence.

The defendant joined issue on the reply.

1. The special rejoinder was that Capper had an interest in the sale of the ship, and had colluded and conspired with the plaintiffs to induce the defendant to purchase the ship.

2. More than eight days had elapsed from the time of the making of the order at chambers, but the time for appealing had been extended by consent.

W. A. Lewis, for the plaintiff, took the preliminary objection that the defendant was out of time, and cited *Crum v. Samuels* (46 L. J. 1, C. P.).

The Court (Grove and Denman, JJ.)—Parties must not exercise the jurisdiction of the Court, and extend time by mutual consent. We do not accept such consent; but regard orders as to time as compulsory. In the present case we will now extend the time to appeal.

Crump, for the defendant.—By Order XXIV., r. 2, leave to rejoin is necessary. The plaintiff has pleaded specially. I wish to set up a special defence. The fact of Capper having seen the ship was only raised by the reply. The plaintiff being thus at liberty to raise the point without amending his statement of claim, the defendant is entitled to the same privilege. The counter-claim raised the question of misrepresentation; and a counter-claim is merely a statement of a defendant's claim. The pleadings are in this state: Defendant charges, "You misrepresented the state of the ship." Plaintiff answers: "But you saw the ship." Defendant seeks to reply. "If Capper saw the ship, Capper was guilty of fraud." The case is exactly parallel to one in the Court of Appeal, *Hall v. Eve* (LAW TIMES, 30th Dec. 1876) where the claim was for specific performance, the defence was forfeiture, and the reply (which was allowed), was leave and licence. This is a matter in which a rejoinder is desirable for the ends of both parties.

Lewis, for the plaintiff.—Pollock, B., offered to allow the defendant to amend his statement of defence on payment of costs, but refused him leave to rejoin, on the ground that it would cause a departure, which could not be allowed. The departure is plain. The statement of defence says that neither the defendant, nor any person on his behalf, saw the ship. The reply traverses that statement. A new ground is then set up, the defendant says if his agent did see the ship, he was a fraudulent agent. Such a charge only makes the rejoinder still more objectionable.

Crump, in reply.—Fraud must be pleaded specially, Order XIX., rule 18. The plea of not guilty and justification are allowed in libel. The defendant does not admit that Capper was a member of his company.

GROVE, J.—I am of opinion that this rule should

be discharged, and that the learned judge rightly exercised his discretion in disallowing a rejoinder of matter which might have been set out in the statement of defence. By setting it out there the defendant would have obtained all that he wanted. That was the proper time to plead it, and it must then have been within his knowledge. Either Capper was a member of the defendant's company, or he was not. If he was, and yet committed a fraud upon them by collusion with the plaintiff, that fact might have been set up in their statement of defence. And supposing the defendant considered it obligatory upon him to place the fact upon the pleadings, he should have done so in his statement of defence. It would give rise to very great confusion if, under the new system of pleading, a rejoinder were permitted, which was, in effect, only the matter contained in a statement of defence stated in a more detailed way. The Lord Justice James, in the case of *Hall v. Eve*, correctly said that if the rules had provided that the plaintiff should say what he had to say by means of an amendment of his statement of claim, the court would have been bound by them. That is exactly the case here. The rules bind us, and we must follow them. If this application were allowed the defendant would have the advantage of double pleading. He would be permitted first to state that he had not seen the ship, and then to plead that his agent had seen it under certain circumstances; permitting this would cause greater embarrassment than refusing it. General rules are necessary in order to put a stop to lengthened pleadings such as were in vogue under the former system.

DENMAN, J.—I am of the same opinion. Mr. Lewis said that the learned baron refused leave to rejoin on the ground that the matter sought to be added would cause a departure. I cannot exactly adopt that view. I hold that it would be objectionable as a repetition. For some time I agreed with Mr. Crump that the rejoinder was proper because there did seem to be new matter to be introduced; but that is not my present view. I now think that the statement of defence and counter-claim between them included all the matter now sought to be amplified by means of the rejoinder. This appears from the very words of the proposed rejoinder itself. It refers to the conspiracy, collusion, and concealment, "in the defendant's counter-claim alleged." If Capper was a party to a misrepresentation the fact might have been set out in the counter-claim; or it might have been given in evidence that he and the plaintiff conspired together. The learned Baron gave permission to the defendant to amend his counter-claim if he thought that Capper ought to be named in it, but a rejoinder was not rendered necessary by the mere statement of the plaintiff in his reply that Capper was a member of the defendant's company. The judgment of the learned Baron upon this point ought not to be set aside. Pleadings should be as short as they reasonably can be, provided they raise the points in issue between the parties, and matters of evidence are not to be introduced into them. Allowing this rejoinder would be to disregard Order XXIV., r. 2, and Order XIX., r. 4 against pleading evidence. *Rule discharged with costs.*

Solicitors for plaintiff, *Trinders and Curtis Hayward*.

Solicitors for defendant, *Brook and Chapman*.

Friday, Jan. 12.

NORRIS v. BRAZLEY.(a)

Joinder of parties—Adding a defendant.

The defendant, on behalf of himself and the members of a projected company, purchased a ship from the plaintiffs. The ship was delivered by the plaintiffs to the company who paid 3000l., out of 3500l., the amount of the purchase money, to the plaintiffs. The defendant had accepted a bill for the remaining 500l. In an action against him on this bill, he applied to join the company as defendants.

Held, that the company were not within Order XVI., r. 13.

UNDER the circumstances stated in the headnote

Crump moved to rescind an order of *Grove, J.*, refusing leave to add the company as defendants under Order XVI., r. 13.

W. Arnold Lewis opposed on the part of the plaintiffs.

The arguments of counsel will appear from the judgments of the learned judges.

LORD COLERIDGE, C.J.—This is an application on the part of the present defendant for leave to add a defendant to the record. The action is upon a bill of exchange of which the defendant is the acceptor. He pleads a number of pleas, one of which sets up a case of fraud by which he says he was induced to accept the bill. The facts are these: A ship was bought on behalf of the Niger Merchants (Limited), who were not at the time an incorporated company, and she was subsequently transferred to them. They have a ground of complaint against the plaintiff, giving rise to a counter-claim in which is set up a charge of fraud. The plaintiff replies, and the defendant now moves for leave to add the Niger Company as defendants. The company it seems are willing to be so added; whilst the plaintiffs made some objections on the merits which are not very material. The whole question is one of procedure. Order II., r. 6, directs that the procedure under the Bills of Exchange Act shall be continued. Under that Act the application could not have been made at all. But it is not necessary to decide the question upon that Act, because by Order XVI., r. 13, it is enacted that the name of any party who ought to have been joined may be added on certain terms. If this rule were unqualified I should have acceded to Mr. Crump's application. His case is this, "I am merely a nominal defendant, the real defendants are the Niger Company, who have a large counter-claim in respect of a cause of action of which this bill of exchange is only a part; and their counter-claim would be a substantial one if the action were brought against them. I am only a trustee." If matters stood there, I should have thought it proper that the company should be before the court for the purpose of determining the validity of their claim, and should have allowed this application. But Mr. Lewis called our attention to a subsequent part of the rule, which I consider very material, and adverse to Mr. Crump. These words occur, "No person shall be added as a plaintiff . . . without his own consent thereto." Here it is sought to make a party a plaintiff (so far as regards the counter-claim), in respect of a matter which he does not seek as

(a) Reported by S. HARR, Esq., Barrister-at-Law.

adjudication upon; and then come the words, "All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order &c. . . ." Mr. Lewis argued that those words imply that a defendant to be added must be a party against whom the plaintiff has some cause of complaint, and not a person against whom the plaintiff neither has, nor desires, any claim. I think Mr. Lewis has answered the argument of Mr. Crump, and that under this section it is not intended that one defendant should be added for the convenience of another. It is important to keep strictly to rules. I cannot look into the merits of this case. It might be possible to use this section to harass plaintiffs, and to insert parties who have no interest; and by that means to do great injustice. Therefore, I think this power should be exercised with discretion, that we have no authority to add the Niger Company as defendants, and that the order appealed from ought not to be interfered with.

DENMAN, J.—I am of the same opinion. This being an action under the Bills of Exchange Act that procedure was to be supposed to be the one under which it would proceed. But that now seems to be insufficient, and we have to determine how far the procedure under the Judicature Act is to be applied to actions under the other statute. There are only two decided cases upon the subject, *Pollock v. Campbell* (L. Rep. 1 Ex. D. 50), and *Oger v. Bradnum* (L. Rep. 1 C.P. Div. 334). These cases decided that, up to a certain point, the proceedings taken must be under the Bills of Exchange Act, the provisions of the Judicature Act notwithstanding. Mr. Crump took a right view when he said that there must be a limitation upon that rule. The true limit is this. So long as the proceeding is confined to procedure regulated by the Bills of Exchange Act the Judicature Act does not apply; but when a cause is actually commenced the Judicature Act is to be followed. In the present case the proceedings have reached the point at which Order XVI., r. 13, would be applicable, if a proper case were made out. It is impossible to say that Order XVI., r. 13 is to be wholly confined to cases where a plaintiff in his original statement of claim shows a cause of action against particular parties, and to limit the power of the court to the introduction of a defendant against whom that claim shows a right of action. It may sometimes be necessary to bring in another party; but the court ought not to bring in any person as defendant whom the plaintiff does not desire to sue, unless a strong case is made out for its doing so. In this case the plaintiff sues the defendant as acceptor of a bill of exchange, and there is no denial of the acceptance; but the defendant says that although the bill was given in part payment of the price of a ship, yet it was obtained under an agreement founded upon a fraudulent misrepresentation of fact. If the case of the defendant is true he may perhaps hereafter recover the damages he seeks against the plaintiff in his counter-claim, in the character of a trustee for the Niger company. But the action is upon a bill of exchange, to which the defence is a counter claim by a third party. We ought not, upon a mere statement of such a cross claim, to join as a co-defendant a party the plaintiff does not wish to join. There is no necessity

for it, there is no justice in it, and it may be very detrimental to the rights of the plaintiff. We must be guided by the whole of Rule 13. The earlier words of it are qualified by the later ones, though the court cannot altogether decide the point upon that ground. There might be cases in which a party might properly be added, but they would only be cases where such an addition would enable the court to do substantial justice.

GROVE, J.—I am of the same opinion. Mr. Crump said when this case came before me on appeal from the master that he applied under Order XVI., r. 13, and I have also some faint recollection of Order XVI., r. 13, being then cited. My impression was then and is now, that the object of the rule was to enable the court of its own motion, or upon the motion of a party, to add a plaintiff, or a defendant, with his consent, upon service of a summons and notice. Under the Common Law Procedure Act 1852, sect. 222, power was given to amend all defects and errors in civil proceedings; but it was a moot question whether parties could be added under that section, and a more precise power was desirable: (*Blake v. Done*, 7 H. & N. 465.) Therefore, the rule was made that where either party was likely to be damaged by the non-joinder of necessary parties a plaintiff or a defendant might be added. The rule is limited to questions involved in the action. The word "involved" is an elastic word. Collateral rights may be involved. It is difficult to give an exact demarcation to the word; but there must be some limitation to its meaning. I am prepared to concur in this case with the judgment of the court, because I hold that the right to be set up by the Niger company is not a right fairly involved in the action, though I do not say that that company may not have some rights over against the plaintiffs. If the court is to add parties because there may arise contingencies in which an action over may be possible, such an extension of the object of the rule would lead at least to great embarrassment, and would actually unsettle questions. In this case there has not been even a sufficient *prima facie* case of right to add a defendant made out. In so saying I speak from the affidavits relied on by the plaintiffs. The contract, as a part performance of which the bill of exchange was given, was made not with the Niger company, but with the defendant. There is no allegation of agency, although the ship was conveyed over to the company afterwards. The defendant gave the bill of exchange in question. If, where a bargain of sale is made, and the seller elects to take as payment a bill of exchange, he is to be told that he has a right of action against a third person, and to have his right of payment deferred till the rights of the third person can be settled, a most formidable obstacle would be interposed to the making of contracts. The seller would say, "My contract is with the person who gave me the bill, and not with others behind him." The case made out by the counter claim is the unseaworthiness of the ship. Are we to extend the Act upon bills of exchange to try the case of the sale of a ship? A counter claim is not applicable to claims by third parties, but to those by the parties to the action themselves. The subject of this counter claim is too remote.

LORD COLERIDGE, C.J.—I desire to adopt the language of Archibald, J., in the case of *Edwards v. Lowther* (45 L. J. 417, C. P.); "all parties against

whom relief or remedy is sought, should, if possible, be joined in the same action."

Application dismissed with costs.

Solicitors for the plaintiff, *Trinders and Curtis Hayward.*

Solicitors for the defendant, *Brook and Chapman.*

Monday, Jan. 15.

HALL v. LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

Interrogatories—Order XXXI., rr. 4, 5.

Discovery by a railway company of the contents of books, in the possession of themselves and their agents, extending over a series of years, to show the receipt of goods specifically described, delivered to them for carriage, ordered.

Grove, J. (dissentiente).—The interrogatories are too onerous.

Fullarton moved to rescind an order of Pollock, B., disallowing interrogatories.

The plaintiff was a wine and spirit merchant, and was in the habit of purchasing whiskies in Ireland and Scotland, and storing them in certain bonded warehouses in Haydon-square until sold. After sale the empty casks were returned through the defendants as carriers to the parties from whom the plaintiff purchased. Between the years 1870 and 1874 many of these empty casks were lost in carriage, and the plaintiff sought to recover their value from the defendants. It appeared that some of the casks had been delivered at the defendants' own goods station, in Haydon-square, whilst others had been collected by Messrs. Chaplin and Horne, and Messrs. Pickford and Co., as their agents.

The statement of defence did not admit the plaintiff's statement, and required him to prove it. The course of business was admitted, but the agency of the carrying firms, and the loss, were denied for the purposes of this action.

The interrogatories consisted of the material parts of the statement of claim which were not admitted turned into questions. Those which were objected to are set out in the judgment of Grove, J.

Fullarton, for the plaintiff.—The defendants have put the plaintiff to the proof of certain facts which he has alleged, and he has a right to put them on their oath as to whether they will dispute these facts or not. [*Grove, J.*—There is no difference between a denial and a refusal to admit under the present pleadings.] The defendant attempts to nonsuit us by refusing information. It would be extremely difficult to prove our case without the defendants' books. They have evidence in their books which will show whether or not they received the casks for carriage. We have given full particulars of the missing casks.

Bosanquet, for the defendants.—The plaintiff has followed the old Chancery rule of turning his bill into interrogatories, which is not now permitted. We cannot answer such interrogatories by the affidavit of any officer in our service. The plaintiff seeks to make us pay for all the casks he has lost in the last five years. Such an inquiry as he asks us to make would be attended with great expense. He has made a general claim, and

now seeks to compel us to prove it. Besides a great portion of the information is in the hands of the firms who do our cartage business. This is a mere fishing application. [*DENMAN, J.*—If you can say you did not receive the casks you put the plaintiff out of court.] The firms we employ are not our servants, they are merely our agents for a particular purpose.

Fullarton, in reply.—The firms are nothing more than servants. [*DENMAN, J.*—Is not this a bye mode of obtaining information which would more properly be obtained by asking for inspection.] If we were to have a general order for inspection, it would send us on a roving commission all over the United Kingdom. The defendants have the result of their inquiries in their hands, which they withhold from us.

Lord COLERIDGE, C.J.—I am of opinion that these interrogatories ought to be allowed. This is an action against a railway company as carriers for non-delivery of certain empty casks delivered to them for carriage, and lost by their negligence. The course of business between the plaintiff and the defendants is set out in the first seven paragraphs of the statement of claim, of which the fourth and fifth are the most important. [The paragraphs were to the effect stated above.] These two statements are admitted. The defendants also admit that being carriers they had a goods station in Haydon-square for the purpose of receiving goods, and that Messrs. Chaplin and Horne, and Messrs. Pickford and Co., were also their agents for the like purpose. This being the state of the admissions, the plaintiff seeks to prove as part of his case a receipt by the defendants through Chaplin and Horne, or Pickford and Co., or by themselves, of a variety of empty casks, a list of which the plaintiff sets out in great detail—with numbers, signs, dates of delivery, places of collection, persons from whom collected, by whom received and to whom consigned, and values—in a schedule at the foot of one of the interrogatories which have been disallowed; and these interrogatories put general questions to the defendants as to their dealings with the empty casks particularised in the schedule to this effect. "Did not I on certain dates send to you or your agents notice to collect, and did I not deliver to you, or them, and you, or they, collect certain casks?" To these interrogatories it is objected that they should be disallowed *in toto*. That must depend upon whether they relate to a matter which could be discovered if it were contained in books under the control of the defendants. Many cases upon this subject are collected in Mr. Day's book of procedure, which decide that if books containing entries showing the collection and receipt of casks are in the possession of the defendants discovery can be obtained of them. That assistance cannot be obtained here, because Pickford and Co., and Chaplin and Horne, are not parties, and are not under the control of the defendants, nor can direct discovery be procured from agents. But in principle this is information to which the plaintiff is entitled. It is part of his case. He has a right to the information in the possession of the defendants whether acquired through agents or not. It is the same thing whether the principal is a corporation or not. Were it otherwise, the usual defence would be, "We know only through our agents, we know nothing ourselves;" and such a defence would be

(a) Reported by S. HARR, Esq., Barrister-at-Law.

successful. That cannot be accepted as a defence. Knowledge of the agent is knowledge of the principal. If the agents received the casks in the ordinary course of business the defendants must say whether or not they received them. So much for the mere receipt of the casks, the fact of which I understand is already ascertained by the defendants in the present instance. As to the second point. In what capacity did Pickford and Co. and Chaplin and Horne receive these goods, if at all? This the principals are bound to tell. If they can ascertain as a matter of fact whether the goods were collected or not, they must know in what capacity they were received by their carriers. If not as their agents then they should say so. In any case it ought to be plain, because, as in the case of a corporation, they could not receive goods *manu propria*, and I see no reason why they should refuse to answer the question of agency any more than whether they received the goods at Haydon-square. They do not in fact deny that the carrying firms represent them in ordinary cases. It therefore appears to me to be clear upon principle that these interrogatories ought to be allowed. The question of the sufficiency of the answer to the interrogatories is not now to be decided. I think this is a kind of information which the plaintiff is entitled to have.

GROVE, J.—I do not take the same view of the last ground as the Lord Chief Justice. Upon the question of form I agree with the decision of Pollock B. at chambers. I think the burden of answering these interrogatories too great. I should not have disallowed them *in toto*, but should have altered them materially. Interrogatory No. 4, as it stands, is this: "Did not the plaintiff in and during or about the said years 1870 to 1874, both inclusive, from time to time cause the casks or empties in respect of which this action is brought, and of which a list is hereunder written, to be collected by and delivered to the defendants, or to be collected by and delivered to the carrying firms named, or one and which of such firms, as the defendants' agents?" Now if the question had been, "Did the defendants receive goods, or were they delivered to their agents?" I should not have objected to it; but when it is asked of the defendants whether the plaintiff caused the casks to be collected by and delivered to the defendants, or caused them to be collected by or delivered to another firm, I think the question becomes one which is extremely difficult to answer. It is not calling upon the defendants to answer for their own acts and the acts of their agents, but as to transactions between the plaintiff and the servants of the carrying firms, it is asking too much of them. If the interrogatory was confined to matters within the knowledge of the company in the regular course of their business, or known to their managers, it would be a fair and reasonable one to put; but this, I think, is too hard. Then as to interrogatory No. 5. "Did not the plaintiff in, during, or about the said years 1870 to 1874, both inclusive, from time to time employ the defendants (by themselves or their agents) as carriers, for the purpose of carrying back and returning the said casks or empties, or some and which of the same, and redelivering them to the respective consignees, distillers, or sellers of the said whiskies?" "In, during, or about," I think, is too vague. "By themselves or their agents." If those

agents are the firms mentioned the words are appropriate, but if they are any agents employed, at some time or other, I think it not reasonable to put the defendants to answer. As to interrogatory No. 6, "Did not the defendants (by themselves or their agents) accept such employment, and accept and receive such casks or empties, or some and which of them for the purpose of being so carried back, and returned, and redelivered by them?" there is the same objection to the general question of agency as in the last interrogatory. I think the acceptance of employment a fair question. As to interrogatory 9, "Did not the plaintiff from time to time deliver the empties or goods hereinbefore mentioned, or some and which of them, to the said persons respectively (as set forth in the said list), or some and which of them for the purpose of being carried back and returned by the defendants?" Certain persons (twenty-four in number) are named, who are to be inquired of as to what they did during five years. I think that a very large inquiry. Interrogatory 10 asks, "Did the defendants at any time, and if so when, carry back, and return, and re-deliver the said empties or goods hereinbefore mentioned, or any, or either, and which of the same?" That a person because he sues out a writ, and on one contingency may require discovery, may ask for a large inquiry, causing a great expense, especially where the defendant can only answer by hearsay, I think is unreasonable. He may ask what the defendants themselves or their managers know; but to ask the names of all the servants in such a case as this, to whom casks have been delivered, is too vague a question to be allowed. Interrogatories are said to be too technical. So they would be even if the parties were anxious to understand them; but such is not the case. They are always offered to adverse parties, who are only too ready to treat them as incomprehensible. Therefore they should be such as a party can answer categorically, and such as he can answer himself, and easily procure answers to.

DENMAN, J.—I agree with my Lord that these interrogatories ought to be allowed. The defendants being a corporation, leave to interrogate is necessary; and it is necessary for the judge to see that the interrogatories exhibited are proper ones. We start with an admission of agency by certain firms for purposes of collecting goods. Interrogatories are required to be answered by an officer of the company with reference to the plaintiff's claim in respect of negligence by the defendants as carriers. Some of the casks lost are said to have been delivered to the defendants themselves, some at the offices of admitted agents. The question here is not whether the answers to the interrogatories are sufficient, but whether the interrogatories should be allowed. I cannot help thinking that the view taken by my learned brother would impair the usefulness of the enactment with regard to interrogatories. The company are *prima facie* bound to answer like a private person by an officer. He represents them. He can only speak through the information he can obtain, but he must answer all such fair questions as he may be asked. It is said that the officer might not be able to answer without going to great expense. Suppose an officer were to say that he could not answer fully except at the expense of 1000*l.*, there might be some reason

for inquiring as to the necessity of a complete answer. But here the information is said to be already in the hands of the company. Order XXXI., rule 5, gives as grounds for applying to strike out interrogatories that they are scandalous, irrelevant, or not put *bonâ fide* for the purposes of the action, or not material at the stage at which they are put. It adds, also, "or on any other ground." That must mean, any other ground apparent upon the face of the pleadings. The company may be able though not willing to give information, because it may admit the plaintiff's case; or the information may be of such a character as to induce the plaintiff to drop the action. The object of discovery is to prevent the necessity for a long inquiry at *Nisi Prius*, and to determine the action as expeditiously as possible.

Rule absolute. Costs to be costs in the cause.

Solicitors for the plaintiff, *Peckham, Mailand, and Peckham.*

Solicitor for the defendant, *Roberts.*

Monday, Jan. 15.

SCHRODER v. CLOUGH (a).

Costs—Interest upon—Date from which it is to run—Allocatur or Incipitur—Judicature Act, 1875, sect. 16—Order XLII. r. 12—Order II. r. 2. Appendix (F.) form 1, to Schedule 1.

Interest on costs runs from the date of the taxing master's certificate.

MOTION before a judge to vary an order of a master, giving interest on costs from the date of his certificate, referred to the Divisional Court.

Webster, for the motion.—The question in dispute here is the date from which interest upon a bill of costs is to run, whether from the *incipitur*, or date of signing judgment; or from the date of the master's *allocatur*, or certificate of taxation of costs. Prior to the Judicature Act this depended, so far as concerned the Courts of Common Law, upon sect. 17 of 1 & 2 Vict., c. 110; which has been held in the case of *Newton v. Grand Junction Railway Company*, (16 M. & W., 139) to apply to costs as well as to the judgment debt itself. Interest upon both ran from the time of the entry of the *incipitur*, and not from that of the certificate of taxation. The statute above mentioned did not apply to the Court of Chancery, where it was the custom—not founded however upon any statute—to allow interest to run only from the date of the *allocatur*. This appears from the case of *Attorney-General v. Lord Carrington* (6 Beav. 454). Under these circumstances, the one practice being founded on statute law, and the other upon case law, the question is which of the two is to prevail, bearing in mind the 11th sub-section of the 25th section of the Judicature Act of 1873, which enacts that: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict, or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail." [Lord COLERIDGE C.J.—The word "rules" there used, means equitable doctrines, and not rules of practice.] The form of the writ of *fi. fa.*, given in Appendix (F.) 1, to the rules (after commanding the sheriff to levy execution for the

judgment debt and costs) adds "together with interest thereon . . . , from the day of &c." Here is inserted a foot note, "The date of the certificate of taxation." [Lord COLERIDGE, C.J.—Is that part of a statute?] It is part of a statutory form. It was taken from the Chancery Consolidated Orders. Order XLII., r. 12, says, "The forms in Appendix (F.) hereto may be used with such variations as circumstances may require." Section 16 of the Judicature Act, 1875, enacts that, "The rules of court in the first Schedule to this Act . . . as to all matters to which they extend, shall thenceforth regulate the proceedings of the High Court of Justice and Court of Appeal." The foot-note goes on to say, "The writ must be so moulded as to follow the substance of the judgment or order."

J. C. Mathew, contra, was not called upon.

Lord COLERIDGE, C. J.—We are asked to put a construction upon part of a statute, and to determine from what time interest is to run upon a bill of costs awarded by the *allocatur* of a master. It is not disputed that the statute 1 & 2 Vict., c. 110, s. 17, enacted that it should run in the same manner as interest on a judgment itself, that is from the date of the *incipitur*; or that the Courts of Common Pleas and Exchequer have so interpreted that statute. We have to decide whether a later statute has repealed that earlier one *pro tanto*, as it was interpreted by judges. Section 16 of the Judicature Act of 1875, says [His Lordship read the section.] The question is whether the form given in Appendix (F.) is part of the rules of the High Court of Justice, which that section is to regulate. Order II., r. 2, upon another subject, enacts that "Any costs occasioned by the use of any more prolix or other forms . . . than the forms hereinafter prescribed, shall be borne by the party using the same," &c. From this order an argument may be drawn with respect to the case in point. What is the form "prescribed"? It is prescribed by a rule, which is itself incorporated into an Act of Parliament; and it commands the sheriff to levy the amount of the judgment and costs, "together with interest from the day of . . ." These words are printed in the form; and there is a foot note appended. I think that, to use the words of the foot note, a form so moulded as to follow the circumstances of the case would be one which complied with the date prescribed by the previous part of the note—itsself in effect a part of an Act of Parliament, and not with the decisions of a court upon another Act of Parliament.

GROVE, J.—It does not appear to me to be necessary to decide that the form given, Appendix (F.), 1 to the Judicature Act, necessarily repeals the 17th section of 1 & 2 Vict. c. 110; because, although that statute is compulsory as to the time from which the judgment debt is to carry interest, it says nothing about interest upon costs. When learned judges decided that costs, though not expressly mentioned by the earlier Act, should carry interest from the same date as the judgment, they judicially applied the Act to a matter to which they considered it applicable. But we are not bound by their decisions upon a particular statute, and upon a point which it did not expressly determine. There is no inconsistency between the two Acts themselves. The costs are not ascertained at the time the judgment debt comes into existence, that is, when judgment is

(a) Reported by S. HARR, Esq., Barrister-at-Law.

C.P. Div.]

PARSONS v. TINLING.

[C.P. Div.]

delivered: they are only created by the master's certificate of taxation. I am of opinion that the blanks in the form of writ of *fi. fa.* must be filled up with the date of the taxing master's certificate.

DENMAN, J.—Section 16 of the Judicature Act, 1875, adopts the rules set out in the schedule to the Act, as rules to regulate the procedure of the courts. Order XLII., r. 12, permits the use of the form of writ of *fi. fa.* given in Appendix (F.) as the proper one for the very matter here in question; and that form gives the day to be inserted in the writ from which interest is to run. That day is by a foot note directed to be the date of the certificate. Mr. Webster relied upon the decisions upon the Statute 1 & 2 Vict., c. 110, which speaks of judgment debts only, under which interest upon costs has been given from the date of the *incipitur*. I apprehend that if we decide that it ought to run from the date of the *allocatur* only, our judgment will not be in conflict with earlier decisions. We might decide on the ground that this is the first express enactment on the subject; or else upon the ground that the recent enactment overrides the earlier. The last ground is perhaps the safer.

Order affirmed. No order as to costs.

Solicitors for the motion, *Maples, Teesdale, and Co.*

Solicitors for the respondent, *Wallons, Bubb, and Walton.*

Tuesday, Jan. 30.

PARSONS v. TINLING (a)

Practice—Costs—Event—Farthing damages for libel—Judicature Act 1875, sect. 67—Order LV.

Costs in the High Court are to follow the substantial result of an action, except in cases where it may be otherwise provided by sect. 67 of the Judicature Act 1875, by Order LV., or by any future provision for that purpose.

THIS was an appeal from chambers.

In an action for libel, Lopes, J., summed up for substantial damages, but the jury gave one farthing. Counsel applied for a certificate for costs; which the learned judge said was not necessary. An application was subsequently made at chambers to Hawkins, J., but his Lordship made no order.

O. Russell, Q.C. and French, for the plaintiff, now asked for a decision of the Court upon the construction of Order LV. Except in a few instances, principally relating to interlocutory applications, costs were not, previously to the commencement of the Judicature Act, in the discretion of the judges at Westminster. A long series of statutes, commencing with the Statute of Houcester (6 Edw. I., cap. 1), determined in what case a plaintiff could, or could not, get his costs. They depended principally upon the event. In equity, the course of procedure left the costs in the absolute discretion of the judge who heard the suit, subject to the established principle that the successful party got his costs unless something happened to deprive him of them. The object of the Judicature Acts was to establish uniformity of system in all the decisions of the High Court. Section 67 of the Act of 1875 enacts that the provision contained in (amongst others) the 8th section of the County Courts Act 1867,

shall apply to all actions commenced in the High Court, with this limitation, that they are within the jurisdiction of a County Court. This is not such an action. [Grove, J.—If this case could have been tried in a County Court, you would have lost your costs.] Yes. Sect. 68, or its substitute section 17 of the Act of 1875, provides for the making of rules for regulating any matters relating to the costs of proceedings. Then Order LV. of the Rules of 1875 comes under consideration, making the costs follow the event, except that if a party is guilty of misconduct, the judge may give costs even to a losing party—a power which the Court of Chancery not unfrequently exercised. They cited:

3 & 4 Vict., c. 24, s. 2;

30 & 31 Vict., c. 142, s. 5;

Sampson v. Mackay, L. Rep. 4 Q. B. 643;

Baker v. Oakes, Weekly Notes, 20th Jan. 1877.

Pope, Q.C. and McConnell, for the defendant.—In *Baker v. Oakes* the application was not made at the trial, which was the proper time to make it; the court only said that a certain section of the Judicature Act gave no new powers. The question is whether, by the use of general words in Order LV., previous Acts are repealed. The conflict between the new and the old procedure has already been dealt with in matters of costs in *Dodds v. Shepherd* (L. Rep. 1 Ex. D. 75.) Our contention is that costs are to follow the legal events, that is, the events with the incidents attached to them by previous statutes. It has been decided that when a cause is referred before trial, nominal damages will carry costs, *Kelcey v. Stupples* (1 H. & C. 576), but that where a cause is referred at the trial they will not do so: *Moore v. Watson* (L. Rep. 2 C. P. 314.) Where costs are to abide the event, it is the event subject to existing statutes which apply unless they are expressly repealed: (*Hill v. Hall*, L. Rep. 1 Ex. D. 411.) [Grove, J.—Your contention is that, in spite of what the Act says, it is inoperative.] It does not repeal the long list of statutes, from Queen Elizabeth's reign downwards, upon the subject of costs.

Russell, Q.C., in reply.—The Judicature Acts and Orders are inconsistent with previous statutes, and therefore, repeal them. [Lord COLERIDGE.—The Court of Appeal has quite recently held upon sub-sect. 11 of sect. 25 of the Act of 1873 that the word "rules" means practice.]

Lord COLERIDGE, C.J.—We are called upon for the first time to construe Order LV. of the Judicature Act of 1875 which relates to costs. The Order provides that "subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in courts of equity, provided that when any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown the judge before whom such action or issue is tried or the court shall otherwise order." The action was one of libel, tried before my brother Lopes, when there was a verdict found for the plaintiff, with one farthing damages. According to the law previously to 1875 costs could not have been recovered without a judge's certificate

(a) Reported by S. HARE, Esq., Barrister-at-Law.

Here the judge has refused his certificate, leaving the plaintiff to try his right at law. The court has exercised no discretion, and we have to consider the meaning of the words that the costs are to follow the event. It is contended that, because before the passing of the Judicature Act costs would not have followed the actual event in this case, the true construction of the enactment is that costs ought now to follow the legal event which, prior to the passing of the Judicature Act, they would have followed. That is a wide addition to make to the words of the statute. Neither according to reason, nor from the construction of the statute, are we justified in coming to such a conclusion. The order is one which seeks to incorporate in one system the diverging codes of law and practice in the Courts of Common Law and Equity. I assent to the view that, except in particular cases where comparatively recent statutes have given it them, the Courts of Common Law had no discretion, whereas the Court of Chancery had; and the object of the late statute was to make one rule and code of procedure for both. Read by the general light of the Act, as a general rule the practice of equity is to prevail, and the costs are to be in the discretion of the judge. To this there are three exceptions; first, the provisions of sect. 67 of the Act of 1873; secondly, the case of innocent parties, such as trustees, whose rights to costs are to remain intact; and, thirdly, the case of actions or issues tried by a jury, when the event is to decide the costs. Here the event is for the plaintiff, and the costs are to follow in such a case, except upon the happening of another circumstance which has not happened. Let us see if there is any authority to prevent our arriving at such a decision. In the case of *Kelcey v. Stupples* the court had to determine the costs of "a reference to abide the event." The action was for breaches of a farming lease. A variety of breaches were alleged, and the arbitrators found all the issues for the defendant but one, on which they awarded 16s. damages to the plaintiff. It was then held that the event was substantially in favour of the defendant, yet if the trial had been at Nisi Prius, in a certain sense the verdict would have been for the plaintiff. Then the case of *Moore v. Watson* was cited. There the costs of the cause were to abide the event, and the costs of the reference were to be in the discretion of the master. He gave the plaintiff the whole costs of the reference, but his order was set aside because, under the County Court Act, the plaintiff was not entitled to any, the whole sum certified for being under 20l. The reference being compulsory, it was confined within the powers of the court itself, and as the court had no power to give costs, so neither could it give a master a power which it had not itself. *Dobbs v. Shepherd* was cited as being directly in point; but it was not a judgment upon the section in question, and is not applicable. We should be introducing uncertainty where the Act intended to be clear, if we decided that the event being substantially for the plaintiff, the costs were to be other than the same. Costs were formerly a most difficult matter, but now a short section and order make them plain to every one.

GROVE, J.—I am of the same opinion. Order LV. is inconsistent with the previous Acts relating to the incidence of costs; and the Legislature, therefore, intended to make a new rule

upon the subject. The words of the rule, "Subject to the provisions of the Act," are not to be understood in the sense that there are a series of other provisions which materially alter this rule. Sect. 67 of the Act of 1873, applies only to actions in which any relief is sought which can be given in a County Court, and that is not this case. "Following the event" does not mean following the legal event as provided for by former statutes regulating costs. It means that costs are not to be subject to preceding legislation, but to be wholly subject to the provisions of this Act—that is, to sect. 67, or any other section applicable, for instance, to part of sect. 68, which is repealed, and for this purpose re-enacted, by sect. 17 of the Act of 1875. The words, "the costs of and incident to all proceedings shall be in the discretion of the court," imply more than a mere re-enactment of former Acts. The section makes a distinction between matters to be tried by a court and by a jury. In the latter case, costs are generally to follow the event. That means the result of the cause; costs are to be given to the person in whose favour the court decides. If any other meaning had been intended, other words would have been used. Under the old procedure the costs did not always follow the event. Now they are to follow the result of each particular case, unless there is good cause shown. To say that good cause means such as is required to be shown in other Acts in particular cases is an extravagant interpretation of the enactment. In my opinion the words are unambiguous. Costs are to follow the event in cases like the present one, subject to the discretion of the judge, upon an application made at the trial, or of the court afterwards, to order otherwise for good and sufficient cause.

Solicitors for the plaintiff, *Vizard, Crowder, and Co.*

Solicitors for the defendant, *Johnson and Wetherall.*

APPEAL FROM INFERIOR COURT.

Thursday, Jan. 18.

WARDEN v. TYE. (a)

Drunkenness, penalty for—Licensed person drunk on his own premises—The Licensing Act 1872, ss. 12 and 13.

A publican cannot be convicted under sect. 13 of the Licensing Act 1872, for being drunk on his own premises.

CASE stated by the justices of Northamptonshire.

The appellant was summarily convicted under sect. 13 of the Licensing Act 1872, which enacts that "if any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person," he shall be liable to a penalty, &c.

It appeared that the appellant was a licensed person, and that he was found drunk by the respondent, a policeman, upon his own licensed premises. He was fined 5l. and costs, and the conviction was ordered to be indorsed upon the licence.

Poland, against the conviction.—The conviction is under the wrong section. Sect. 13 makes it an

(a) Reported by S. HALL, Esq., Barrister-at-Law.

offence for a licensed person to permit a person to be drunk on his premises; but the drunkenness must be that of another person—the landlord cannot be the person drunk. The section goes on to say that if any licensed person “sells any intoxicating liquor to any drunken person.” This shows that the person must be another than the person, for he cannot sell to himself. Sect. 12 is the one applicable to this case, by which every person found drunk is liable to a penalty of 10s.

LORD COLERIDGE, C.J.—I come to the conclusion that the case does not fall within the section under which the conviction has been made, and that it cannot be sustained. The Licensing Act 1872, is divided into heads, one of which, entitled “Offences against public order,” consists of several sections, numbered 12 to 18 respectively, all except the first regulating the duty of licensed persons in relation to others. Except sect. 12, every one of them is clear in this respect; and sect. 13 in particular says that “if any licensed person permits drunkenness, &c., on his premises, or sells any intoxicating liquor,” &c., he shall be liable to conviction. He cannot sell to himself in his own house. Part of the section, therefore, cannot apply to the licensed person; and, using a fair construction of the whole of the Act, I think the rest of the section cannot. I come to the conclusion, therefore, reluctantly but clearly, that the words of sect. 13 do not include the publican himself, but reserve his case to be dealt with in another way.

GROVE, J.—I am of the same opinion. Sect. 13 clearly points to the conduct of the landlord with relation to others; for he must take care persons do not get drunk, &c., &c., but it does not relate to a licensed person himself getting drunk. There is another provision made for that case. By sect. 12 any person found drunk is liable to punishment. However much we may regret it, we cannot uphold this conviction. The court has only to construe an Act as it finds it, and in my opinion sect. 13 was not intended to apply to this case.

Conviction quashed.

Solicitor for the appellant, J. J. Rae.

APPEAL FROM INFERIOR COURT.

Thursday, Jan. 18.

DUFFELL v. CURTIS. (a)

Sunday trading—Refreshment-house licence—Hours of closing where no wine licence—29 Car. 2, c. 7, sect. 1—23 Vict. c. 27, sects. 6, 7, & 27—27 & 28 Vict. c. 64, s. 5.

A licensed refreshment-house keeper, although he does not hold a wine licence, may not sell articles for consumption off the premises on Sundays.

CASE stated by the magistrates of Yarmouth.

The appellant was convicted at the petty sessions of the borough, held on 19th July 1876, under 29 Car. 2, c. 7, sect. 1, for having exercised the worldly business of his ordinary calling, between the hours of 3 and 6 p.m., on Sunday, 16th July 1876.

He was a baker and confectioner, and held a refreshment licence under 23 Vict. c. 27, s. 6; but did not hold a wine licence under sect. 7.

The question for the decision of the court was whether sect. 27 of the latter Act, which enacts that the house of a person holding a wine licence “shall not be open for the sale or consumption therein of any article whatever at any time during which the houses of licensed victuallers shall be closed on Sunday,” . . . &c., applied to the present case.

Poland, for the appellant.—The words of the Act (23 Vict. c. 27), apply to a refreshment house keeper who does, and not to one who does not, hold a wine licence. 27 & 28 Vict. c. 64, sect. 5, only enacts that a refreshment house must not be open between 1 and 4 a.m. The cakes were sold for consumption off the premises. The Statute 29 Car. 2, c. 7, is suspended by the limited licence obtained.

No counsel appeared to support the conviction.

LORD COLERIDGE, C.J.—I am of opinion this conviction ought to be confirmed. The observance of the Lord's Day Act is enforced or neglected according to the public opinion of the moment, or to the zeal of the informers. In this case the appellant sold cakes and sweetmeats to grown-up people and children; and from the fact that he carried on his trade Sunday after Sunday, there is good reason to infer that he knew the articles he sold would not be consumed on the premises. *Prima facie* the statute of Charles II. is against him. Is there anything that takes his case out of its provisions? Does the license to keep a refreshment house do so? I am clearly of opinion that it does not. The statute 23 Vict. c. 27, s. 6, permits a person who keeps a house for the purpose of selling refreshment to be consumed therein to procure a licence for his house; and, having done so, he may proceed to take out a wine licence under sect. 7, when he will come within the provisions of sect. 2. But the later statute contains nothing to exempt the appellant from the penalty of breaking the statute of Charles II., for the trading of which he has been convicted, that is, the selling of articles to be consumed elsewhere, is not part of the calling of a refreshment house keeper, as defined by the statute mentioned above, under which the license was granted.

GROVE, J.—I am of the same opinion. I hold that the construction of the statute as permitting the sale in licensed houses on Sunday of refreshments to be consumed on the premises to be a reasonable one; but it must not, in my judgment, be extended to make a licensed refreshment house an ordinary trading one in such articles. The other part of the case is matter of police regulation. Since the legislature has fixed closing hours for public houses, I cannot see why closing hours should not be fixed for other refreshment houses; and that has been done. As to 27 & 28 Vict. c. 64, s. 5, it distinctly says that nothing therein contained shall authorise any person to keep open any refreshment house, or to sell refreshments otherwise than at the times and upon the conditions prescribed by the Acts of Parliament in that behalf made.

Conviction upheld.

Solicitor for the appellant, A. Storey.

(a) Reported by S. HARR, Esq., Barrister-at-Law.

APPEALS FROM INFERIOR COURTS.

Monday, Jan. 29.

TYNE COAL COMPANY (LIMITED) v. OVERSEERS OF WALLSEND PARISH. (a)

Rating appeal—Colliery drowned out—Value to a tenant of pumping machinery—Principle of assessment.

A colliery, the pumping engines of which only were at work, and which appeared to be a hopeless loss, was assessed to the relief of the poor at a rate calculated upon the land and machinery as a going concern, having a prospective value.

Held, that the land must be rated at its value to a tenant for year to year, and the machinery at its value independently of the land.

CASE stated by the justices of the County of Northumberland.

The question for the opinion of the court was whether the Tyne Coal Company (Limited), the appellants, were rateable for certain reservoirs, buildings, engine, railway and colliery.

The appellants are under-lessees of the Wallsend Colliery at a rent of 200*l.* a-year certain. They have power to work existing shafts, and to take surface lands, paying compensation for them. Upon this surface land they have constructed two large reservoirs, boiler sheds, and an engine house, with a large chimney. A railway has been laid from the colliery to a wharf on the river Tyne. The greater part of the buildings, reservoirs, plant, and railway, are substantially constructed. All of them are intended for permanent use, and are used with the sole object of getting coal. The boiler shed contains twelve boilers set in masonry.

The mine was drowned out many years ago, and no coal has been got since 1854. The water was considerably reduced before 1870, but since then, notwithstanding continual pumping, it has remained at about the same level.

The appellants have been assessed to the relief of the poor of the parish in respect of "land, shafts, buildings, engines, pumps, and fixed plant" at the rateable value of 1250*l.*, upon a gross estimated rental of 1500*l.* They admit that they are rateable in respect of the lands taken by them; but they contend that, as the mine is totally unproductive, they are not rateable in respect of any of the other particulars, which are used solely for the purpose of unwatering the mine.

Herschel, Q.C. and *E. Ridley*, for the appellants, admitted that the principle is well established that in valuing mining property for rating purposes, the value of the plant may be taken into consideration; and that, in estimating the plant and buildings, an extra value may be put upon them because of the mine beneath them. They contended that this principle should work the opposite way when the mine is valueless.

Sir Henry James, Q.C. and *Webster*, for the overseers.—The mine is not rated. What is rated is the land, with what is upon it, which includes the shaft or opening in the land. The reservoirs also, and the railway and wharf, used for bringing coal to the pumping engines, are not exempted. They are all beneficially occupied, and the fact that they do not produce any return is immaterial. The machinery, &c., are there for the purpose of pumping out water; and making the mine a valuable property. Suppose the pumping

were done by a contractor, his works would be rateable. This case stands upon the same footing; here the owner is his own contractor. [*Lord COLERIDGE*.—The question in these cases is always what would a person give for the tenancy?] The working of the mine has been beneficial in the sense that the water in it has not been allowed to increase. [*Lord COLERIDGE*.—The time will come when the engines will be rateable.] Then the duty of the engine and its rateability will be at an end. You cannot levy a rate for past years. The engines are now worked in the hope of future profits. Why do the appellants continue to pump if they consider the mine of no value?

Reg. v. Metropolitan Board of Works, L. Rep. 1 Q. B. 15;

Staley v. Castleton, 5 B. & S. 505;

Guest v. East Dean, L. Rep. 7 Q. B. 331;

Talargoch Mining Company v. St. Asaph, L. Rep., 3 Q. B., 778;

Kittow v. St. Cleer, 41 L. J. 23, M. C.

Herschel, Q.C., in reply.—None of the cases cited support the claim of the respondents. They have failed to show any case in which property not capable of being let to a tenant from year to year, and not producing any profit, has been held to be rateable. The case of *Staley v. Castleton* was that of a cotton mill which, owing to the scarcity of cotton during the American war, was idle, and used as a warehouse. There the rate allowed was that of a warehouse. In *Reg. v. Metropolitan Board of Works*, the pumping station, &c., had an occupation value as land. The board must have rented them if it had not been proprietor, and a tenant might easily have been found to take them off its hands. That is not our case. The case of *Metropolitan Board of Works v. West Ham* (40 L. J. 30, M. C.) applies the principle of the last case to the buildings upon the land; that is, they were capable of being let, and had an independent value apart from that of the land. Neither is that our case. *Harter v. Salford* (6 B. & S. 591), was a case where the owner of a silk mill, having ceased to work it, was rated for a building used as a warehouse for machinery. In *Reg. v. Bilston* (5 B. & C. 851), the pumping engines of a mine were exempted from rating.

Lord COLERIDGE, C.J.—In this case our judgment must be for the appellants. This is an appeal against a rate assessed upon certain machinery, and buildings in connection with the machinery, all of which are occupied and used to drain a coal mine drowned out, and yielding no profits. In order to bring myself within the authority of the decided cases, I must decide that the surface of the land is rateable at whatever it would be worth in the hands of a tenant from year to year; and that the engine-house, pumps, &c., are to be assessed separately, if they have any independent value, upon the authority of the case of *Metropolitan Board of Works v. West Ham*. If there be any independent value in them apart from that of the worthless mine, upon the principle of that case, to that extent they ought to be rated. This fact was not raised by the case, and so I express no opinion upon it. I decide upon the assumption that these engines, &c., are of value only in connection with something at present valueless, and that they have no separate and independent value; that they are part of a valueless whole, which has been valuable at some time now past, and may be so again, when they will be rated at the value which they may then be ascertained to have. When they do so

(a) Reported by S. HARR, Esq., Barrister-at-Law.

become valuable, either the land will be rated at an additional value, or the mine itself, or perhaps the subjects of this appeal themselves, will be rated. In deciding as I do, I desire to conform to the cases which have already been decided.

GROVE, J.—I concur in the opinion expressed by my Lord. It is not disputed that the land is rateable, or that if it has any adjuncts which increase its value they may be rated; but the appellants contend that besides the land there is nothing in this case rateable. The facts stated show that the mine is absolutely valueless, that it has no value for which a person would give anything. It was argued that a rent might be obtained from a speculator. But that is not the principal upon which rating should be settled. If there were a house to live in upon the land, then there might be some reason for assessing the rate higher than the actual value of the land. At the most the work going on now could only give the property a prospective value, and that we cannot value for rating purposes. The case of *Metropolitan Board of Works v. West Ham* is inconsistent with such a principle. You do not rate land because it may have a contingent value, any more than you reduce a rate because there may possibly be a loss upon the rated property in the future; you take its present value. I should be prepared to decide this case upon that ground only. But the case goes further. My brother LUSH, J., in the case of *Reg. v. Metropolitan Board of Works*, held that the rateable quality of the land and buildings of the defendants was not affected by the particular use to which it was applied. Here is a stronger case. The mine has no reasonably prospective value. It has been in the same position for six years, during which time the engines have done no useful work. It would not be right to rate them, because they may at some future time have some value, whilst there is no probability of their having a future, or any, value. I conceive nothing would induce a tenant to give 1s. more rent for the land because the engines were on it. The only cases at all supporting the contention of the respondents, but falling far short of it, are the case of *Reg. v. Metropolitan Board of Works*, from which it would appear that there was a rateability upon pumping engines, because they had a value, explained by the case of *Metropolitan Board of Works v. West Ham*, which shows that the sewage works had a value, not because they were sewage works, but because they might be valuable in the hands of a tenant, and might be used by him for some other purpose. The only utility of the pumps, &c., in question, is in respect of the mine, and the same remark applies to the wharf and the railway. They are so unprofitable that they would even be a drawback to a tenant.

Rate ordered to be amended in terms of the judgment. No costs.

Solicitors: Conkson, Wainwright, and Pennington; H. C. Coots.

Monday, May 29, 1876.

PHILPOTT v. LEHAIN. (a)

Distress for rent—Action for balance after sale—2 Will. & M. sess. 1, c. 5, s. 2—Sale not compulsory—Recovery of costs payable under Judge's order—Order LXII., rule 20.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Where goods have been sold under a distress, and the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counter claim for the balance.

2 Will. & M. sess. 1, c. 5, s. 2, by which the landlord after five days "shall and may lawfully sell the goods distrained," is permissive, not compulsory, and therefore no action lies for not selling.

Costs payable under a Judge's order can be recovered by action or counter claim.

THIS was an action brought by a tenant against his landlord. There were demurrers to certain paragraphs in the statement of defence and counter-claim. The demurrers raised three questions:

1. Whether, where a landlord has distrained and has sold the distress, but the proceeds have proved insufficient to satisfy the amount due for rent, he has any remedy by action against the tenant, or by way of set-off or counter-claim, to recover the balance of the rent due.

2. Whether the statute 2 Will. & M. sess. 1, cap. 5, s. 2, by which the person distraining, if the goods are not replevied within five days, "shall and may . . . cause the goods and chattels so distrained to be appraised . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained," &c., is permissive or compulsory, and therefore whether an action will lie against a landlord, who has distrained for not selling the distress.

3. Whether costs, payable under a judge's order, can be set-off or recovered by way of counter-claim.

A. BOVELL, for the plaintiff.—As to the first question, the landlord by distraining has elected what remedy he will pursue, and cannot afterwards sue for the same rent, nor, consequently, set it off or claim it by counter-claim. [DENMAN, J.—Is not this question practically decided against the plaintiff's contention by *Lehain v. Philpott* (L. Rep. 10 Ex. 242; 33 L. T. Rep. N. S. 98; 44 L. J. 258, Ex. P.) The remedy by action being once suspended is gone for ever.

Ford v. Beech, 11 Q. B. at p. 867.

He also referred to

Vaspor v. Edwards, 12 Mod. 658; 11 Mod. 21 (nom. *Jasper v. Eddowes*); 1 Lord Raymond, 719; 1 Salk. 248 (nom. *Vaspor v. Eddowes*);

17 Car. 2 c. 7, s. 4;

Year Book, 21 Edw. 3, fo. 22, cited in Brooke's Abridgement, fo. 218, Return, and in Vinor's Abridgement, Extinguishment, N. 8;

Edwards v. Kelly, 6 M. & S. 204;

Lear v. Edmonds, 1 B. & A. 157; s. c. (no n. *Dears v.*

Edmonds) 2 Chitty, 301;

Hudd v. Ravenor, 2 B. & B. 662; 5 Moor. 512;

Dawson v. Cropp, 1 C. B. 981;

Comyn's Digest, Election, C. 2;

Littleton's Tenures, s. 219, Rents;

Davies v. Gude, 2 A. & E. 623.

As to the second question, the statement of claim is good, for the words of the statute 2 Will. & M. sess. 1, c. 5, s. 2 are compulsory, and the landlord is bound to sell the distress. See *Piggott v. Birtles* (1 M. & W. 441, 448). As to the third question, Order XLII. rule 20 does not give any right to sue for costs payable under a judge's order; the remedy is by execution.

AMBROSE, Q.C. (Glyn with him) for the defendant.—[As to the first point he was stopped by the court.] As to the second question, the passage from

the judgment in *Piggott v. Birtles* (*ubi sup.*), which has been cited, refers to sect. 3. The words "shall and may" in sect. 2 are permissive. In Woodfall's *Landlord and Tenant*, page 430, 10th edition, the word "shall" is omitted in giving the effect of the section. The judgments in *Hudd v. Ravenor* (*ubi sup.*) are conclusive on this point. See Bullen on Distress, 153. As to the third point, before the Judicature Acts the payment of costs payable under a judge's order could only have been enforced by execution or attachment, but Order XLII., rule 20 gives the same remedies as would exist on a judgment. The only penalty for suing on a judgment was that the plaintiff was not entitled to costs. [BRETT, J. referred to *Gray on Costs*, 167, and DENMAN, J. to *Sheehy v. The Professional Life Assurance Company* (2 C. B., N. S., 211:)] Then, as an action lies, there is a remedy by counter-claim by Order XIX., rule 3.

Bovell, in reply.

BRETT, J.—As to the first demurrer, it raises the question whether where a landlord has distrained for rent, and has fairly sold the distress, but the sum realised by the sale has proved insufficient to satisfy the amount due for rent, he can sue for or set-off the balance remaining due. I should have been much surprised if he could not, and if this had been so an Act must have been passed to alter a state of the law which would have worked monstrous injustice. The thing must have happened over and over again, and nobody ever thought of the point before. It is as clear as possible that this claim can be made the subject of a set-off, and the counter-claim is good. The second demurrer is to the fourth paragraph of the statement of defence, which is pleaded to the third paragraph of the statement of claim; it is a demurrer to part of the defence which applies to part of the claim, and raises the question whether that part of the claim is good, that is, whether it discloses a cause of action. The third paragraph is pleaded as an independent cause of action. It is true that by reference it embodies a statement contained in the second paragraph. The statement is that the defendant has made an excessive distress, and still retains the proceeds of the distress, and has refused to sell, contrary to the statute. At first I thought there might be some difference as to this question between cases where there was an excessive distress and cases where there was not. If there was not an excessive distress I fail to see what damage the plaintiff can have sustained, for the defendant would be entitled to keep the whole proceeds of the sale, but where the distress was excessive it seemed to me for a moment that there might be a difference. The question is whether the statute is permissive or compulsory as to sale within a reasonable time. If this were the first time that question had arisen I should have thought that on the words "shall and may" there might be some difficulty, but those words have already been interpreted by the courts. The cases of *Hudd v. Ravenor* and *Lear v. Edmonds* (*ubi sup.*) are strong authorities that the statute is not compulsory. The more liberal construction is to say that it is permissive, having been passed for the purpose of enabling the landlord to realise the value of the distress. Therefore, whether the distress was excessive or not, the third paragraph, being pleaded as showing a distinct cause of action, fails. On the third

demurrer the question is this: The defendant sets up a counter-claim, and the statement claims three certain sums for costs due under three rules of court made before the passing of the Judicature Acts. Before these statutes no action could be brought to enforce payment of money due in this way, but it should have been done by attachment. It is not necessary to decide whether there could be a counterclaim where there could not be an action, for in my opinion since the Judicature Acts claims such as these can be enforced by action. If so, they come within Order XIX., rule 3, because they are within Order XLII., rule 20, by which "Every order of the court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect." If, therefore, these orders are in the position of judgments, how can they be enforced? The passage which has been cited from *Gray on Costs* shows that a judgment might be enforced by action, subject to the penalty, imposed by statute on the plaintiff, of getting no costs if successful; but still judgment might be obtained. Therefore, under certain circumstances there might be a second action, and if this were an action on the judgment, what would it be brought for? It is one means of enforcing the judgment. If this is so, this claim comes within the words of Order XLII., rule 20, and therefore may be the subject matter of an action, and therefore of a counterclaim, and therefore is within Order XIX., rule 3, and may be set up by way of counter-claim in answer to the plaintiff's cause of action. Our judgment must be for the defendant on all the demurrers.

GROVE, J.—I am of the same opinion. As to the first point, it is a startling proposition that a landlord should lose his remedy unless he took exactly the right amount, for according to the plaintiff's contention, if he took too little his remedy would be lost so far as concerned all that portion of the rent due which was not realised by the sale of the goods, and if he took too much he would be liable to an action. Therefore, he could hardly be safe in distraining unless he could make the amount fit exactly. It is admitted that there is no express authority on the question, but *Lehain v. Philpott*, go to show that the nearly all the cases cited by Cleasby, B. in remedy is only suspended, and not gone. It is true that all that was actually decided there was that an action could not be brought before the distress was sold, and the decision of the point now before us was not necessary for the decision in that case, but it was a necessary part of the reasoning on which the judgment is founded to show that the remedy by action was not gone for ever. Therefore, the judgment of the Court of Exchequer in that case, and the cases there cited, are strong authorities in favour of the defendant here, and show that, although while the landlord holds the distress he cannot bring an action, for which ample reasons are given, still that proposition only holds good while the distress is retained, and when it is replevied or sold there would be a remedy by action, and therefore now by counter-claim, for the balance. The point has always been tacitly conceded, and there can be no doubt about it. The second question is whether the statute 2 Will. & M. sess. 1, c. 5, s. 2, is imperative or optional. It is true that the words "shall and may" are, as a general

rule, imperative, but the authorities are very strong in this instance in favour of a different construction. In *Lear v. Edmonds*, and particularly in *Hudd v. Ravenor*, there are the express opinions of the judges to that effect. The object of the statute was to avoid the hardship on the tenant which would result if the landlord could sacrifice the property by a forced sale. As a general rule, the longer the distress is kept without being sold the more in favour of the tenant. I think the result is that the statute is not imperative, and that it is consistent with the whole meaning and general scope of the enactment to hold that there is no time fixed at which the landlord is bound to sell. As to the third point, it seems to me to be practically decided, for it follows by necessary implication from the statute, which took away costs where an action is brought on a judgment (43 Geo. 3, c. 46, s. 4), that such an action will lie. Then, if an action can be brought on a judgment, Order XLII., r. 20, is in point, and shows that this claim can be the subject of an action, and therefore, by Order XIX., r. 3, of a counter-claim.

DENMAN, J.—I am of the same opinion. As to the first point, I agree that the judgment of the Exchequer in *Lehain v. Philpott* practically decides the question in favour of the defendant here, for the reasoning on which that judgment is founded would be erroneous if the other view were correct. There is no authority on the other side, and common sense and reason are against the plaintiff's contention. I see no reason to doubt the correctness of the *dicta* of the Court of Exchequer, and the correctness of the judgment depends on them. As to the second point, on the question whether the third paragraph of the statement of claim is good in itself, I am clearly of opinion that it is not. I agree that it is not compulsory on the landlord to sell the distress. The most that can be alleged is that there is a duty to take reasonable care, and the landlord may be bound for the sake of the goods to sell within a reasonable time, or to elect what he will do if he cannot keep them without injury; but there is no cause of action for mere non-selling. Assuming that there is a duty to elect within a reasonable time, paragraph three shows no violation of such duty. I do not think that the old principles of pleading are so far abolished as to make it right for us to hold that the mere use of the word "wrongfully" is sufficient to show a cause of action; we ought to see something stated constituting a wrong. The statement of claim is deficient in other respects, for there is no statement that anything was done which was unreasonable, and there is no statement of such damage as to give a cause of action. As to the third point, at first sight it struck me there might be some difficulty, but my doubts have vanished, and I agree with the rest of the court.

Judgment for the defendant on all the demurrers.

Solicitors for plaintiff, *Alfred Jones, Tindale, and Grove.*

Solicitors for defendant, *John C. Button and Co.*

Tuesday, July 25, 1876.

(Before Lord COLERIDGE, C.J., and QUAIN, J.)

Re LEWIS; *Ex parte* MUNRO. (a)

Attorneys and Solicitors' Act, 1870—Agreement in writing for payment of costs.

An agreement in writing between a solicitor and his client as to payment of costs is not valid by the Attorneys and Solicitors' Act 1870 (33 & 34 Vict. c. 28), s. 4., unless it is signed by both parties.

Therefore, where a solicitor received a cheque, and gave a receipt with the words, "it is agreed that the entire costs shall be 300l.," added, which was signed by the solicitor, but not by the client, Held, that the receipt was not an agreement in writing within the Act, and an order made for delivery of a bill of costs for taxation.

MR. EDWARD DILLON LEWIS, a solicitor, had been retained for the defence of a person of the name of Munro, who was charged with forgery. Before the trial, the retainer was put an end to, and another solicitor retained. Mr. Lewis claimed to be entitled to payment for his services under an agreement in writing, within the meaning of the Attorneys and Solicitors' Act 1870 (33 & 34 Vict. c. 28), s. 4, so as to be exempt, under sect. 15, from the obligation to deliver his bill of costs for taxation.

Mr. Lewis had received a draft on a banker for 400l. from Mrs. Munro, the mother of the person whom he was retained to defend, to provide for the expenses of the defence, and had signed a receipt for the draft, to which the following words were added, "It is agreed that the entire costs of this defence, including special counsel, shall be 300l." This receipt, which was not signed by any person except Mr. Lewis, was the document relied on as an agreement.

By the Attorneys and Solicitors' Act 1870 (33 & 34 Vict. c. 28), s. 4

An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole, or any part, of any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission, or percentage, or by salary, or otherwise, and either at the same, or at a greater, or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained" (the remainder of the section provides that the amount shall not be paid until the agreement has been examined and allowed by a taxing officer, and if it is unreasonable the court may reduce the amount payable, or cancel the agreement.)

Sect. 15:

Except as in this part of this Act provided the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act, shall not be subject to any taxation, nor to the provisions of the Act of 6 & 7 Vict. c. 73, and the Acts amending the same respecting the signing and delivery of the bill of an attorney or solicitor.

Manisty Q.C. (with him J. F. Moulton), moved on behalf of Mrs. Munro for a declaration that there was no agreement in writing within the meaning of the 4th section of the Attorneys and Solicitors' Act, 1870, and for an order for Mr. Lewis to deliver his bill of costs for taxation.

W. Willis, who appeared to show cause, was called on by the court. The receipt constitutes

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law

an agreement in writing within the meaning of the Act, for it is a written document in the form of an agreement signed by the solicitor, and assented to. It is clearly binding on the solicitor, and ought, therefore, to be binding on all parties. If this amounts to an agreement this court has no jurisdiction to set it aside, for the business was not done in this court. See 33 & 34 Vict. c. 28, s. 8. He also referred to:

In Re Andrews, 17 Beav. 510;

Cowdell v. Neale, 26 L. J. 37, C. P.

Munistry, Q.C., in support of the rule, was not called on.

Lord COLERIDGE, C.J.—The real question which we have to decide is whether, within the meaning of the Attorneys and Solicitors' Act 1870 (33 & 34 Vict. c. 28, s. 4) there is an agreement in writing, which would exempt the solicitor's bill from taxation in the ordinary way. I am of opinion that there is not. Therefore Mr. Lewis is not within the provisions of sect. 15, and has no answer to an application for the ordinary order to deliver a bill to be taxed by the Master in the usual way. I am of opinion for reasons that have been already thrown out in the course of the argument that an agreement to come within the Act must be an agreement in writing by both parties, and that the names of both parties must be written by them in the agreement. As my brother QUAIN has put it, a case of this nature furnishes a very forcible illustration of the mischief which might be produced if we were to arrive at any other conclusion, for possibly an attorney might purposely abstain from pointedly drawing his client's notice to the exact terms of the arrangement into which he was persuading him to enter. The object of the Act is to prevent a discussion, such as has arisen in this case, as to the terms which were agreed upon, and to ascertain by the signature of the parties to the agreement exactly what those terms were. I therefore think that this is not an agreement in writing within the meaning of sect. 4. The order will be to deliver a bill of costs to be taxed by the Master.

QUAIN, J. concurred.

Order to deliver a bill of costs for taxation within ten days.

Solicitor for Mrs. Munro, Walter Webb.

E. D. Lewis in person.

EXCHEQUER DIVISION.

Thursday, Dec. 7, 1876.

Re ARTHUR HEAVENS SMITH (a).

Imprisonment for debt—Crown debt—Recognisance for costs of Appeal to House of Lords—Debtors Act 1869 (32 & 33 Vict. c. 62), sect. 4.—Jurisdiction of Court of Exchequer to release—Crown debtor—33 Hen. 8, c. 39—22 & 23 Vict. c. 21 (Queen's Remembrancer's Act 1859).

The costs of appeal to the House of Lords secured by recognisance, and according to the Standing Orders of that House become a Crown debt on the recognisance being estreated, and an appellant committed to prison for nonpayment of such costs is not entitled to his discharge under the Debtor's Act 1869.

In an application for the release of a Crown debtor by the grace and favour of the Court of Exchequer, the Court made an order for his release upon his

giving a promissory note for the amount of his debt.

This was a motion to discharge Arthur Heavens Smith from custody.

The prisoner was in custody in the county gaol of Gloucester, and was now brought before the court by the gaoler of the said prison, in obedience to a writ of *habeas corpus* issued by Denman, J., at chambers, and made returnable in the Court of Exchequer.

The prisoner was a solicitor, and was plaintiff in a suit in Chancery, which was dismissed with costs, which costs he paid. He afterwards instructed his solicitor to appeal, but the appeal not being set down in time, the defendants in the action enrolled the decree, and the Lords Justices refused to vacate the enrolment. The plaintiff then appealed to the House of Lords, but before doing so he was bound by No. 61 of the standing orders of the House to enter into a recognisance to secure payment of costs, whereby he acknowledged himself to owe to our Sovereign Lady the Queen the sum of 400*l.*, the condition of this recognisance being "that if the appellant shall well and truly pay to the respondent, in case the decree appealed from should not be reversed, all such costs as the Lords in Parliament shall appoint, then this recognisance shall have no effect, otherwise it shall remain in force."

Eventually the appeal was dismissed with costs. The costs of the plaintiff amounted to 861*l.*, and those of the defendant were taxed at 625*l.* At the time of entering into the recognisance Arthur Heavens Smith was possessed of about 600*l.*, which was expended in bringing the appeal before the House of Lords, and he in consequence was unable to pay the respondents their costs. The respondents thereupon applied to the House of Lords for his committal for contempt, but they refused to commit. His recognisances were therefore estreated into the Court of Exchequer, and that court issued a writ to the sheriff commanding him to levy the amount by distress, and on the 24th Aug. he was arrested for non-payment of the amount of his recognisance, and was lodged in the county gaol of Gloucester, and the gaoler justified his detention.

The Debtors Act 1869 enacts that, with certain exceptions, "no person shall, after the commencement of this Act, be arrested and imprisoned for making default in payment of a sum of money." The exceptions named are six in number, but no reference is made to debts due to the Crown.

Channell now moved for the discharge of the prisoner from custody.—First, the arrest was wrongful by reason of the Debtors Act 1869 abolishing imprisonment for debt, except in certain specified cases. Secondly, even if the arrest was not wrongful, the Court of Exchequer has power over the debtor's recognisances, and can relieve him under rule 110 of the Queen's Remembrancer's Act. As to the first point, the contention on the other side is that the debt for which he was arrested was a debt due to the Crown, and, therefore, the debtor could not avail himself of its provisions, the Crown not being mentioned in the Debtors' Act, and, therefore, not bound by its provisions. But this was not a debt due to the Crown. This recognisance was a mere form to secure the payment of money to the respondent, and in which the Crown had no interest whatever. [Here Bowen handed up to the court the case of *Th*

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

Attorney-General v. Edmonds (22 L. T. Rep. N. S. 667)]. That case is quite distinguishable. There the money was due to the Crown, and it would have gone into the public revenues. Here the money would go to the respondent, not to the public funds. The Act which regulates the practice of the Exchequer with respect to forfeited recognisances is 3 & 4 Will. 4. c. 99. (a) It is clear from these sections what the practice in these cases is. The money would be paid by the Treasury to the respondent, and if they did not pay it over the Exchequer would order them to do so. In fact, the Crown is a bare trustee of the money for the respondent. Strictly, of course, the Crown cannot be a trustee, but that expression expresses my meaning. With reference to the principle that the Crown is not bound unless specially named, that is an old doctrine, and the cases upon it are somewhat old. The true rule of law is that that doctrine does not apply unless the Crown has some prerogative, estate, right, title, or interest affected. This was laid down in *The case of Magdalen College* (11 Rep. 66 b.) cited in *The King v. Wright* (1 Ad. & E. 440). Crompton, in an elaborate argument on the point in the latter case, says "The rule which is sometimes laid down that the King is not bound by an Act of Parliament in which he is not named, applies only where the property or peculiar privilege of the Crown is affected. In *Bac. Abr. Prerogative E. 5, vol. 4, p. 462* (edit. 1832), it is said, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him. Here the Crown clearly has no interest, and is, therefore, bound by the Act, the evident intention of which was to prevent imprisonment for a debt of this nature. It will also be said on the other side that this is a penalty within the meaning of the exception in the Debtors' Act. But the penalty there means a criminal penalty. Here it arises from contract.

(a) Sect. 33 of that Act enacts: That it shall be lawful for the Lord High Treasurer or the Commissioners of His Majesty's Treasury, and he or they are hereby authorised, by warrant under his or their hands directed to the proper officer or officers, to stay the issuing or execution of all or any process touching any of the matters set, lost, imposed, forfeited, or estreated as aforesaid, and to vacate and discharge such fines, issues, amerciaments, penalties, forfeited recognisances, or any of them or any part thereof; provided that nothing in this clause contained shall extend to enable the said Lord High Treasurer or the Commissioners of His Majesty's Treasury to remit or restore any fine, issue, amerciaments, penalty, or forfeited recognisance to which any body, corporate or politic, person or persons, shall or may be entitled, which shall have been actually levied by or paid to them.

Sect. 35.—And be it further enacted that it shall be lawful for the Lord High Treasurer, or any three or more of the Commissioners of His Majesty's Treasury, from time to time to order and direct payment, by warrant under his or their hand, of the said fines, issues, amerciaments, penalties, forfeited recognisances, dividends, sum or sums of money or any of them, to any body, corporate or politic, person or persons entitled to the same, or to their, his, or her bailiff, steward, or agent provided always that notwithstanding such payment any body, politic or corporate, person or persons aggrieved thereby, shall and may apply by petition in the manner hereinafter mentioned against the party or parties to whom such payment shall have been made, to restore or refund the sum or sums by him or them so received.

[Lord COLERIDGE, C.J.—If this were a penalty, so would the penalty on any bond be so.] He was proceeding to argue his second point under rule 110 of the Queen's Remembrancer's Act, when he was stopped by the Court, who ruled that that must be a matter for another application and could not be discussed on the argument as to the validity of a return to a writ of *Habeas corpus*.

Bowen, for the Treasury.—The sole point is whether this is a Crown debt or no. If it be a Crown debt, then there can be no doubt whatever that the Debtors Act does not relieve the debtor from imprisonment. That has been decided by the case of *The Attorney-General v. Edmonds* (22 L. T. Rep. N. S. 667.). This debt must from its very nature be a Crown debt. The recognisance is taken in all cases to prevent any difficulty which the respondent might otherwise experience in recovering his costs of the appeal. That recognisance is taken in the name of the Queen. That creates a debt due to the Queen. She may possibly have duties to carry out with reference to that debt to parties interested, but that does not make it any less a debt due to her, nor can that duty in strictness be called a legal duty. [Lord COLERIDGE, C.J.—Suppose, putting the question with all respect and merely for the purpose of argument, that this money were paid into the hands of the Queen, and that she kept it, what would be the remedy?] Except so far as statute gives a remedy it would be, I apprehend, by a petition of indulgence to the Court of Exchequer, who is the guardian of the purse. [Lord COLERIDGE, C.J.—If that can be done, how can it be said that this is not a Crown debt?] The parties might petition the Treasury.

T. S. Pritchard appeared for the respondents in the appeal to the House of Lords, but was held to have no *locus standi*.

Lord COLERIDGE.—I am of opinion that this is a Crown debt in form and in law, and is therefore not covered by the provisions of the Debtors Act 33 & 34 Vict. c. 62, and on that ground a perfectly good return can be made to this writ of *Habeas corpus*.

POLLOCK, B.—I am quite of the same opinion. I think it would be dangerous if any doubt were allowed to go forth on this subject. The recognisance here is taken before Parliament, but there are many others, such as those entered into before judges of assizes and justices, all of which constitute Crown debts for all intents and purposes.

Motion refused.

Dec. 20.—*Channell*, having obtained a rule *nisi* for the release of the prisoner by the grace and favour of the Court of Exchequer,

Bowen (*The Attorney-General*, Sir John Holker, Q.C., with him) showed cause.—The applicant in this case relies in support of his application on 33 Hen. 8, c. 39, which empowered the Court of Exchequer to relieve subjects from recognisances upon sufficient cause, as well as on rule 110 of the Queen's Remembrancers' Act (22 & 23 Vict. c. 21). The Treasury has no interest in the matter, except to see that it is conducted in due form, and is merely anxious that the decision of the court should be given on the question. He cited

Re John Bick, 6 Price, 102;

Ex parte Williams, 8 Price, 3;

Re Fridlington, 9 Price, 658;

Attorney-General v. Halling, 15 M. & W. 687;

McQueen's House of Lords Practice, p. 271.

Pritchard, for the respondents, argued on the merits of the case.

Channell was not called upon in support of his rule.

The COURT (*Kelly*, C.B. and *Mellor*, J.) were of opinion that the rule should be made absolute to vacate the recognisance and discharge the debtor, upon his giving to the respondents a promissory note for the amount of 626l. 3s., payable in a month.

Order accordingly.

Solicitors for the appellant, *Milne*, *Riddle*, and *Co.*

Solicitor for the respondent, *R. J. Child.*

Solicitor for the Crown, *Solicitor to the Treasury.*

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Feb. 24 and May 25, 1876.

HILL (app.) v. HALL (resp.) (a)

Repeal of statute by implication—Inconsistent provisions—Different penalties—Conviction.

By 3 & 4 Vict., c. 85, s. 6, all partitions between any chimney or flue shall be of brick or stone, and at least equal to half a brick in thickness; every chimney or flue in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall be in every section not less than fourteen by nine inches; no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of 120 degrees; and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture by every master builder or workman making such chimney or flue of any sum not less than 10l. or exceeding 50l.

The *Huddersfield Improvement Act 1871*, makes no mention of the said general Act; but by section 111 enacts that the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall be determined or approved by the corporation. Unless otherwise prescribed or ordered every chimney or flue shall be constructed of good brick or stone work, and if circular, must be formed of earthenware pipes of not less than ten inches diameter; and if not circular, must be pargeted with mortar, and not less than fourteen by twelve inches clear interior measurement. No chimney or flue shall have angles less obtuse than 120 degrees, except when proper iron or stone doors or openings are left for cleaning purposes. Other provisions are made about materials, but nothing is said about the other matters provided by the general Act. Section 150 makes the penalty for breach of the local Act any sum not exceeding 5l.

Held, upon a case stated by justices, that the local Act did not impliedly repeal the general Act with respect to new chimneys in *Huddersfield*; but that the appellant, who had there made a partition less than half a brick in thickness, and had not rounded off a projecting angle four inches, was rightly convicted and fined 10l. for each offence, under the general Act.

THIS was an information preferred by *Peter Hall* against *John Hill* for that he the said *John Hill*

(a) Reported by *M. W. McKELLAR, Esq., Barrister-at-Law.*

did unlawfully make or cause to be made a certain chimney or flue, the salient or projecting angle of the same not being rounded off four inches at the least. Two of the justices of the peace for the borough of *Huddersfield* ordered that the said *John Hill* should for the said offence forfeit and pay the sum of 10l. The following case was stated for the opinion of the court:

At the hearing of the said information it was admitted before the said justices that the said *John Hill*, who is a master builder, had built a chimney or flue, the salient or projecting angle of the same not being rounded off four inches at the least, and that he had in that respect contravened the provisions of the 6th section of 3 & 4 Vict., c. 85. At the close of the complainant's case, the solicitor for the said *John Hill* was heard in answer to the matter of the said information, and he then contended before the said justices—

1. That the sum which an offender under sect. 6 renders himself liable to forfeit, viz., a sum not less than 10l. nor exceeding 50l., is not a penalty upon conviction, but a forfeiture only, and that there was no power on the part of the justices to direct the payment of any such sum; and that the remedy was only before a civil tribunal, the jurisdiction of the justices being limited to convictions for penalties only, and the appeal given by the statute not applying to forfeitures.

2. That the provisions of 3 & 4 Vict., c. 85, had been impliedly repealed, so far as respects the borough of *Huddersfield* (within the limits of which the chimney or flue complained of is built), by the *Public Health Act*, and by "The *Huddersfield Improvement Act 1871*," and the bye-laws made thereunder.

3. That the building, of which the chimney or flue complained of formed part, had been erected in accordance with plans which had been prepared and submitted to the *Huddersfield Corporation* for their approval in pursuance of sect. 103 of the said *Huddersfield Improvement Act 1871*, and which plans had been approved by them.

The questions upon which the opinion of the court is desired, are:

Whether the said justices had upon the above statement of fact power to order and adjudge that the said *John Hill* should forfeit and pay the sum of 10l.; and whether the statute under which such penalty was inflicted was impliedly repealed; whereupon the opinion of the said court is asked upon the said questions of law.

Whether they were correct in their determination as aforesaid; and if not, what should be done or ordered by the said court in the premises.

A second case was stated by the same justices, between the same parties and in the same words, *mutatis mutandis*, the information alleging that *John Hill* did unlawfully make or cause to be made a certain, or partition of a certain, chimney or flue, less than half a brick in thickness, to wit, one and a half inch.

The two cases were separately argued, the first before *Cleasby B.* and *Field J.*, on the 24th Feb.; and the second before *Cleasby B.*, *Grove*, and *Field, JJ.*, on the 25th May.

Manisty, Q.O. (with him *Beresford*), for the appellant.—No doubt at the time of its passing, the statute 3 & 4 Vict., c. 85, which is called An Act for the regulation of chimney sweepers and chimneys, had a general application, even to the borough of *Huddersfield*; section 6 is—"And

whereas it is expedient, for the better security from accidents by fire or otherwise, the improved construction of chimneys and flues provided by the said Act, viz. (4 & 5 Will. 4, c. 35) be continued: Be it enacted that all withs and partitions between any chimney or flue, which at any time after the passing of this Act shall be built or re-built, shall be of brick or stone, and at least equal to half a brick in thickness; and every breast-back and with, or partition of any chimney or flue, hereafter to be built or re-built, shall be built of sound materials, and the joints of the work well filled in with good mortar or cement, and rendered or stuccoed within; and also that every chimney or flue hereafter to be built or re-built in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall be in every section of the same not less than fourteen inches by nine inches; and no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of one hundred and twenty degrees, except as is hereinafter excepted; and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture by every master builder or other master workman, who shall make or cause to be made such chimney or flue, of any sum of not less than ten pounds nor exceeding fifty pounds." The provisions of the local Act however on this particular subject, differ so much that they impliedly repeal, within the limits of the borough of Huddersfield, the general Act. By section 111 of the Huddersfield Improvement Act 1871 (34 & 35 Vict. c. 151) "The chimneys and flues of every new building shall be constructed in such mode, and of such materials and dimensions as shall from time to time be determined or approved by the corporation. Unless otherwise prescribed or ordered, every chimney or flue shall be constructed of good brickwork or stone work, and mortar well grouted, and if circular must be formed of earthenware pipes of not less than ten inches diameter set in mortar, and if not circular must be pargeted with mortar, and not less than fourteen inches by twelve inches clear interior measurement. No chimney or flue shall have angles less obtuse than 120 degrees, except when proper iron or stone doors or openings are left for cleaning purposes. No timber or woodwork shall be placed within nine inches, or wooden plugs driven nearer than six inches of the inside face of any chimney or flue, and no opening shall be made in any chimneys or flues for any purpose nor pipe for conveying smoke, heated air, steam, or hot water, fixed in any new building, except of the materials and in the manner to be submitted to and specially approved by the corporation." The byelaws under this Act merely repeat the provisions of this section upon this subject. The enactments in these two statutes are so inconsistent that the latter must be interpreted to repeal the earlier, so far as the latter applies. The general Act absolutely requires the various proceedings imposed by it, the local Act gives full discretion to the corporation to determine and prescribe rules concerning the matter, and in case of the corporation making no different rules, the things required are by no means the same as in the general Act; for instance, by the general Act a circular chimney must be twelve inches in diameter, by the local Act it may be ten

inches; by the former a chimney not circular may be fourteen inches by nine inches, by the latter Act it must be fourteen inches by twelve inches; and there is no provision in the local Act in respect to either of the two matters for which the appellant has been convicted. Moreover, the penalty for breach of section 6 of the general Act must be between 10*l*. and 50*l*., whilst the penalty for breach of the local Act must by section 150 be under 5*l*. These distinctions all tend to show that the general Act is not meant to apply any longer to the borough of Huddersfield. Special provisions, different from those of the Chimneys Act of 1840, are now in force throughout the Metropolis by section 20 of 18 and 19 Vic. c. 122.

J. F. Clerk, for the respondent.—With respect to the Metropolis, 3 & 4 Vict. c. 85, is expressly repealed by the Metropolis Building Act (7 & 8 Vict. c. 84), Schedule A. The general Chimneys Act 1840, and the Huddersfield Local Act 1871 are quite consistent, and their provisions concerning the construction of chimneys must be read together and jointly applied to all chimneys within the borough of Huddersfield. With the exception of the diameter of a circular chimney, all the provisions of the local Act merely extend the limiting legislation of the general Act. The ten inches apply to earthenware pipes which apparently were not in use in 1840; but even if that single provision be inconsistent with the twelve inches permitted by the general Act, it is not sufficient to impliedly repeal all the other provisions of the general Act on that subject. Lord Hardwicke laid down the law on this subject in *Middleton v. Crofts* (2 Atkins 650, at p. 675), "The rule touching the repeal of laws is *leges posteriores priores contrarias abrogant*; but subsequent Acts of Parliament in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding Acts of Parliament, without negative words." Again, "Besides, a later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law makers to repeal it." It was also held in *Dr. Foster's case* (Co. Reps. P. xi), 56b, that an affirmative statute shall not repeal a precedent affirmative law, unless the subsequent statute is contrary to the precedent law.

Manisty, Q.C. in reply.—The words "Unless otherwise prescribed or ordered," in sect. 111 of the local Act, can only be construed to give the corporation power to abrogate the existing law. Those words are sufficient to make this provision an exception to the ordinary rule of law.

CLEASBY, B.—My mind has fluctuated considerably during the argument of this case, but upon the best consideration I can give the matter I have, like my learned brethren, come to the conclusion that there is not enough in the words of sect. 111 of the Huddersfield Improvement Act 1840 to repeal by implication the provisions of the general Act (3 & 4 Vict.) c. 85, s. 6, on the same subject. The rule of law is well laid down in *Foster's case* (Co. Reps. vol. 6, p. 119), and although it appears that the contrariety sufficient to repeal by implication a previous statute, may be of

different kinds, as for instance in quality, in matter, or in respect of the form prescribed, "only it must be known that forasmuch as Acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated." For myself, I must say I cannot lose sight of the fact that the later Act has but a local application; and when we look at the object of the general legislation as appears by the preamble of the 16th section of the Act for the regulation of chimney sweepers and chimneys, and when we consider that the better security from accidents by fire is of so universal an advantage, we may well take it that the policy of the Legislature was to apply these provisions even to places where further enactments of the same kind are in force. It seems to me to be most essential that chimneys should be at least a brick and a half apart, and that every projecting angle in a chimney should be rounded off four inches at the least; and although neither of these matters is required expressly in the local Act before us, I cannot think their mere omission is conclusive of an intention to repeal the enactments about them in the general Act. I can come to no other conclusion than that the Legislature in passing this local Act meant to adopt the general Act as part of its provisions on this subject. Sect. 111 is not inconsistent with sect. 6 of the Act of 1840, except as to the matters of slight importance mentioned by Mr. Manisty. Sect. 103 and following sections provide the means by which notice is to be given to and consent obtained from the corporation, but they contain nothing further about chimneys and flues. I do not, therefore, consider this local Act contains enough contrariety to repeal the previous general Act, or to set aside the existing legislation. The two Acts must if possible be read together, and the implication of repeal in the second falls short of any abrogation of the previous law. Our judgment, therefore, will be for the respondent.

GROVE, J.—I am of the same opinion. In considering the question whether one Act of Parliament impliedly repeals another, we must remember it may have that effect by the necessary inconsistency of the provisions, or if they are irreconcilable in their scope or language. Much importance should be attached to the fact of any mention made concerning the previous Act, and all these considerations should be more strictly applied when the alleged repeal is contained in a special Act of only local adaptation. It would be very dangerous if an inconsistency in something unimportant, as for instance a mere matter of measurement, should be enough to imply the repeal of an earlier Act. The question for us is whether there is anything substantially irreconcilable between sect. 6 of 3 & 4 Vict. c. 85, and sect. 111 of 34 & 35 Vict. c. 151. Reliance has been placed upon the early words of the latter, by which it is said power is given to the corporation to make any provisions concerning chimneys in Huddersfield which they may think fit; but it appears to me that this power may well be subject to the previous general Act, and that the corporation can only make by-laws and give consents within the limits allowed by that Act. Then come the directions which are to be in force with reference to chimneys, if not otherwise prescribed

by byelaws. There is no reason that I can see why they should not be read together with the directions contained in sect. 6 of the general Act. There is nothing at all inconsistent in the provisions of the two, unless it be the required diameter of a circular chimney. The old Act seems to contemplate a diameter not less than 12 inches, and the new Act authorises a diameter of 10 inches; but the latter is required, if of that size, to be of earthenware, which is a better material for the purpose than brick or stone, which the old Act refers to. It may be that a circular chimney of the new material need not in the borough of Huddersfield be of more than 10 inches in diameter, but there is no other provision in this sect. (111) which cannot be carried out at the same time as the provisions of the general Act. This slight distinction between the two Acts is not enough to imply a repeal of the earlier general provisions. Such a construction would be contrary to the ordinary canons concerning repeal by implication.

FIELD, J.—There are here in fact two appeals from convictions under the 6th section of 3 & 4 Vict. c. 85, but they both turn on the one point whether the provisions of that section are impliedly repealed by sect. 111 of the Huddersfield Improvement Act, 1871. I think that both Acts are in force within that borough, and that the later does not repeal the earlier Act. To establish an implied repeal there must be a clear contrariety in the provisions. The application of this rule is not always clear, but there seems to me to be no difficulty here. They may well be read together, and it would be most dangerous to hold that the slight inconsistencies between the two Acts was sufficient to abrogate one of them. I think Huddersfield has a protection against accidental fire from the construction of its chimneys beyond that which has been created by the general law.

Judgment for respondent.

Leave to appeal was refused to the appellant.

Solicitors for the appellant, *Shum, Crossman, and Crossman*, for *Sykes and Son*, Huddersfield.

Solicitors for the respondent, *Learoyd and Learoyd*, for *Learoyd, Learoyd, and Morrison*, Huddersfield.

Saturday, May 27, 1876.

PASHLER (app.) v. STEVENITT (resp.) (a)

Adulteration — Gin — Water — Evidence — 38 & 39 Vict. c. 63, s. 6.

Appellant sold, as a bottle of gin, liquid composed of 26 per cent. alcohol, 70 per cent. water, and 4 per cent. sugar. Evidence was adduced that gin was sold by retailers at varying strength from proof to 20 per cent. under proof. This liquid was 44 per cent. under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." Justices convicted the appellant under the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6.

Held, upon a case stated, that the facts justified the justices' finding that this liquid was not of the quality of gin, but that the excess of water was a fraudulent increase of the measure of the article within the enacting part of the said section.

This was a case stated by the two justices of the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

peace for the parts of Kesteven in the County of Lincoln, under the statute 20 & 21 Vict. c. 43.

On the 24th Jan. 1876, the respondent, who is a superintendent of police, and the proper officer appointed under "The Sale of Food and Drugs Act, 1875" (38 & 39 Vict. c. 63), for carrying into execution the said Act, laid information in due form of law against the appellant, for that he the said Baxter Pashler, on the 2nd Dec. last, at the parish of New Sleaford, in the said parts and county, did unlawfully sell to the prejudice of the said Thomas Stevenett, the purchaser, a certain article of food, to wit, gin, which was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to the form of the statute in such case made and provided.

The appellant is a licensed victualler carrying on business at Sleaford in the County of Lincoln.

On the 31st Jan. 1876, the said information came to be heard before one of the said justices alone, when both parties appeared; the hearing was adjourned to the 14th Jan. 1876, when both parties again appeared.

The evidence on the part of respondent consisted of that given by the respondent and by George May Lowe, M.D., the public analyst for the County of Lincoln. The respondent proved that he visited the ordinary place of business of the appellant and asked for a bottle of gin, with which he was furnished by the appellant and for which he was charged, and paid 2s. 6d. He did not ask for any particular quality or strength of gin, nor did the appellant give any intimation of the quality or strength of that supplied. No label or descriptive mark was on the bottle.

The respondent notified to the appellant his intention of having the gin analysed by the public analyst, and offered to divide the gin according to the provisions of the 14th section of the Act 38 & 39 Vict. c. 63. The appellant did not accept the offer to divide the sample. The respondent submitted the gin to the public analyst, Dr. Lowe, and received from him a certificate which he produced, and of which the following is a copy:

S. K. 28, gin.
Sale of Food and Drugs Act 1875.—Form of certificate.

To Mr. Thos. Stevenett, of Sleaford.
I, the undersigned public analyst for Lincolnshire, do hereby certify that I received on the 3rd Dec. 1875, from Mr. Thos. Stevenett a sample of gin labelled S. K. 28, for analysis, and have analysed the same, and declare the result of my analysis to be as follows:

I am of opinion that the same is a sample of gin, water, and sugar in the following proportions. I am of opinion that the said sample contains the parts as under, or the per centage of foreign ingredients as under:

Pure alcohol	26	per cent.
Water	70	"
Extract	4	"
	100	

Observations.

The extracts consist of sugar only.

The spirit is pure.

The alcoholic strength is exceedingly low.

As witness my hand this 10th Jan. 1876, at Lincoln.

G. M. Lowe.

Dr. Lowe proved his certificate. He stated that spirits known as "proof" contained about one-half part of water and one-half part of pure alcohol. He also said that he found from Professor Atcherley's work on the adulteration of food, that gin as sold by retailers varied in strength from proof to 20 per cent. under proof. The appellant's

gin was about 44 per cent. under proof, as tested by Sykes' hydrometer. He did not know that there was any fixed standard for gin, and he did not know from personal experience at what strength it was usually sold in the retail trade. He would not say how low its strength might be reduced without its ceasing to be gin; and when asked how he should describe that which he had analysed, he said he "should call it gin, whose alcoholic strength is exceedingly low."

The appellant tendered no evidence whatever.

The appellant was fined 1s. and costs.

The question for the opinion of the court is whether or not, upon the evidence above stated, the appellant was properly convicted under the 6th section of the Act 38 & 39 Vict. c. 63?

Graham (with him Raymond), argued for the appellant.—The words of this sect. 6 are, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases, that is to say, (1) where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof; (2) where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the strength required by the specification of the patent; (3) where the food or drug is compounded as in this Act mentioned; (4) where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation." By sect. 7 "No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser under a penalty not exceeding twenty pounds." "Provided that (by sect. 8) no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label, distinctly and legibly written or printed on, or with the article or drug, to the effect that the same is mixed." These sections do not create any offence upon the evidence before the justices. The liquid sold was of the nature, substance, and quality of the substance demanded; no provision is made as to the proportion of the ingredients, nor to the strength of the article. The analyst himself stated, in his evidence, that he should call the liquid "gin," which is what the respondent asked for.

No counsel appeared for the respondent.

CLEASBY, B.—I do not think we can interfere with this conviction. This is an article of food which is not of the substance and quality of the article demanded by the purchaser. It does not appear to me to come within either of the exemptions; the first is the only one at all applicable, and it cannot be maintained that this excess of

water has been added to the liquid because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption; indeed, it may be said, upon the facts proved, that the object was fraudulently to increase the bulk, weight, or measure of the food, or to conceal the inferior quality thereof. The justices have come to the conclusion that a mixture of alcohol and water, so far as 44 per cent. below proof, is not of the quality of gin as known commercially, but a fraudulent increase of the measure of the liquid. It is impossible for us to say they were wrong, and they were therefore justified in convicting the appellant.

GROVE, J.—I am of the same opinion. We cannot decide whether, upon the weight of the evidence, the case comes within the first exception or not; that is a question for the magistrates. The witness certainly said he should call the liquid gin, or rather qualified gin, but the magistrates had to use their discretion upon all the facts and statements before them. If 44 per cent. beyond the ordinary proportion be not adulteration, it must be difficult to discover anything to which the statute could apply. It is really a question of fact, and I think the justices have decided it rightly.

Judgment for the respondent.

Solicitors for appellant, *Varley and Toynbee*, for *Toynbee, Larken, and Toynbee*, Lincoln.

Saturday, May 27, 1876.

WILLIAMS (app.) v. EVANS (resp.) (a)

Highways—Riding furiously—Driver—Offence—Conviction—5 & 6 Will. 4, c. 50, s. 78.

The Highway Act 1835, s. 78, enumerates various acts and omissions by persons on highways having charge of carriages and animals, and also by persons interrupting others; amongst them, if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, then follow the words, "Every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5l., in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10l.

The appellant was convicted by justices of riding furiously on horseback along a highway, and fined a sum less than 5l.

Held, upon a case stated, that the penalty under 5l. was applicable to all offences mentioned in the section, whether the offenders were drivers of carriages or not; and that the conviction was right.

This was a case stated by justices of Denbigh, under the statute 20 & 21 Vict. c. 43.

An information was preferred by one John Evans, of Llandyrnog, in the parish of Llandyrnog, in the county of Denbigh, police constable (hereinafter called the respondent), against Edwin Williams, of Shopywaen, in the parish of Llandyrnog, aforesaid, labourer (hereinafter called the appellant), under sect. 78 of the Act

5 & 6 Will. 4, c. 50, charging for that he, the said appellant, on the 14th March 1876, at the parish of Llandyrnog, in the county aforesaid, unlawfully did ride a horse furiously on a certain highway there situate, leading from Denbigh to Llandyrnog aforesaid, so as then to endanger the lives and limbs of passengers on the said highway, contrary to the form of the statute in such case made and provided. The justices convicted the appellant and fined him 20s. The justices, on application, stated and signed the following case.

Upon the hearing of the information and complaint it was proved on the part of the respondent, and found as a fact, that the said appellant, on the 14th March 1876, at the parish of Llandyrnog aforesaid, unlawfully did ride a cart horse furiously, he being on the back of such horse without saddle, and urging the same forward on a certain highway there situate, leading from Denbigh to Llandyrnog aforesaid, so as then to endanger the lives and limbs of passengers on the said highway.

It was contended on the part of the appellant that the justices had no power to impose a penalty or convict for riding furiously, as the penal part of sect. 78 of the Act 5 & 6 Will. 4, c. 50, omitted all mention of a rider.

The said justices, however, on reading and considering such section, decided that not only persons driving furiously, but those riding also to the danger of the public and furiously, were intended to be and are included in such section and Act; and for the above reason they adjudged the case to be brought within the operation of the 78th section, and gave their determination against the appellant, in manner hereinbefore stated.

The question of law arising on the above statement for the opinion of this court therefore is:—Whether a person on a horse, and urging the animal furiously forward on the highway, to the danger of passengers, is liable to be convicted and fined under the 78th section of the Act 5 & 6 Will. 4, c. 50? If the court should be of opinion that the said conviction and fine was legally and properly made and imposed, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

W. C. Yale argued for the appellant.—This 78th section of the Highway Act 1835 provides a penalty for a great number of offences, but it omits any penalty for riding furiously on horseback, although such a proceeding is classed amongst the other offences created by the section. It enacts, among other things, that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger; every person so offending in any of the cases aforesaid, and being convicted of any such offence either by his own confession, the view of a justice, or by the oath of one or more credible witnesses, before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5l. in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10l., and in either of the said cases shall in default of payment be committed to the common gaol or house of correction, there to be

(a) Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

kept to hard labour for any time not exceeding six calendar weeks, unless such forfeiture shall be sooner paid." In a trial for perjury alleged to have been committed on a charge of furious riding under this section, Kelly, C.B. held, on the Western Circuit, that justices had no jurisdiction to convict on such a charge; and therefore there could be no perjury: *Reg v. Bacon* (11 Cox Cr. Cas. 540), that, so far as it goes, is a direct authority in the appellant's favour. The Chief Baron is reported to have said, "It is quite clear that the Act does not give the justices any power to inflict any punishment for furiously riding. The statute imposes a penalty only on those who furiously drive. This is, no doubt, a *casus omissus*, but it is not for me to supply the omission." Similarly Cockburn, C.J. declined to supply an omission in the Coal Mines Regulation Act 1855 (18 & 19 Vict. c. 108); by sect. 9, the owner or agent of a mine or colliery, who in case of loss of life to any person employed in such coal mine or colliery, by reason of any accident, or in case of serious personal injury arising from explosion therein, does not send notice of such accident to the inspector of the district within twenty-four hours next after such loss of life is to be liable to a penalty. The appellants were owners of a coal mine in which serious personal injury arose from explosion. They did not give notice to the inspector, and were convicted for not doing so under this section. It was held that words had been omitted which were necessary to create the offence which the appellants were supposed to have committed, and that as those words could only be supplied by the Legislature, the appellants were not liable to the penalty: (*Underhill v. Longridge*, 29 L. J. 65 M. C.). In other statutes containing enactments of this nature the distinction between riding and driving is recognised and provided for: as in the Act for the more effectual prevention of cruelty to animals (12 & 13 Vict. c. 92), where by sect. 29 "the word *overdrive* shall also signify *override*." So too the fifth offence in sect. 54 of the Metropolitan Police Act 1840 (2 & 3 Vict. c. 47), is "Every person who shall ride or drive furiously so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare." [FIELD, J.—The 78th section treats of riders, drivers, and persons who are neither.] It cannot be said that driving a carriage means riding on horseback without express words to make it so.

No counsel appeared for the respondent.

CLEASBY, B.—It is impossible to come to any conclusion on this point without some doubt, and I feel great difficulty in agreeing with my learned brothers that this was a right conviction. There are two alternatives which may be adopted in the construction of this section; either the conviction of a person riding on horseback is a *casus omissus*, or we must extend the application of the enactment beyond the words actually used. Both my brothers concur that we ought to interpret the section to include the case before us in its application, and I am not prepared to dissent from their conclusion. The question which arises is, whether the use of the word "driver" only in the part relating to the penalty, excludes its application to a person riding on horseback. If capable of being so read, the remainder of the section supports the decision of the justices, which made "driver" include a "rider." The same word too must be applied

in the same way to a person having no carriage or horse of his own, who interrupts the passage of another, or his carriage or animal on the highway; my brothers, however, think we may read this part of the section in a broad sense, and if so, it is certainly not unreasonable to do so. Although it is somewhat a strong step to impose a penalty by implication, and my doubts are not removed, yet I assent to the decision of the rest of the court.

GROVE, J.—I cannot say there is no doubt about the matter, but unless a large portion of this clause be rendered merely nugatory, the justices have adopted the only possible interpretation. The old-established rule is, that you must construe a statute grammatically, except when such construction leads to a manifest absurdity. I think the result would be an absurdity if we were to treat the conviction of a furious rider as a *casus omissus*. The section creates various offences, amongst them, "if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger." The appellant is found to have committed this offence, but he says, although convicted of riding on horseback furiously, he must go in peace and cannot be fined, because a penalty is imposed only upon persons driving who commit any of these offences. The words immediately following those I have quoted relate to the whole of the previous part of the section, "every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5*l.*, in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*" I cannot think that the word "such" limits the application of penalties only to persons driving their own or other person's carriages. The expression is somewhat elliptical, but I read the words, "in case the offender be the owner of such waggon, cart, or other carriage," to be a mere proviso that such an offender shall suffer a heavier penalty. All other offenders, including drivers who are not owners of carriages, are to forfeit sums within the lower limit of 5*l.*, by force of the earlier part of the sentence. Another view which may be adopted is that the word "driver" is used in a wider sense than that generally given to it, and that it includes a person who rides on the back of a horse, and may be said to conduct or drive it. I do not think any very great strain would be necessarily put upon the word if it were made to include every person in charge of a horse or carriage, and upon that interpretation also this conviction might be sustained. I prefer, however, to look at the whole of the section, and to apply the penalty to all offences mentioned in it; 10*l.* being the amount to which a person offending is liable if he is owner of the carriage by which he commits the offence, 5*l.* being the amount in all other cases.

FIELD, J.—I have arrived at the same conclusion, not without great doubt nor some fluctuation of opinion. The object of the section is clearly the protection of persons passing along highways, and all the acts and omissions enumerated are rendered offences against the law, and persons committing them may be convicted. It would be an absurdity if a penalty were to attach only

to a part of such convictions, and that would be the result of a strictly grammatical construction of the clause. I think, therefore, that the first interpretation suggested by my brother Grove is the right one; that, notwithstanding the words, "in case such driver shall not be the owner of such waggon, cart, or other carriage," the penalty of 5*l.* or less is imposed for every offence in the section, and if committed by the owner of the carriage which he is at the time driving, he is liable to a penalty of 10*l.* *Ut res magis valeat quam pereat* is a rule of construction better in some cases than to follow the strictly grammatical meaning of the words. The conviction will be affirmed.

Judgment for respondent.

Solicitors for appellant, *Finney and Bruff*, for *Louis and Edwards*, *Ruthin*.

Nov. 9, 10, and 16, 1876.

WOOD v. BEARD.(a)

Landlord and tenant—Yearly tenancy—Agreement to allow tenant to continue—Uncertainty.

Plaintiff, in writing but not under seal, agreed to let to defendant as tenant from year to year a house and premises at a yearly rent paid quarterly, and also agreed to let him remain as tenant so long as defendant kept his rent paid, and plaintiff had power to let the premises.

Held that this clause introduced an uncertainty which made it impossible to give effect to the agreement as conferring any particular estate; and that the defendant occupied the premises merely as tenant from year to year.

APPEAL from a decision of J. J. Lonsdale, Esq., County Court Judge of Kent, sitting at Gravesend.

1. This is an action commenced in the above County Court on the 29th March 1876 to recover possession and mesne profits of a tenement under 19 & 20 Vict. c. 108, ss. 50 and 51.

2. By the particulars of demand the plaintiffs claimed (first) possession of the house and premises known as No. 167, Windmill-street, Gravesend, with the outbuilding belonging thereto known formerly as a skittle ground in the rear of the said house, the defendant's interest as tenant of the premises to the late Mr. George Wood deceased, being alleged in the particulars to have been determined by a notice to quit and also to have expired (secondly) 9*l.* 6*s.* 8*d.* for mesne profits of of the same premises for seven months from the 29th Sept. 1875 to 25th April 1876.

3. The defendant paid into 8*l.* into court, and gave notice of the following ground of defence that he caused all-rent due on the 25th March 1876, to be legally tendered on that day to the plaintiff George Wood.

4. The action came on for trial before James John Lonsdale, Esq., the Judge of the said County Court at Gravesend on the 25th April 1876, when the plaintiffs, by their counsel, put in an agreement under hand only between the defendant and the said George Wood deceased, which had been previously admitted and was as follows:

An agreement made this 28th Feb. 1872, between George Wood, of Milton-next-Gravesend, Kent, brewer, of the one part, and Alfred John Beard, of Gravesend, Kent, of the other part.

The said George Wood doth hereby agree to let, and the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

said Alfred John Beard to hire and take as tenant from year to year, from the 25th March 1872, the house and premises known as No. 167, Windmill-street, Gravesend, with the outbuilding belonging thereto, known formerly as a skittle ground, in the rear of the said house, at the yearly rental of 16*l.*, payable quarterly. And the said George Wood doth hereby agree to let the said Alfred John Beard remain as tenant of the above-named premises so long as he, the said Alfred John Beard, keeps his rent paid, and he, the said George Wood, has power to let the said premises. Also the said George Wood doth likewise agree not to raise or increase the rental of the said house and premises during the tenancy of the said Alfred John Beard. Also the said Alfred John Beard doth agree to make all purchases of ale, beer, and porter (disposed or consumed on the said premises) at the public house attached, known by the sign of the "Rose and Crown" tavern. And the said Alfred John Beard doth further agree to pay all rates and taxes, with the exception of the land and property tax. Witness the hands of the said parties the day and year first above written.

ALFRED JOHN BEARD.

Witness

per pro. GEORGE WOOD.

GEORGE SMITH, GEORGE WOOD, Jun.
Clerk to Mr. Geo. Wood, Brewer.

5. With the exception of the said agreement there was no evidence as to what the interest or estate of the said George Wood in the premises was.

6. On the 24th Sept. 1875, defendant was served with a notice to quit of that date, signed by the said George Wood, deceased, to the following effect:

To Mr. Alfred John Beard, of 167, Windmill-street, Gravesend. I hereby give you notice to quit and deliver up possession of the house with the outbuildings thereto and premises, with the appurtenances, situate at 167, Windmill-street, in the parish of Gravesend, in the county of Kent, which you hold of me as tenant thereof, on the 25th March next.

7. The same George Wood died on the 12th Dec. 1875.

8. All rent due by the defendant to the testator George Wood was paid by defendant quarterly up to the 29th Sept. 1875, and no rent had been accepted by the plaintiffs after that date, though it was admitted that a tender of the same as it became due at Christmas 1875 and Lady Day 1876, had been duly made by the defendant, but refused by the plaintiffs.

9. The same George Wood, by his will dated the 31st Dec. 1874, gave, devised, and bequeathed all and singular his real and personal estate (with some exceptions not applying to this case) unto the three plaintiffs, their heirs, executors, administrators, and assigns, and appointed the three plaintiffs executors of that his will.

10. That will was proved in the principal registry of the Court of Probate on the 12th Jan. 1876, by the plaintiffs William Browne Ferris and Edward Hilder, the plaintiff George Wood having renounced probate thereof.

11. On the 27th March 1876, the defendant was served with a notice of that date signed by the three plaintiffs to the following effect:

To Mr. Alfred John Beard —We hereby demand of and require you forthwith to quit and deliver up possession of the house and premises known as No. 167, Windmill-street, Gravesend, with the outbuilding belonging thereto, known formerly as a skittle ground, in the rear of the said house which were held by you under a tenancy from the late Mr. George Wood, deceased, and which tenancy has expired and been determined."

But defendant refused to give up possession.

12. The plaintiffs also proved by three witnesses, one a surveyor and auctioneer, and the other two house agents and auctioneers, that the annual

value of the premises is from 40l. to 42l., and no more, and also proved that in the present parochial valuation list for the purposes of the poor rate, the premises are assessed at 28l. as the gross annual value and 23l. net rateable value, and that they were assessed at the same sums in the valuation list for January 1871, when defendant unsuccessfully appealed to the assessment committee against that assessment on the ground, that it was beyond the gross annual value. Also that the premises were at first occupied by defendant as dining rooms, but recently were underlet by him as a provision store, and had been shut up and unoccupied for the then last six weeks.

13. It was contended, on behalf of the defendant, that the defendant was entitled, under the agreement, to hold as long as he kept his rent paid, and the said George Wood had power to let, that it was incumbent on the plaintiffs to prove that the defendant had not kept his rent paid, and that the power to let had ceased, and that they had not done so, that even if the lease were void at law the court could give effect to it as a court of equity that the agreement was definite (*videlicet*), for as long as the defendant kept his rent paid, and George Wood had power to let, and that the notice to quit was given before the death of the said George Wood, the testator.

14. It was contended, on behalf of the plaintiffs, First, that whether by the first part of the agreement, or by payment of rent, defendant became a tenant from year to year, such tenancy was only a tenancy from year to year, determinable by the usual half-year's notice, and had been determined by the first notice to quit; secondly, that the first part of the agreement distinctly stipulated for a tenancy from year to year, and that the subsequent clause, being inconsistent with this, was to be rejected as repugnant; thirdly, that the document is void as a lease under the Statute of Frauds, and the Act (8 & 9 Vict. c. 106), from not being under seal, either because it was for more than three years, or that two-thirds of the rack rent was not reserved, and that defendant had not given any notice of any counterclaim to have a lease under the equitable jurisdiction of the court; fourthly, that the agreement was void for indefiniteness, vagueness, and uncertainty; fifthly, that it expired on the death of the said George Wood, deceased, and that the second notice of the 27th March had been served since his death.

15. The judge decided that the term and interest of the defendant had not expired or been determined by the plaintiffs, by a legal notice to quit, that the defendant was a tenant from year to year, and for so long as he paid his rent, and the testator, George Wood, had power to let, and that the defendant paid or tendered all his rent as it became due, and there was no evidence that the power of the said testator, George Wood, to let had ceased before the notice to quit, dated the 24th Sept. 1875, was given to the defendant. Therefore, the defendant's counsel asked for judgment for defendant, but ultimately the judge gave judgment of nonsuit against the plaintiffs with costs, with leave to them to appeal if such leave be necessary.

16. The question for the opinion of the Divisional Court of the High Court of Justice is: First, whether or not the tenancy of the defendant had expired, or been determined by a legal

notice to quit before the common action; secondly, whether or not the defendant had been determined of possession, dated the 27th March the plaintiffs: thirdly, whether the defendant, under the agreement, to let he keeps his rent paid, and the George Wood, had power to let whether or not the tenancy of the binding on the plaintiffs, and continue the defendant keeps his rent paid, power to let.

H. Matthews, Q.C. (with him 1 for the plaintiffs).—This agreement tenancy from year to year, which concluded by the notice to quit of 1875. Upon the face of it no could be created by reason of its was laid down in *Say v. Smith* (1 P p. 272) "Every contract sufficient for years ought to have certainty of terms, viz., in the commencement of the continuance of it, and in the end all these ought to be known at the of the lease, and words in a lease make this appear are but babble. And these three are in effect by showing the certainty of the time lessees shall have the land, and if any not a good lease, for then there was The clause of the lease in that analogous to the condition in this with respect to the payment of 10,0 value in money, at the end of ten years thereby, "and further, it was agreed between the said William Norton (the said John Kirton (the lessee), to demise, that if the said John Kirton assigns, should pay to the said William Norton or their assigns, the said 10,000 value of them in money, at the end and ten years from thence next follow said William Norton granted and himself, his heirs, and assigns, by deed, that the said John Kirton, assigns, should have a perpetual demise of the premises from ten years continually and ensuing out of the man, paying therefore yearly the rent and the aforesaid titles in manner specified." Of this it was said in the here in the principal case there is three certainties for any term beyond years, for when the first ten years there is a condition here appointed performed before any new term shall and before the condition is performed be no lease, for such is the limitation This authority is conclusive in favor of the plaintiff's right to recover in this action considering the statutes which have since that time limiting the effects as to land; but the case of *Doe v. Browne* (8 East, 165), decided since the Statute of Frauds, is even more nearly in point: there was to lease at a certain time the lessor should not turn out the tenant as he paid the rent and did not do so; it is injurious to the lessor's business that this either created an estate which would require a deed, or it must be a tenancy from year to year. Law

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p. 167: "The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded."

Rolland for defendant.—The question for this court must be whether the judge was justified in coming to a judgment against the plaintiffs. [GROVE, J.—That is not the point upon which our opinion is asked.] The intention of the parties must have been that for which the defendant now contends. [GROVE, J.—Yes, and it is for us to consider whether the natural interpretation of the words of the agreement can be carried out consistently with the decided cases and the statutes.] There is nothing inconsistent nor uncertain in this agreement, for although it is said that every lease for years must have a certain beginning and a certain end, yet the certainty here is sufficient; "albeit there appear" (Coke on Littleton, 45 b.) "no certainty of years in the lease, yet if, by reference to a certainty, it may be made certain, it sufficeth, *Quia id certum est quod certum reddi potest.*" The example given is, "if A. leaseth his land to B. for so many years as B. hath in the manor of Dale, and B. hath then a term in the manor of Dale for ten years, this is a good lease by A. to B. of the land of A. for ten years." This agreement creates a tenancy from year to year with an incident, and, therefore, no deed is necessary; and further, to be within the statute 8 & 9 Vict. c. 106, the term must be necessarily over three years:

Weld v. Baxter, 11 Ex. 816;

Beeson v. Burton, 32 L. J. 33, C. P.;

Ashworth v. Hopper, L. Rep. 1 C. P. Div. 178;

Tress v. Savage, 4 E. & B. 36;

Berry v. Lindley, 3 M. & G. 498;

Lee v. Smith, 9 Ex. 662.

Moreover, it does not lie in the plaintiff's mouth to say that the agreement which he produced at the trial ought to have been a lease: the circumstances of this case give the defendant an equitable interest in these premises, which is sufficient to establish his right to judgment against the plaintiffs. Malins, V.C. referred to *Doe dem. Warner v. Brown in Re King's Leasehold Estates, Ex parte East of London Railway Company* (L. Rep. 16 Eq. 521); and also to the same case *Browne v. Warner* (14 Ves. 156 & 409), as it came before Lord Eldon upon a bill by the tenant against his landlord, and also upon an injunction. The landlord's demurrer was overruled. "I suppose" (said Malins, V.C.), "the parties finding Lord Eldon's opinion was that there was an equitable interest, did not go any further, and the tenant continued in possession. Therefore, upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord, that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interests exists."

Matthews, Q.C., in reply.—A defendant in a County Court can obtain equitable relief only upon a counterclaim, and no such proceeding appears in this case. Lord Eldon, in his judgment in *Browne v. Warner*, at p. 158, recognises the propriety of the decision at law, and neither on the demurrer nor on the injunction expresses any such opinion on the equitable right as that inferred by Malins, V.C.

Cur. adv. vult.

Nov. 16.—CLEASBY B. delivered the following

written judgment:—This was an action to recover the possession of a house which had been let by one George Wood to the defendant. On the 24th Sept., Wood had served a notice to quit on the 25th March following, and the question was whether after the expiration of that notice, the defendant had any interest in the premises. The demise was by writing under the hand of Wood, without seal, and purported to let the premises to the defendant as tenant from year to year, from the 25th March 1872, and for so long as he continued to pay the rent and Wood had power to let; and there was a stipulation that the defendant should procure all the beer &c., sold or consumed on the premises, from a public-house of Wood. It is set out at length in the case. The question was, having regard to the Statute of Frauds, and the statute 8 & 9 Vict. c. 106, s. 3, what is the effect of the instrument, and what interest did the defendant take under it? It will be observed that the stipulation that the defendant shall not be disturbed in his tenancy so long as he pays his rent has this qualification, so long as the landlord has power to let. These words which put a qualification upon the interest intended to be created, cannot be rejected as of course. The plaintiff relied on the case of *Doe v. Brown* (5 East, 165), where it was held that a similar lease, so far as it created any interest beyond a tenancy from year to year, was void. This was before the statute of Victoria, which made a deed necessary for all leases exceeding three years and rested upon this, that the interest created was a freehold one, so far as it was greater than a tenancy from year to year.

The learned counsel for the defendant distinguished the present case on the ground that the continuance of the term did not wholly depend upon the will and act of the lessee, as in the case cited; in which case the uncertain interest would be a freehold one, but this was a qualification which introduced the will of the lessor, viz. his capacity to let depending not necessarily upon his capacity at the time of the agreement, but capacity afterwards acquired; and it was suggested that the lessor might be, and indeed was, tenant from year to year himself. And further, it was contended for the defendant that whatever the legal interest of the lessee might be, he acquired at all events an equitable right to an extension of the term. And for this the decision of Lord Eldon was referred to, when the same case came before him as that reported in 8 East, upon a bill for specific performance by granting a formal lease. The case is reported in the 14th vol. of Vesey jun., and it appears that Lord Eldon overruled a demurrer to the bill for want of equity (p. 156), and that an injunction against the action was allowed; though what became of the suit and whether the injunction was continued did not appear: (14 Vesey jun. 409.) It should be noticed that the agreement in that case contained a clause that the tenant was to receive £40 on a change of tenancy, and upon this Lord Eldon relied upon both occasions when the case was before him, shewing that a lease was necessary to carry into effect the intention of the parties. There is no such clause in the present agreement. Various other authorities were referred to, and among others particularly the case *Re King's Leasehold Estates* (L. Rep. 16 Eq. 521), in which a person holding under a similar agreement was held entitled

to compensation beyond his yearly tenancy, when the property was compulsorily taken. The authorities do not apply to the present case by reason of the additional condition "so long as the lessee has power to let." It appears to me that this clause (which, as before observed, cannot be rejected as necessarily unmeaning, and the meaning of which can only be arrived at by conjecture), introduces an uncertainty which makes it impossible to give effect to the lease as conferring any particular estate. This objection equally applies whether the legal or equitable estate of the defendant is considered. Another objection was, that in addition to the rent, there was in this case a further consideration for the lease, viz., the procuring all the beer, &c., at the public house of Mr. Wood, and that the other evidence showed that less than two-thirds of the value was reserved, so that the case was taken out of the 2nd section of the Statute of Frauds; and though not within the first section of the Statute of Frauds, being in writing, the lease was void at law by virtue of the statute of 8 & 9 Vict., for not being under seal. It followed from this that the only legal estate of the defendant was that derived from the yearly payment of rent, viz., a tenancy from year to year, and that the lease being void there was nothing to give the defendant any equitable estate beyond his legal tenancy. It is unnecessary to consider other objections, but it seems clear that if the defendant was entitled to any lease beyond the lease from year to year, the lease should contain a clause of forfeiture upon non-payment of rent and non-performance of covenants. In a lease from year to year such a clause is unnecessary, because the landlord can always put an end to the tenancy by a six months' notice. But if a lease were granted it is by no means clear that it ought not to be in such a form as would make the discontinuing the use of the premises as a dining room, and letting them as provision stores, followed by their being shut up, a forfeiture of the lease. This only shows further how undefined and uncertain the interest of the defendant was, except so far as it was an interest as tenant from year to year. As I think the only interest of the defendant was terminated by the legal notice to quit (which is an answer to the first question), it is unnecessary to say what would be the effect of the demand of possession after Mr. Wood's death, if the notice had been inoperative. I do not think that a question arises in the present case what would be the result of a proper application for a specific performance of the agreement, as there is no counter-claim, and the only question is whether upon the agreement as it stands without explanation there is a defence to the action.

GROVE, J.—I agree with my brother Cleasby. The equitable question is not before us, as the matter is here raised. The question specifically reserved is whether or not the tenancy of the defendant had been determined by the notice to quit; as to the answer to that question, I have come to the conclusion that the defendant's tenancy was so determined. I should have been glad to carry out the apparent intention of the parties at the time of the agreement, but the authorities against it are too strong. The County Court Judge may, if he think fit, allow a counter-claim to be added, and decide whether the defendant is entitled to any equitable relief, I

but on the legal point reserved the plaintiff is right.

Judgment for plaintiff.

Solicitors for plaintiff, *Walker, Son, and Field*, for *E. W. Bewley, Gravesend*.

Solicitor for defendants, *T. Sisney*, for *A. Tolhurst, Gravesend*.

Judicial Committee of the Privy Council.

Tuesday, Dec. 5, 1876.

(Present the Right Hons. Lord BLACKBURN, Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE CREDIT FONCIER OF MAURITIUS v. PATURAU AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Practice—Costs—Appealable value.

Appeals to the Judicial Committee merely for the sake of costs will not be allowed, even if the costs amount to the appealable value.

THIS was an appeal from a judgment of the Supreme Court of Mauritius, pronounced in Jan. 15th, 1875, in a suit in which the present respondents were plaintiffs, and the present appellants, together with other persons who did not appeal, defendants.

The facts appear sufficiently in the judgment of their Lordships.

Leith, Q.C. and *Lumley Smith* appeared for the appellants.

The respondents did not appear, and the appeal was consequently heard *ex parte*.

At the conclusion of the argument their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—In this case the action was brought by Paturau and others to cancel a contract which they had entered into with Charles Mauvis, and to authorise them to remove certain machinery which they had set up upon a sugar estate of Charles Mauvis, he having failed to pay them the price of the said machinery. At the time when the contract was entered into by Mauvis the estate had been mortgaged by a person under whom he claimed to, amongst other persons, the Credit Foncier, and they claimed to have the right to the machinery, notwithstanding Paturau had not been paid. Pending the suit an order was made for the sale of the estate which had been mortgaged to the Credit Foncier upon the application of that company, and the estate was sold, after notice of this action, to the purchasers, who were informed that they would purchase subject to the decision of the court. The Credit Foncier were paid, and fully paid, all their principal and interest out of the money which the estate realised, and the only persons remaining interested in the case were the purchasers who had been made parties to and who defended this suit, but who do not think it necessary to appeal against the judgment. If the judgment be set aside, the Credit Foncier will get nothing; the purchasers will be entitled to the machinery. Whatever may be the decision of this tribunal upon this appeal, the Credit Foncier would get no benefit whatever. The only interest, therefore, the Credit Foncier can have is to have the judgment reversed, with

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

which they have been put to in the action. But appeals are not allowed to Her Majesty in Council merely for the sake of costs, nor (if they were) do the costs amount to the appealable value nor to the sum which the Credit Foncier, when they appealed, alleged to be the amount involved. Under these circumstances their Lordships are most clearly of opinion that the Credit Foncier have no *locus standi* as appellants, and consequently they will humbly advise Her Majesty that the appeal be dismissed.

Solicitors for the appellants, *Flux and Co.*

Nov. 7, 8, 9, and 11, 1876.

(Present the Right Hons. Sir BARNES PEACOCK, Sir ROBERT COLLIER, and Sir HENRY KEATING.)

THE MAYOR, &C., OF MONTREAL v. BROWN AND ANOTHER. (a)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Lower Canada—Right of appeal—Code of Procedure, sects. 1114, 1115, 1116—Statute 27 & 28 Vict. c. 60—Commissioners in expropriation—Want of diligence—Prospective value of land.

The rule of English law that an appeal does not lie unless given by express legislative enactment does not prevail in French or Canadian law.

By a colonial statute, commissioners were appointed to fix the compensation to be paid for property taken for public improvements, who were to make a report to be confirmed by the Superior Court, from which there was no appeal. The Act contained a further provision that if the commissioners did not fulfil their duties in a diligent manner, they might be removed on petition to the Superior Court.

Held (affirming the judgment of the court below), that the Court of Queen's Bench had jurisdiction to entertain an appeal from the Superior Court upon a petition under the Act, and further that the adoption of an erroneous principle in estimating the value of property did not amount to a want of diligence within the meaning of the Act. The prospective value of land is not to be excluded from a valuation under the Act.

Upon a question of procedure, the Judicial Committee will be unwilling to reverse the decision of a colonial court.

This was an appeal from the Court of Queen's Bench for Lower Canada, which had reversed a decision of the Superior Court in favour of the appellants.

The appellants were the Mayor and Corporation of Montreal; the respondents were two of the "commissioners in expropriation," appointed under the Colonial Act, regulating expropriations in the City of Montreal (27 & 28 Vict. c. 60), to fix the amount of compensation to be paid by the appellants for a certain lot of ground and buildings which they had resolved to acquire for the purpose of widening a street in the City of Montreal.

By sect. 13, sub-sect. 12, of the Act the commissioners were directed to make a report, to be confirmed and homologated by the Superior Court, and it was provided that this "confirmation and homologation"

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

parties interested, and consequently not open to any appeal."

By sect. 13, sub-sect. 9 :

If one or more of the said commissioners, at any time after their appointment, shall fail in the due performance of the duties assigned to them in and by the present Act, or shall not fulfil the said duties in a faithful, diligent, and impartial manner, it shall be lawful for the corporation of the said city, by its attorney, to apply by summary petition to the said Superior Court, or to a judge thereof, as the case may be, to stay the proceedings of the said commissioners, and to remove and replace the said commissioner or commissioners who may have forfeited or violated his or their obligations, and upon such petition the said court or a judge may issue such orders as may be deemed "conformable to justice."

In the present case there was a very wide difference between the valuation fixed by the respondents and that of their co-commissioner, a Mr. Masson, who dissented from their report, and made a report of his own, in which he fixed a much smaller sum.

The appellants thereupon presented a petition to the Superior Court, in which they charged the appellants with unfairness and partiality in their award, and prayed for their removal.

The case was heard before Berthelot, J., who, in Sept. 1870, gave judgment, exonerating the respondents from the charges of unfairness, but removing them from their positions as commissioners on the ground that they had included the prospective value of the land in their award, and that this principle of valuation was erroneous, and amounted to a want of diligence within the meaning of the Act.

The respondents appealed to the Court of Queen's Bench, and in Sept. 1873 the judgment of the Superior Court was reversed by Drummond, Badgley, Monk, and Taschereau, JJ., Duval, C.J. dissenting.

From that judgment this appeal was brought to the Privy Council.

Fry, Q.C. and Gibbs, appeared for the appellants, and contended that the Court of Queen's Bench had no jurisdiction to entertain the appeal. The decision of the judge of the Superior Court was final. This being a private and local Act, no appeal can be given by the general law as contained in the Code of Civil Procedure, if it is not given by the Act itself :

The Attorney-General v. Skillem, 10 L. T. Rep. N. S. 434; 10 H. of L. Cas. 704;
Birkenhead Docks v. Laird, 28 L. J. 457, Ch. ;
Fitzgerald v. Champneys, 5 L. T. Rep. N. S. 233; 2 J. & H. 31.

The Code itself shows that an appeal was not intended in such a case as this. Sect. 1115 only applies to "judgments," and this was in the nature of an "order." As a general rule, the House of Lords has an appeal in all cases from the Court of Chancery, but never under a statutory jurisdiction unless it is given expressly by the Act :

Re Mockett's Will, 1 L. T. Rep. N. S. 436; *Joh. 636*;
Wall v. The Attorney-General, 11 Price, 643;
Bygnald v. Springfield, 7 Cl. & Fin. 71.

Subsequent general legislation cannot affect a previous special Act. Further, the evidence shows that the decision of the judge of the Superior Court was correct.

Bompas and K. E. Digby, for the respondents, argued that this was a "final judgment," and therefore susceptible of appeal. In French juris-

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THE MAYOR, &C., OF MONTREAL V. BROWN AND ANOTHER.

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prudence there is no difference between "judgments" and "orders." The only cases in which an appeal is excluded is in money matters, when the amount at stake is trifling. The case of *Brown v. The Curé of Montreal* (31 L. T. Rep. N. S. 555; L. Rep. 6 P. C. 157) was a proceeding by *mandamus*, but it was never suggested that an appeal would not lie. The case of the right of the House of Lords to hear appeals is not applicable to Canadian jurisprudence. If there was no right of appeal before the passing of the Code it was given by the Code, for a private and special Act may be superseded by a public general Act: (*Stewart v. Jones*, 22 L. J. 1, Q. B.; *Re Cuckfield Burial Board*, 19 Bear. 153; 24 L. J. 585, Ch.) Besides the judicial committee will not disturb the decision of the Colonial Court in point of practice: (*Boston v. Lelievre*, 22 L. T. Rep. N. S. 735; L. Rep. 3 P. C. 157). The judge of the Superior Court was not justified in his finding by the evidence before him.

Fry, Q.C. in reply, cited

O'Sullivan v. Hutchins, 7 Cl. & Fin. 85, note.

At the conclusion of the arguments their Lordships gave judgment as follows: This is an appeal from the judgment of the Court of Queen's Bench of Lower Canada (appeal side), delivered on the 20th Sept. 1873, reversing, in favour of the present respondents, the judgment of the Superior Court sitting at Montreal of Sept. 17th, 1870, upon a petition of the appellants. The judgment of the Superior Court stayed the proceedings of the present respondents, commissioners in expropriation, and of one Damase Masson, their co-commissioner, and removed the respondents, replacing them by two other persons mentioned in the judgment. A petition similar to that of the appellants was presented at the same time to the Superior Court by Walter Benny and others, and the judgments, both of the Superior Court and of the Court of Appeal, were delivered on both petitions. Leave to appeal also was granted to all the parties, as well as to the appellants. There is no appeal lodged by Walter Benny and others against the judgment of the Court of Queen's Bench, but the case for the appellants states that the appeal is prosecuted not only on their own behalf, but on behalf of those parties. The case turns upon the powers and duties of the commissioners in expropriation appointed under a statute passed by the Provincial Parliament of the 27 & 28 Vict. c. 60. That Act recites that in consequence of the rapid extension of the city of Montreal, it became necessary to lay out streets and make other arrangements for the public convenience, and that difficulty and delays were oftentimes experienced in doing so by reason of the defect of the laws then existing. We are informed that the mode of proceeding to expropriate before the Act was to make the valuations by means of the intervention of juries, as with us, in cases where agreements cannot be come to. The Act goes on to give power to the corporation of the city to adopt various ways of making the improvements in question, and to direct whether they are to be paid for out of the funds of the city or whether the cost is to be assessed upon persons interested in, and benefited by, the improvements. If the council cannot enter into an amicable agreement with the owner of any land which it may be necessary to take for the purpose of those improvements, they are then to proceed in a

way pointed out by the Act, viz., that having given public notice of their intention, and a special notice to the owner, they are to apply to the Superior Court or, if the court be not sitting, to a judge of that court in chambers, to choose and nominate three competent and disinterested persons to act as commissioners to fix and determine the price or compensation to be allowed for the property so to be taken; and there is a sub-section which obliges the parties named to accept the nomination under a penalty specified. The commissioners so appointed are to be sworn, and invested with the powers, and to have the duties of experts in conducting their valuation. It is their duty to "determine the amount of the price, indemnity, or compensation which they shall deem just and reasonable" for the land to be taken "or for the damages caused by such expropriation," and they are invested with powers to examine witnesses, to call for deeds, and all other powers necessary for the performance of their office. In case of difference the valuation of the majority is to prevail. There is then the provision upon which this case mainly turns, which is contained in sub-section 9 of the Act. That sub-section provides, "If one or more of the said commissioners at any time after their appointment shall fail in the due performance of the duties assigned to them in and by the present Act, or shall not fulfil the said duties in a faithful, diligent, and impartial manner, it shall be lawful for the corporation of the said city by its attorney to apply by summary petition to the said superior court, or to a judge thereof, as the case may be, to stay the proceedings of the said commissioners, and to remove and to replace the commissioner or commissioners who may have forfeited or violated his or their obligations, and upon such petition the said court or judge may issue such orders as may be deemed conformable to justice." Then it goes on to provide, that so soon as the commissioners shall have completed their valuation they are to give public notice to all parties to come in at a certain time and raise any objections that may occur to them with reference to the valuation so made, and which therefore in some sense may not improperly be termed a preliminary valuation, because the Act goes on to say that,—"it shall be lawful for the said commissioners to maintain or modify at their own discretion the appraisal so made by them." The Act then provides that the corporation shall submit to the said Superior Court or to one of the judges the report containing the appraisal of the commissioners, for the purpose of being confirmed and homologated to all intents and purposes. "And the said court or judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal." As to that judgment by homologation, therefore, any appeal upon it is thus undoubtedly taken away. The respondents and a Mr. Masson were appointed commissioners, and they proceeded to value the property of a Mr. Wilson, who was the owner of a piece of land which had a double frontage in two streets, St. Joseph-street, which it was intended to enlarge, and another street called McGill-street. It was necessary to take a portion

street, the effect of which would be to diminish the frontage in both streets. The commissioners proceeded to value under the Act of Parliament, and there was a difference of opinion between them as to the value, Mr. Masson making the lower estimate, and the present respondents making their estimate considerably higher, the higher estimate being 19,500 dols., and the other between 7000 and 8000 dols. only. The respondents, however, having given the public notice required by the statute, and having certain facts brought before them of which they say they were previously unaware, reduced their estimate to 13,066 dols. Meanwhile it was known of course what their first valuation had been, and this appears to have excited great surprise and disappointment on the part of those who were to be called upon to contribute to the payment; accordingly petitions were presented to the Superior Court both by Walter Benny and others, who were to be contributory, and by the corporation, who are the present appellants. The petitions were to the Superior Court, and contained charges of very scandalous fraud and partiality upon the part of the two commissioners who had made the higher valuation, and prayed for their removal and for the appointment of other commissioners in their place. Their Lordships think it unfortunate that such charges were made, because it turned out there was no ground whatever for them. They were made, however, and the respondents were called upon to answer them. That they were called upon to answer these charges, and that in a formal way, appears distinctly from the following order of the court: "By consent of all parties it is ordered by his honour Mr. Justice Berthelot that delay be granted to the 4th Sept. next for the said commissioners to answer the petition of the said Walter Benny *et al.*, and the Mayor *et al.*" Accordingly, they appeared, answered, and pleaded to the petitions in a formal way. To those pleas there were replications, and the case proceeded to issue. The issues having been joined, and an articulation of facts delivered, witnesses were examined on both sides; and after such examination, Mr. Justice Berthelot delivered the judgment of the court. By that judgment it was decided that the respondents, although not guilty of the serious charges which were made against them, had, in their valuation, adopted a principle which was so palpably erroneous that its adoption amounted to a want of diligence that justified the court in ordering their removal; and accordingly it was ordered that they should be removed and others appointed in their place, and that the valuation of the others should proceed. Thereupon the present respondents appealed to the Court of Queen's Bench in Canada, and the first question that arises is whether an appeal lay from the judgment pronounced by the Superior Court to the Court of Queen's Bench. That question turns mainly upon the construction of the 1114th and 1115th articles of the Code of Procedure, which embodies the provisions of previous Acts of Parliament. The 1114th article of the Code provides, that error may be brought by means of a writ of error against any judgment of the Superior Court, founded upon a general verdict given by a special jury. It must be brought before the Court of Queen's Bench sitting in appeal, and questions of law are only to

"an appeal lies to the same final judgment rendered by except in matters of *certiorari* article says: "An appeal al tory judgments in the follow in part, decide the issues, or doing of anything which can was argued that the decision was not a final judgment w that article of the Code, inas in a proceeding commenced provisions of the Act of P and had not the incidents of an appeal, not having been of summons, the ordinary an action; further that able by writ of execution a decision in a matter Court had summary and was also contended that in appeal from the homologat taken away, it was not pr lature intended a proceeding to be appealable. On the observed that the terms of A are quite general: "Any rendered by the Superior sion of the Superior Court of an ordinary *judgement* m required in a case where appeal to the Court of Q expressly described as a j which pronounced it. It was commenced by petition tion were regularly serve were by the court called u so by pleas, to which there articulations of facts, and usual in an ordinary suit. they were examined and sides by the advocates of and finally judgment was give the costs which we petition, but entailing oth as well as pecuniary loss, c suit. The judges of the considered that under the to the real substance, and of the proceedings, the re of appeal from what was poses a final judgment. They further held that appeal from the judgn report was to be confined which it applied, and coul tially to another and tota It must be borne in min this country, that an ap given by express legislat prevail in French or C presumption is in favour one of the judges of the C terms the "sacred righ regard to these consider vations of Lord Westbur Board of *Boston v. Leliè* 22 L. T. Rep. N. S. 735), questions of procedure t slow to reverse decision Colonial Courts unless t that their proceedings v

ships have come to the conclusion that the judgment of the Court of Queen's Bench, so far as it admits the appeal, should be affirmed. That being so, there remain the questions between these parties upon the merits, and their Lordships entertain a clear opinion that the decision of the Court of Queen's Bench was right in reversing the judgment pronounced by the Superior Court. It is necessary to see upon what ground it really was that the Superior Court pronounced a sentence of removal against the respondents. They expressed that ground with sufficient clearness. They were of opinion that the respondents in making their valuation proceeded upon a wrong and erroneous principle, not justified by, but contrary to law, and so palpably contrary to law that the adoption of it necessarily showed that want of diligence which would come within the provisions of the Act of Parliament to which reference has been made. Even if the respondents had adopted a wrong principle, their Lordships are far from thinking that this would of itself necessarily justify a finding of "want of diligence." But it is unnecessary here to enter upon the discussion which seems to have taken place in the court below, as to the exact meaning of those words, because their Lordships are unable to concur in the view taken by the Superior Court as to the principle to be adopted in the valuation of land to be expropriated under this statute. The Superior Court were of opinion that in valuing such land the prospective capabilities of it are not to be taken into consideration; that this is not a legal element in the calculation; that you are to look at the land and what is upon it at the time that the valuation takes place, and that you are not to go into what they are pleased to term hypothetical or speculative inquiries as to what purposes the land might advantageously be applied to. Their Lordships are of opinion that the prospective capabilities of land may form, and very often is a very important element in the calculation of its value, and therefore they cannot concur in the view of the Superior Court, which seems to have supposed that that consideration was to be absolutely excluded in a valuation under the Act of Parliament. The learned counsel who argued on the evidence, was desirous of showing that the respondents carried into effect the principle which they adopted erroneously; but whether they came to a right conclusion upon the figures, or made clerical or other errors which might be easily rectified, are matters upon which their Lordships do not feel it at all necessary to give an opinion. The respondents were removed, not for having carried into effect a right principle erroneously, but for having adopted an erroneous principle. Their Lordships consider that the principle adopted by the respondents was not erroneous, and, therefore, that the inference of want of diligence drawn from it fails. On the whole, their Lordships are of opinion that the Court of Queen's Bench were right in their judgment, and will therefore humbly advise Her Majesty that that judgment be affirmed, and that this Appeal be dismissed with costs.

Solicitors for the appellants, *Wilde, Berger, Moore, and Wilde.*

Solicitors for the respondents, *Freeman and Bothamley.*

Supreme Court of

COURT OF APPEAL

SITTINGS AT LINCOLN

Friday, Feb. 2.

(Before JAMES, L.J. and BRETT J.J.A.)

JUDD v. GREEN. (C)

Practice—Dismissing appeal for want of security for costs of appeal—1875, Order LVIII., r. 15.

Where the Court of Appeal had ordered the appellant to give security for the costs of the appeal, and the appellant had not done so within the time allowed, the court refused to give security for costs, and dismissed the appeal with costs of the motion for security for costs of the motion to dismiss.

THIS was a motion to dismiss an appeal from a judgment of the Superior Court of the County of Lincoln, under the following circumstances:—

On the 7th Dec. 1875, Bacon, V.C., dismissed the plaintiff's bill (except as related to his claim to a redemption of a mortgage) against the defendant. Rep. N. S. 597.)

The plaintiff having given notice of appeal from this decree, the defendant applied to the Court of Appeal to order the plaintiff to give security for the costs of the appeal. On the 25th April 1876, the Court of Appeal ordered that the plaintiff should give security for the costs of the appeal of the amount of 150*l.* for the costs of the appeal should not be paid for hearing till fourteen days after the security had been given, and notice thereof to the defendants.

The security not having been given by the plaintiff, the defendant applied to the Court of Appeal to dismiss the appeal for want of security.

W. S. Owen, in support of the motion, called *Kekewich* and *W. Barber*, for the defendant, in the same interest.

Everitt, for the plaintiff, asked for further time to find security, but the court refused to give an explanation of the delay which had occurred.

The COURT (JAMES, L.J. and BRETT, J.J.A.), refused to allow any further time, and made an order dismissing the appeal, including the costs both of the motion for security and of the motion to dismiss the appeal.

Solicitors for the applicant, *Harbutt, Battcock.*

Solicitors for other defendants, *A. C. Curtis Hayward.*

Solicitors for the plaintiff, *Vallance.*

(a) Reported by H. PRAT, Esq., Barrister at Law.

[Ct. of App.]

THE GREAT AUSTRALIAN GOLD MINING COMPANY v. MARTIN.

[Ct. of App.]

Jan. 11 and Feb. 2.

(Before JAMES, L.J. and BAGGALLAY and BRAMWELL, JJ.A.)

THE GREAT AUSTRALIAN GOLD MINING COMPANY v. MARTIN. (a)

*Practice—Service out of the jurisdiction—Evidence of cause of action—Rules of Court 1875, Order II., r. 4; Order XI., rr. 1 & 3.**The affidavit required by Order XI., r. 3, in support of an application for an order for leave to serve a writ of summons on a defendant out of the jurisdiction must state that the deponent is advised and believes that there is a good cause of action arising within the jurisdiction, and must state in distinct terms what the cause of action is.**Decision of Malins, V.C. reversed, Baggallay, J.A. dissentiente.*

THIS was an appeal from a decision of Malins, V.C. refusing to discharge an order for service of a writ of summons on Sir James Martin, Chief Justice of Sydney, New South Wales, one of the defendants to the action.

The hearing in the court below is reported *ante* p. 703, where the facts of the case are sufficiently stated.

Sir James Martin appealed from the Vice-Chancellor's decision.

Higgins, Q.C. and Sangster Green, for the appellant.—The endorsement on the writ of summons shows no case coming within any of the clauses of Order XI., rule 1. The claim on the writ is that a certain contract may be annulled, but there is no contract within the jurisdiction of the court with which Sir James Martin is concerned, nor has there been any breach within the jurisdiction with which he is concerned. Therefore, this is not a case in which the court has power to make an order for service out of the jurisdiction. We have not yet been served with the statement of claim, and the court will not look into it. Rule 3 of Order XI. provides that an application for leave to serve the writ out of the jurisdiction shall be supported by evidence showing the grounds upon which the affidavit is made. The plaintiffs must show that there is a cause of action arising within the jurisdiction. That was required under the old practice at common law: (*Diamond v. Sutton*, 13 L. T. Rep. N. S. 800; L. Rep. 1, Ex. 130.) And rule 3, of Order XI. shows that it was intended to preserve the old common law practice in this respect. At all events the matter is one altogether in the discretion of the court, and if the merits of the case could be gone into it would be seen that the statement of claim makes no specific charge against Sir James Martin, and the vague allegations made by the plaintiffs do not justify the making of an order for service out of the jurisdiction.

Glasse, Q.C. and Freeling for the respondents.—The statement of claim, if properly read, charges the appellant with fraud and conspiracy in getting up a company which was got up and registered in this country. By Order X., r. 7 of the Consolidated Orders of the Court of Chancery, no affidavit such as the appellant contends for was required. We submit that it was intended that the Chancery practice should be preserved. Our affidavit is a sufficient compliance with rule 3 of Order XI. of the new Rules of Court. No doubt the Court has

a discretion in the matter. That was so under the old practice: (*Hawarden v. Dunlop*, 2 Dr. & Sm. 155; *Maclean v. Dawson*, 33 L. T. Rep. O. S. 158; 4 De G. & J. 150). And it has been held to have the same discretion under the new practice (*Preston v. Lamont*, 35 L. T. Rep. N. S. 341; L. Rep. 1 Ex. D. 361), and therefore the Court of Appeal will not interfere with the discretion of the Vice-Chancellor.

Higgins, Q.C., in reply, referred to

Foley v. Maillardet, 9 L. T. Rep. N. S. 643; 1 De G. J. & S. 389-94;
Casey v. Arnott, 35 L. T. Rep. N. S. 424; L. Rep. 1 C. P. D. 24;
Cookney v. Anderson, 8 L. T. Rep. N. S. 295; 1 De G. J. & S. 365;
Drummond v. Drummond, 14 L. T. Rep. N. S. 62; L. Rep. 2 Eq. 335;
Allhusen v. Magarejo, 18 L. T. Rep. N. S. 323; L. Rep. 3 Q. B. 340;
Newby v. Von Oppen, 26 L. T. Rep. N. S. 164; L. Rep. 7, Q. B. 293;
Rules of Court 1875, Order II., rule 4;
Griffith's Judicature Acts note on Order II., rule 4;
Day's Common Law Practice, *passim*.

Freeling was heard in reply on the cases cited by *Higgins* in reply.

JAMES, L.J.—I am of opinion that as matters now stand before us the order of the Vice-Chancellor ought to be discharged. The practice of the Court of Chancery and the practice of the courts of common law under the Common Law Procedure Act were different with respect to obtaining leave to serve a party abroad. In the Courts of Common Law, beyond all question, it was required that there should be an affidavit showing that there was a cause of action, and that the cause of action occurred within the jurisdiction. Apparently that was not required in the Court of Chancery, one reason being that the Court of Chancery, before any service at all was allowed, saw that the whole of the case was stated on the bill which the court might see before it allowed service of the bill abroad; and it was required that the bill should bear the signature of counsel to which the court was in the habit of paying—as it ought to pay, and as it always will be warranted in paying, hereafter as it has done heretofore—the greatest possible respect, and the signature of counsel to the bill was to that extent a voucher, something to show that the case was not a mere fiction. However, there is now no such thing as the Court of Chancery, and there is no such thing as a court of common law; they are both combined in one. The hundreds of cases in the Court of Chancery and the many thousands of cases in the courts of common law are now put together in one mass, and are dealt with in the same manner for all purposes. Now what is it reasonable to require? It appears to me that the court having a discretion—and it is admitted on both sides that the court must have a discretion in the matter of the service of a writ abroad—the question is whether it will bring over to this country any English gentleman residing abroad or any colonial gentleman in high office over there without being satisfied that there is a cause of action which arose here against him. Before it brings him to this country to litigate a matter, the court ought to be satisfied that there is really a cause of action and that that cause of action arose within the jurisdiction. Now in this case it appears to me that when the writ was issued there was no

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

affidavit before the court verifying the cause of action, and that it arose within the jurisdiction. If we are to look at the whole matter now before us, the statement of claim and the affidavit which has been put in in answer and which can only be admissible for a limited purpose, possibly the Vice-Chancellor was right in saying there was a case to be tried. But I think before the writ was issued in the first instance, there ought to have been an affidavit of merits to this extent, that is to say, an affidavit showing in the clearest possible way that the solicitor or some other person could say, "I have been advised and believe that the defendant, such and such a man, made a misrepresentation with regard to the matter in question, that that misrepresentation had been used in England, and that in consequence of such misrepresentation so being used in England, the company have been put to a considerable expense, and that he received the profits," or something to that effect. That would have been a cause of action, and a cause of action arising in England. There is some difficulty in saying what ought to be done, but something equivalent to that was required by the old Common Law Procedure Act, and that ought to be done before a defendant residing out of the jurisdiction can be called upon to answer anything that anybody chooses to put into a writ of summons. I should be very much shocked if I were made a defendant to a bill or a claim or action in some very remote country, and that were done which has been done in this case. I think there can be no harm, and I think it would be throwing no difficulty in the way of justice in this country—and this country is the proper place for giving relief—to require the plaintiffs to show simply the short nature of the case which is intended to be made against the defendant, how it arises, and that the person having the conduct of the case has every reason to believe that he can make it out. I think a person ought to have no difficulty in making such an affidavit. Of course the merits of the case cannot be tried upon an application to serve the writ out of the jurisdiction. I am of opinion that in this case there ought to have been such an affidavit in the first instance; but I think that this is certainly the first time that rule has ever been laid down, the first time a question has ever come before the court as to which of the two practices, the old practice of the Court of Chancery or the practice of the courts of common law, is the one which ought in the discretion of the court to prevail. Therefore I suggest that, although I take a different view from the Vice-Chancellor in this case, yet before the order is finally set aside we should allow the plaintiffs, if they can do so, to make an affidavit verifying the case to the extent which I have suggested. If they can make that affidavit it is useless to put them to the expense of getting a new writ.

case by the difference in the manner with regard to service out of the two classes of cases. The court in the Court of Chancery has pointed out in the case of *Ma* (4 De G. & J. 150). That was a consolidated order, and it was that what the court would do when was made for leave to serve a jurisdiction would be to examine. Now no affidavit whatever was the purpose of showing that the allegations in the bill were true or not. What Knight Bruce said was this (4 De G. & J. 150) "It is impossible not to observe that no evidence as to the truth of the allegations required." And then he went on to say "It is incumbent on the court to look into the case, although not supported by evidence, to conceive the case of a bill so peculiarly relating to such a subject matter, as to involve persons so circumstanced, that the court ought at once to decline to do so, this is a case of that description. I do not think the argument with the circumstances is probably demurrable, not on the merits, but because it asserts a discussion of which the presence in the legal personal representative consistent with the law of England may be required, not allege or deny (I believe) the fact that a representative," and he thought that in a case in which an order for service was made, the jurisdiction should be discharged. Justice Turner put it, if possible, in the following words: "I wish, however, to state that, in my opinion, the court has not to look into these cases, and that I consider it to be the duty of the court to look into the bill, and to satisfy itself how such duty is to be exercised. The discretion of the court, to be as carefully applied to discharge an order out of the jurisdiction as upon the merits of the case for the order." Then down to the present Judicature Acts, by which the rules were introduced, it was not the Court of Chancery to require as regards the truth of the facts written on the face of the bill; but then the opportunity of seeing what was stated in the bill. When the Rules of Court 1875, came into operation, it was necessary to provide for the necessity that there was no longer a bill, and it was necessary that something should be put in which would correspond (I am not sure) to the impression of the rule) with the courts had before them under the old practice. Therefore, by the 3rd rule, it was provided that "every application for an order for such writ or notice on a defendant's jurisdiction shall be supported by evidence, or otherwise, showing in what way such defendant is or probably may be a defendant, whether such defendant is a British subject or not"—both those things were required in the old practice—"and the grounds on which the application is made." Now, those words by themselves, certainly convey to the mind that there is no intention to alter the old practice, that the grounds should be stated in the bill.

borne in mind that under the Common Law Procedure Act there was a different course of procedure, and the new rules apply to proceedings in the Common Law Divisions as well as in the Chancery Division. The Common Law Procedure Act says: "It shall be lawful for the court or judge upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction . . . to direct from time to time that the plaintiff shall be at liberty to proceed in the action," &c. Now, it has been argued that beyond all question the court has been satisfied by an affidavit that there has been a course of action. I am not by any means sure that it was necessary under the Common Law Procedure Act to show that the question arose within the jurisdiction. But, however that may be, I will assume for the purpose of the observations I have to make, that the rule was more stringent under the old practice. If it was intended to adopt the common law practice, it does seem rather singular that we do not find repeated in the new rules those words which we find in the 18th section of the Common Law Procedure Act. If I am right in this view of the case, it appears to me, first of all, that there was a discretion in the judge to consider whether he had before him a sufficient statement of the grounds upon which the application was made. I am bound to say that I should have been quite as well satisfied if the Vice-Chancellor had taken a different view. I must confess that the statement of claim (if that can be looked at) and even the endorsement on the writ does not contain to my mind a sufficiently clear ground upon which the action is to proceed. Be that as it may, it appears to me that it was a question for the Vice-Chancellor's consideration in his discretion whether the statement which was before him was one so fair and so complete as would satisfy him or anybody else in a similar position—whether in his opinion there was a sufficient statement of facts. I am disposed to think that that is a discretion which we have no power to interfere with unless it has been wrongly exercised. If the proper construction of the 3rd rule was that the learned judge should in every case require an affidavit, then the question would be different, for there would be an omission on the part of the Vice-Chancellor to require that evidence which the 3rd rule really made imperative upon him. But having already expressed my opinion that it was not imperative upon him to require an affidavit, of that kind, the result is, in my judgment, quite different. Upon that branch of the case I entirely agree with what was said by Lord Justice Turner in the case of *Maclean v. Dawson*, that it is a question of discretion into which I think we ought to abstain from going.

BRAMWELL, J.A.—I am of the same opinion as the Lord Justice. [Reads rule 3 of Order XI.] Now, was there before the Vice-Chancellor, when the first order was made, any evidence showing the grounds on which the application is made? It seems to me there was not. What are the grounds on which such an application was made? The grounds are that there is a case within rule 1 of Order XI., that is to say, a cause of action such as there described arising in England. Now where is the evidence which shows

before him was the affidavit of Mr. Appleyard, who says "the above-named plaintiffs claim against the above-named defendants, amongst other things, the delivery up," and so on, and then he goes through the debentures. They also claim delivery up to be cancelled of the contract between the plaintiffs and the defendants, and so on. He proceeds to state what they claim. He does not even say that they claim it in respect of anything done by the defendant or caused by him to be done in England, if I remember the affidavit rightly. How is it, then, possible to say that the application has been supported by evidence showing the grounds upon which the application is made, namely, a case within the 1st rule of Order XI.? It seems to me impossible to say so. I see no difficulty at all in that being done where it can be honestly done. Of course there may be some difficulty in it; but where it can be honestly done there can be no difficulty in it, and it is a very reasonable thing that it should be done; for it is certainly an inordinate thing that without good cause a man should be dragged from the antipodes to answer a claim for which there may be no kind of pretence. I quite admit the force of the argument that has been raised to this effect, that the Common Law Procedure Act to which we may in effect liken the present procedure, used the words that "the judge shall be satisfied as to the cause of action." Then I think there is great justice in what was observed by Sir Richard Baggallay, that probably that meant that he should be satisfied that the alleged cause of action arose in England. But it is impossible to say whether it is necessary that that should be done; it seems to me that the Common Law Procedure Act entails and doubtless must entail an affidavit that there was a cause of action and that it arose in England. It may well be—and indeed in my belief it must have been—that the same thing is intended now, although the same words are not used, and I think so for this reason. I think in the first place, as I have observed already, that the grounds must be shown to be sufficient, namely, that the grounds upon which the application is made are to be shown by affidavit or otherwise. I think that is enough. But independently of that, it seems to me that if one of the two practices were to be abrogated, the common law practice should in all reason be preserved, for this reason, that by the common law practice it was necessary to get an order for leave to serve the writ out of the jurisdiction before it was issued. By the equity practice that was not so, as the Lord Justice has observed. The bill was filed first, and that gave the court some means of judging what the nature of the case was, but now it is equally necessary under the new rules, as well in cases that are brought to the Chancery division as in those in the common law divisions, that leave should be got before the writ is issued. This consequence follows, either that no affidavit is necessary in the Chancery division, and none is necessary in the Queen's Bench, Common Pleas and Exchequer divisions, or that an affidavit is necessary in each of them. Now look at the ordinary cases that take place in the common law divisions, for instance, actions for money lent, goods sold and delivered, and similar things. What would be the use of a mere statement? The plaintiff might say, "I claim of the defendant

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50l. for money lent." How does that show the ground upon which he makes the application? It seems to me, therefore, that not only upon the construction of Order XI, rules 1 and 3, but upon the reason of the thing also, there ought to be an affidavit showing the grounds on which the application is made, namely, showing that there is a case within rule 1, which arose in England within the jurisdiction of this court. As I have said, I think there is no difficulty in making such an affidavit. I should not think it necessary (I do not pronounce a final opinion on this point), but I should not think it necessary that an affidavit should be made with the same rigour that used to be required in an affidavit to hold to bail. Very probably not. It very probably would be sufficient (I do not say that it would) if the secretary of a company such as this were to swear that there was a good cause of action, stating what it was, not merely stating it generally but stating something more definite than that. It was not necessary even in an affidavit to hold to bail that it should be made by a creditor. It was only an affidavit verifying the facts. Therefore it is unnecessary that the plaintiffs should make the affidavit themselves. Anybody who can swear to it can make the affidavit. I really think, therefore, that as this is a power which, considering it is to be applied to a foreigner under the same circumstances under which it is to be applied to a British subject, with this exception only, that you give a person notice of the writ which you serve on a British subject—bearing in mind the fact that unless we were careful we might be assuming a jurisdiction which would be treated by a foreign government as a nullity—bearing those things in mind, and bearing in mind the excessive hardship of bringing a man from where he is, and where there are judicial tribunals—because although this man happens to be chief justice of the colony, he might have been a merchant or any other like person residing in Sydney, and not a member of the court—bearing in mind that he is brought from a place where he might be sued, I think the court ought to require satisfactory evidence such as is called for by rule 3. There seems to be no evidence here. There is merely a statement contained in the statement of claim, there is no justification for that claim, and I consequently think that there were not sufficient materials before the Vice-Chancellor for the order which he made. I was going to add that I think that this is an entire novelty, as far as I am aware. I believe there is no case upon it. I suppose if the order were to be discharged, the writ would be gone, because it would have been issued without authority. In that case it would be competent for the plaintiffs to make a fresh affidavit and issue a fresh writ. I suppose some expense would be incurred by that. As the defendant has been served abroad, I should think an opportunity ought to be given to do what in effect would be amending their original affidavit. It was then arranged that the case should stand over to enable the plaintiffs to file the requisite affidavit.

Feb. 2.—The case now came on for further hearing before a court consisting of James, L.J., and Brett and Amphlett, JJ.A.

The following affidavit had in the meantime been made on behalf of the plaintiff company by Robert Prescott Appleyard, late secretary of the company: "I am informed and believe that the

above named Sir James Martin in collusion with the other defendants above-named and for the purpose of procuring a company to be formed in England, and in consideration of money and shares to be obtained by him from the company when formed, made in England certain false and fraudulent representations as to the value and nature of a certain mine, whereby the plaintiff company was induced to issue certain debentures and shares to the above-named defendants or some of them in England, and to incur certain expenses and pay certain moneys in England. The plaintiffs are advised, and I believe that the plaintiffs have a good cause of action against the defendant Sir James Martin for damages in respect of the false representations so made by him within the jurisdiction of the court. My means of knowledge as to the matters in this affidavit are that I was the secretary of the above-named company during the period in which it carried on business."

Their LORDSHIPS were satisfied with this affidavit, and made no order except that the costs of the appeal should be costs in the action.

Solicitors for the appellant, *Peachey and Lloyd*.

Solicitor for the respondents, *W. F. Stokes*.

SITTINGS AT WESTMINSTER.

Tuesday, Feb. 22, 1876.

(Before COCKBURN, C.J., MELLISH, L.J., and MELLOR and GROVE, JJ.)

BROWN v. EVANS. (a)

Municipal Corporations Act 1835 (5 & 6 Will. 4. c. 76), s. 102—Amendment Act 1861 (24 & 25 Vict. c. 75), s. 5—Clerk of the peace for the county—Clerk to the justices of the borough—Appointment of same person to both offices—Liability of appointing justices to penalty.—Qui tam action.

By sect. 102 of the 5 & 6 Will. 4, c. 76, the justices of every borough to which a separate commission of the peace is granted, may appoint a fit person to be their clerk. . . . Provided that it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any person filling certain offices named in the Act.

Sect. 5 of the Municipal Corporations Act Amendment Act 1861 (24 & 25 Vict. c. 75), repeals the disqualifying provisions of sect. 102 of the principal Act, and enacts that, "from and after the passing of this Act, it shall not be lawful for the justices of any borough to appoint or continue as their clerk, any, &c. . . . or the clerk of the peace of such borough, or of the county in which such borough is situate, or the partner of any such clerk of the peace, &c. . . . and any person who shall in anywise offend in the premises, shall, for every such offence, forfeit and pay the sum of 100l. one moiety, &c. . . . Provided that nothing herein contained shall prevent the justices of any borough re-appointing, as their clerk, any clerk of the peace, or partner of such clerk of the peace, of their borough, or of the county in which such borough is situate, who, at the time of the passing of this Act shall be, or who shall not at the time of such re-appointment have ceased to be, the clerk of such justices."

In June 1845, P., who was a partner in the firm of P. and F., solicitors, in the borough of Newport,

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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Monmouthshire, was appointed clerk to the borough justices. In March 1848, P., being still a member of the firm, was appointed, and acted as clerk of the peace of the county of Monmouth, and he filled the appointment until his death in June 1874. P., soon after his appointment, appointed F., his partner, deputy clerk of the peace, and from 1870 until P.'s death F. discharged all the duties of the office. Upon the passing of the Municipal Corporations Act Amendment Act 1861, the borough justices appointed F. their clerk, and he continued to act as such. On P.'s death F. was, on the 24th June 1874, appointed clerk of the peace of the county of Monmouth, and has continued to act in that capacity.

On the 9th Nov. 1874, the justices of the borough held a meeting, and passed the following resolution: "If, and so far as it may be necessary in accordance with the provisions of sect. 5 of the Statute 24 & 25 Vict. c. 75, Mr. F. be re-appointed clerk to the said justices of the said borough." F. afterwards continued to fill the offices of clerk of the peace of the county, and clerk to the borough justices.

The defendant, a borough justice, took part in the meeting of the 9th Nov. 1874, and voted for the above resolution. The plaintiff brought a *quidam* action against the defendant to recover the 100l. penalty under sect. 5 of the 24 & 25 Vict. c. 75, for appointing and continuing F. clerk to the borough justices, he being at the same time clerk of the peace of the county.

Held (affirming the judgment of the Exchequer Division), that, on the true construction of the proviso attached to sect. 5 of the 24 & 25 Vict. c. 75, the defendant was not liable.

THIS was an appeal from a decision of the Exchequer Division giving judgment for the defendant on a special case stated for the opinion of the court by a judge sitting at Nisi Prius.

The case in the court below is fully reported 33 L. T. Rep. N. S. 737, where the special case and the arguments and judgments are fully set out.

For the purposes of this report the facts sufficiently appear from the head note above.

Sir Henry James, Q.C. (with him Horace Wright and A. T. Lawrence), for the plaintiff.—The question is whether under the proviso in the 5th section of the 24 & 25 Vict., c. 75, the penalty can be recovered against the defendant for the reappointment of Mr. Fox as clerk to the justices. The proviso was put in to protect the vested interests of persons employed as clerks to the justices at the time of the passing of the Act, or it was to protect magistrates from incurring the penalties for reappointing such persons as clerks to the justices. The proviso can only protect the vested interests existing at the time of the passing of the Act. Therefore Mr. Fox must have been clerk of the peace of the county, and clerk to the borough justices at the time of the passing of the Act in order to come within the protection of the proviso. "Nothing herein contained shall prevent the justices of any borough reappointing" means that the person who at the passing of the Act is clerk of the peace of the county and clerk to the justices (the latter office being vacated at the passing of the Act by his holding another incompatible one) may be reappointed. The magistrates can only reappoint once so as to be protected by the proviso. The words in the

proviso "who at the time of the passing of this Act shall be, or who at the time of such reappointment shall not have ceased to be" must be construed as if the word "or" was "and." If not the proviso practically repeals the enacting part. They cited.

Reg. v. Fox, 29 L. J. 54, M. C.;

Mitward v. Thatcher, 2 T. R. 81.

Jelf (Bodham with him), for the defendant.—The whole question turns on sect. 5. If this case comes within the natural meaning of the proviso, the court will not interpolate words. The section deals with the vested interests of a *man qui* clerk to the justices at the passing of the Act. It provides for the continuity of his office. The word "reappointment" would equally apply to a person who was clerk to the justices at the time of the passing of the Act, and afterwards became the clerk of the peace to the county, provided he always continued clerk to the justices. The proviso contemplates the contingent probability of the clerk to the justices becoming clerk of the peace to the county. The notice of action is not sufficient. It alleges an incorrect date for the reappointment.

[As the judgment of the court (post) was for the defendant upon the construction of the section, it became unnecessary to decide upon the sufficiency or otherwise of the plaintiff's notice of action.]

Sir H. James, Q.C., replied.

COCKBURN, C.J.—I am of opinion that the defendant is entitled to our judgment. Of all the instances of bungling legislation this appears to me to be the most remarkable. The proviso which comes in at the end of sect. 5 of the Municipal Corporations Amendment Act is in direct opposition to the former enacting clause, and entirely frustrates its operation. The only way in which it occurs to me that this contradiction in the Act could have occurred is that the framer of the bill was induced to add the proviso by a clerk of the peace. The words of that proviso are so large, so comprehensive and so positive, that I am unable to see my way out of giving effect to them in this case. If the object of the Legislature is frustrated, it is not the fault of courts that have to construe the section. Our judgment will, therefore, be for the defendant.

MELLISH, L.J.—I am of the same opinion. The object of the proviso is evidently to indemnify clerks to the justices at the time of the passing of the Act who are clerks of the peace of the county, and the question for us to decide is, to what extent has this indemnity gone. Does the proviso mean that the justices may reappoint as their clerk any person who, at the time of the passing of the Act, was clerk of the peace of the borough or county, or does it go further and mean that any person who was clerk to the justices at the passing of the Act, if he afterwards became clerk of the peace of the borough or county, might be reappointed clerk to the justices? In order to decide this we must look at what the Legislature has said, and I think the latter construction of the proviso is the proper one. I have come to that conclusion, because the language of the proviso is that the justices shall or may reappoint as their clerk any clerk of the peace, "who, at the time of the passing of the Act, shall be" clerk to the justices. But this is not the case with respect to clerks of the peace of the county. The Act does not speak of the clerk of the peace of the

county as a person who "shall be" clerk of the peace at the passing of the Act. We are compelled to give one of two constructions to the proviso. We must either construe "or" to mean "and," or we must construe the proviso according to what in my opinion is the true meaning of it, that any person who, at the time of the passing of the Act, was clerk to the justices, might be re-appointed as such, on his becoming clerk of the peace of the borough or county.

MELLOR, J.—I am of the same opinion. The proviso takes away the whole effect of the enacting clause, and is quite contrary to the policy of the Legislature in passing the Act, but the words of the proviso are so wide and so positive that I cannot escape from the conclusion that the defendant has acted within the meaning of it, and is not liable.

GROVE, J.—I have had considerable doubt in the course of this case, and that doubt is not entirely removed, but I do not feel justified in saying that of the two constructions, the construction given to the proviso by the Court of Exchequer was wrong. The whole section can at least be consistently construed, if the interpretation of Lord Justice Mellish be adopted. The strange result then follows that the proviso qualifies a person to become in the position, which it is the very object of the enacting part of the section to prevent him from occupying.

Judgment for the defendant. Judgment below affirmed.

Solicitors for the plaintiff, *Clennell and Fraser*.

Solicitors for the defendant, *Hunt and Son*.

Wednesday, May 24, 1876.

THE SWANSEA SHIPPING COMPANY (LIMITED) v. DUNCAN FOX AND COMPANY. (a)

Practice—The *Judicature Act 1875*—Order XVI., rr. 17, 18, 19, 20, 21—Order XI., rr. 1 to 4—Defendants' power to cite third party—Service of notice out of the jurisdiction.

The court, on the application of defendant in an action, will order service of a notice citing a third party to appear in the action under rr. 17 and 18 of Order XVI., where it is satisfied that there is a material question to be tried in the action, common both to the plaintiff and the defendant, and the defendant and the third party, although the whole question to be tried is not precisely identical in both cases, and that the plaintiff will not be prejudiced by so calling in the third party.

The plaintiffs sued the defendants for breach of a charter-party, and claimed a sum for demurrage at the rate of 12*l.* a day by reason of the defendants, who were the charterers, having failed to discharge the cargo "as fast as the custom of the port of discharge would allow" according to their contract. Whilst the ship was on her voyage the defendants sold the cargo to arrive to third parties in Scotland, who, by the contract of sale, were to name the port of discharge and pay lighterage, if any. The third parties named Leith as the port of discharge, and by the usage of trade there purchasers of a cargo to arrive were bound to discharge according to the custom of the port of Leith.

Held (reversing the decision of the Queen's Bench

Division below), that the defendants might issue a notice under rr. 17 and 18 of Order XVI., citing the third parties to appear in the action.

Held also that such notice might properly be served on the third parties in Scotland, as rr. 1 and 4 of Order XI. apply to service of notices under rr. 17 and 18 of Order XVI.

THIS was an appeal from an order of the Queen's Bench Division discharging an order made by Master Unthank.

The plaintiffs, by their statement of claim, alleged that by a charter party of the 18th Feb. 1875, the plaintiffs' ship *Helen Burns* being then at Valparaiso, it was agreed that the ship should proceed to Iquique and Pisagua, and the defendants should there load a full cargo of nitrate of soda in bags, which the plaintiffs agreed to convey to Queenstown or Falmouth for orders, and thence to a specified port of discharge as ordered, and there deliver the whole of her cargo, which the defendants agreed to discharge as fast as the custom of the port would allow, with 12*l.* a day demurrage. That the ship arrived at Leith, her specified port of discharge; but the defendants did not discharge the cargo as fast as the custom of the port allowed, but kept the cargo undischarged for thirty-one days beyond that period. The plaintiffs' claim was for thirty-one days demurrage at 12*l.* per day. On the application of the defendants an order was made by Master Unthank on the British Agricultural Association (Limited), under Ord. XVI., r. 17, requiring the British Agricultural Association to appear within ten days, and allowing the defendants to serve a notice on the British Agricultural Association under Ord. XVI., r. 18.

The defendants made an affidavit in support of their application for this order. In the affidavit it was stated that after the loading of the cargo, and before the arrival of the ship at Queenstown or Falmouth, the cargo was purchased from the defendants to arrive (through brokers at Liverpool acting for buyers and sellers) by the British Agricultural Association, Limited, a company carrying on business at Leith, that on the arrival of the ship at Falmouth, the Association ordered her to discharge at Leith, and, on the ship's arrival, the Association took discharge of the cargo over her side, the defendants taking no part in such discharge, and that, by the terms of the agreement of purchase, and according to the custom of the trade, the Association are bound to indemnify the defendants, and repay them any sum due to the plaintiffs for the detention of the ship at her port of discharge.

The Association applied to Archibald, J., at chambers, to rescind the order of Master Unthank, which had been served upon them, together with a copy of the plaintiffs' statement of claim, at Leith. Archibald, J., referred the matter to the court.

The secretary of the Association made an affidavit in support of the application to rescind, in which it was stated that the Association were only purchasers of the cargo, and not, as alleged in the notice, holders of bills of lading or shipping documents, and were not parties in any way under the contract of charter party. That the claim of the defendants against the Association arose, if at all, wholly in Scotland, and beyond the jurisdiction of the court, and must, if it exist, all depend upon the custom of the port of Leith.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

The contract, contained in the "sold note," between the defendants and the British Agricultural Association, was as follows:

British Agricultural Association (Limited).

We have this day bought for you 1100 tons, more or less, being the entire cargo of nitrate of soda expected to arrive per *Helen Burns*, at 11s. 6d. per cwt., delivered at a safe port in U. K., or 11s. 9d. in a safe port between Havre and Hamburg. If ordered to U. K., sellers to pay usual charges, according to the custom of the port of discharge. Lighterage, if any, to be paid by buyers. Payment in cash in fourteen days from last day of weighing. Payment before delivery if required.

The Queen's Bench division made an order discharging the order of Master Unthank, and the defendants now appealed against this decision. The case in the Queen's Bench Division will be found fully reported 34 L. T. Rep. N. S. 685.

J. C. Mathew for the appellant.—The contract for the sale of the cargo between the defendants and the British Agricultural Association (Limited), is silent as to how the cargo is to be discharged, but the terms of the charter-party between the plaintiffs and the defendants are "to deliver the cargo as fast as the custom of the port should allow." The question is whether the two contracts are *ad idem*. Where there is a common fact which, by calling in the third party, can be settled once for all, and you do not embarrass the plaintiff, you can cite the third party in order to have the common issue tried. No questions are precisely identical, but the British Agricultural Company's contract is substantially the same as that between the plaintiffs and the defendants, viz., to deliver within the time limited by the custom of the port of discharge. The measure of damages, no doubt, would be different in each case on breach of the contract, but that does not make any difference, there being an issue common to both contracts. The defendants are entitled to cite the third party, in order to have it settled once for all. Secondly, there is nothing to prevent the British Agricultural Company, residing in Scotland, from being served with an order under rules 17 and 18 of Order XVI. This contract was entered into within the jurisdiction, and service of notice is to be "according to the rules relating to service of writs of summons," which may be served out of the jurisdiction, under Order XI.

Thesiger, Q.O. and *Castle*, for the British Agricultural Association.—As to the second point under rule 20 of Order XVI., if a person served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant, on whose behalf the notice has been given, he must enter an appearance in the action within eight days after the notice has been given. It would in most cases be impossible to appear within the time, when the third party is out of the jurisdiction, and it was not intended by the rules that he should. [JESSEL, M.R.—Rule 20 of Order XVI. must be read with rule 4 of Order XI., in which service of a notice out of the jurisdiction is provided for.] As to the first point, the contract between the plaintiff and the defendant is on the charter-party alone. The action is really for damages, and there is nothing to show that the charter-party was brought to the notice of the British Agricultural Company. The contracts differ in this, that the purchaser is not bound to find a place for the discharge of the cargo, whilst the charterer is.

J. C. Mathew replied.

JESSEL, M.R.—This is an appeal from an order made by the Queen's Bench Division, discharging an order made by Master Unthank, allowing the defendants in the action to serve a notice on third persons, who are a company, and not parties to the action. The question is to be decided upon the construction of various rules of Order XVI. and the effect of those rules is this. By rule 17, "When the defendant claims contribution or indemnity, or any other remedy or relief, against any other person, or where, from any other cause, it appears to the court or a judge that a question in the action should be determined, not only as between the plaintiff and the defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or judge may, upon notice being given to such last mentioned person, make such order as may be proper for having the question so determined." Under that rule the order complained of by the British Agricultural Association was made. Rule 18 provides the mode in which such notice is to be given; the leave of the court or a judge is required before issuing such notice, and it is to be served "according to the rules relating to the service of writs of summons," and it may be in the form given in the appendix. Form 1, Appendix B., is the form provided, and part of it is that if the third person wishes to dispute the plaintiff's claim he must cause an appearance to be entered within eight days. If the third party desires to appear he can do so, and by rule 20 if he appears, he must do so within eight days, and if he does not cause an appearance to be entered for him, he is bound by the judgment given in the action, but the rule provides that a further time for entering an appearance may be allowed by a judge. Then by rule 21, which is an important one, "If a person not a party to the action, served under these rules, appears pursuant to the notice, the party giving the notice may apply to the court or a judge for directions as to the mode of having the questions in the action determined; and the court or a judge, upon the hearing of such application, may, if it should appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceeding to be taken, and give such directions as to the court or a judge shall appear proper for having the question most conveniently determined, and as to the mode or extent in or to which the person so served shall be bound or made liable by the decision of the question." So that a third party can by the aid of the court or a judge under this rule, limit the extent of the decision by which he is bound, and a judge may give directions as to the portion of costs to be borne by the third party, and make the actions distributive. As to the service of a writ of summons out of the jurisdiction, Rule 1 of Order II. provides that by leave of the court or a judge, service of a writ may be made, or notice of a writ of summons may be served out of the jurisdiction whenever the contract was made, as was the case here, within the jurisdiction. Rule 4 of Order XI. provides that "any order giving leave to effect such service or give such notice, shall limit a time after such service or notice, within which such defendant is to enter an

appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given. The first objection on the part of the British Agricultural Company is that as the Company resides in Scotland, the rule as to the service of notice to third parties does not apply to persons or corporations out of the jurisdiction. The answer to that is that Order XVI., Rule 17, provides that service of the notice shall be "according to the rules relating to the service of writs of summons," and therefore Rule 1 of Order XI. applies. But it is said that by Rule 20 of Order XVI., the time in which a third party served with a notice under Rule 17 may cause an appearance to be entered in within eight days, and it would be irrational so to read the two orders, that appearance must be entered within eight days, when the party served resides out of the jurisdiction and at a distance. The answer is to be found in Rule 4 of Order XI., where it is provided that the order giving leave to serve a notice out of the jurisdiction on the third parties, is to name a time within which a defendant living out of the jurisdiction is to enter an appearance, depending on the place or country where the writ is to be served. On the other ground, upon which the Queen's Bench Division seem to have mainly decided, it is said that the whole cause of action between the plaintiffs and defendants, and the defendant and third party must be identical in order to allow the defendants the advantage of rule 17. I do not think that is so; no doubt the question between them must be a substantial "question" in the action, and it is not every fringe of the subject which will do. The court can consider whether the plaintiff, if he objects to the introduction of the third party, would be prejudiced or delayed in his action. The plaintiffs do not object here, and the point is whether there is a substantial "question" in this case, which can be properly tried both between the plaintiffs and defendants, and the British Agricultural Association. The action was brought on a charter-party, and the alleged breach is that the defendants failed to discharge the cargo as fast as the custom of the port of Leith would allow according to the terms of the charter-party, and the claim is for 12*l.* a day demurrage during thirty-one days. The defendants say that they sold the cargo to the British Agricultural Association, and that a sale of cargo to arrive casts upon the purchaser the same obligations as to discharge as the vendor was under, and that that is the usage of trade. There is an affidavit filed which states this, and it is uncontradicted.^(a) On the other hand it is said that whilst the defendants were bound to discharge the vessel and find a berth for her, the buyer of the cargo "to arrive" has to take delivery only, and that the question might be complicated by having to consider how far the default was the defendants, or how far the default of the defendants' vendees. But by the contract between the defendants and the British Agricultural Association, the latter are to name the port of discharge, and that being so, it seems to me unreasonable, as they might name a place where the defendants had no agent, that they should not find a berth or

discharge the ship. It appears to me to be the fair construction of the contract that the purchasers were to provide for the discharge, and, I think, therefore, that there is a substantial question common both between the plaintiffs and defendants, and the defendants and the British Agricultural Association as to whether the ship was discharged as fast as the custom of the Port of Leith would allow, and that the defendants may properly cite the third parties in order to have it decided.

KELLY, C.B.—The substantial question to be tried between the plaintiffs and the defendants is whether the cargo of the plaintiffs' ship, the *Helen Burns*, was discharged as fast as the custom of the port of Leith would allow, and there is another question which, as between the defendants and third persons, is, whether the British Agricultural Association, in Scotland, is liable on the same ground and to the same extent to the defendants, as the defendants are alleged to be to the plaintiffs. It seems to me that they are. They purchased the cargo to arrive, and by their contract would be liable to discharge it according to the custom of the port. Here then there is a question to be determined between the defendants and the British Agricultural Association, which is really the same as the question between the plaintiffs and the defendants, and the defendants are entitled under the rules which have been referred to under Order XVI., to have the question determined once for all between themselves and the British Agricultural Association. I am of opinion, therefore, that our judgments should be for the defendants, and that the judgment of the Queen's Bench Division should be reversed.

MELLISH, L.J.—I am of the same opinion. There is no doubt in this case as to the position of the defendants, who as charterers are sued for not having discharged the cargo as fast as the custom of the port of Leith would allow, and who claim to be indemnified by third persons—the British Agricultural Association, who, the defendants say, ought to have discharged the cargo in the same way as the defendants themselves were bound to do. I think if the defendants make out a *prima facie* case that the substantial question between themselves and the plaintiffs is the same as between themselves and the third persons, the defendants are entitled to bring in those third persons, so as not to have the same question determined twice over. If the questions in dispute between the defendants and the third persons were really different, that of course would be a ground upon which the third persons might object to be brought in, and upon which we ought to refuse the order; but the Act, I think, gives no choice in the matter, where, as in this case, there is a clear *prima facie* case made out by the defendants of the identity of a material question to be determined between the plaintiffs and the defendants, and the latter and the British Agricultural Association. In the contract between the defendants and the third persons I think it is implied that by the custom of the trade the vendees should discharge the cargo as fast as the custom of the port of discharge would allow, and the vendees are to pay the lighterage (if any), and name the port of discharge, which shows that as far as regards their contract with the defendants, they and not the defendants were to take in hand the discharge of the cargo. It is said that there

(a) His Lordship referred to an affidavit filed for the defendants since the hearing in the Queen's Bench Division, and which after some hesitation, was allowed by the court to be used on appeal.

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may be a different measure of damages between the plaintiffs and the defendants, and between the latter and the third persons, because the British Agricultural Association are not bound by the demurrage clause in the charter-party, which is not mentioned or referred to in their contract of sale; but the third persons would only be bound to the extent ordered by the judge under rule 21 of Order XVI., and the common question here being only whether or not the cargo was discharged as fast as the custom of the port of Leith would allow, the British Agricultural Association cannot be injured by any other decision in the case. I am of opinion, too, with the Master of the Rolls, that the notice may be served out of the jurisdiction.

DENMAN, J.—I am of the same opinion. I think that the order of Master Unthank was rightly made under the 17th and 18th rules of Order XVI. I think that no injustice can be worked, when we look at rules 18 and 21 together, power being given under those rules to limit the effect of the notice on a third party, by dividing upon the decision of what question in the action the third party is to be bound so as not to prejudice him.

Order of Queen's Bench Division reversed.
Order for service of notice affirmed.

Solicitors for the plaintiffs, *Williamson and Co.*, for *H. Field*, Swansea.

Solicitors for the defendants, *Field, Roscoe, and Co.*, for *Bateson and Co.*, Liverpool.

Solicitors for the British Agricultural Association, *Simpson and Co.*

Tuesday, May 30, 1876.

PORTAL v. EMMENS. (a)

Railway company—Director—Liability as shareholder—Scire facias—Companies' Clauses Consolidation Act 1845 (8 & 9 Vict. c. 16), ss. 3, 8, 9, 36, 85.

A railway company was created by a special Act incorporating the Companies' Clauses Consolidation Act 1845. The Special Act provided that the defendant should be one of the first directors of the company, and should continue in office until the first ordinary meeting, and the qualification of a director was to be the possession in his own right of not less than thirty shares. The same Act also provided that the company should keep a register of shareholders, in which the names of the shareholders and the number of their respective shares should be entered. No ordinary meeting of the company was ever held, nor any meeting of directors, and no shares were ever allotted, nor was any register ever prepared. The defendant was one of the persons who petitioned Parliament for the passing of the Special Act, which also enacted that an agreement set out in a schedule to the Act, between the plaintiff and the promoters of the company should be binding upon the company. By virtue of this agreement a sum of 315l. became due to the plaintiff for his costs, as the company's Parliamentary agent.

The Companies' Clauses Consolidation Act 1845, enacts (sect. 3) that "shareholder" shall mean "shareholder, proprietor, or member of the company."

Sect. 8 provides that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall have otherwise become entitled to a share in the company, and whose names shall have been entered on the register of shareholders hereinafter mentioned shall be deemed a shareholder of the company."

By sect. 36, it is enacted that if any execution shall have been issued against the company, and "if there cannot be found sufficient wherewith to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares in the capital of the company not then paid up."

The plaintiff recovered judgment for the 315l. against the company, and proceeded by scire facias against the defendant as a shareholder in respect of thirty shares in the company not paid up.

Held (affirming the judgment of the Common Pleas Division), that the defendant was a shareholder in the company to the extent of thirty shares, and was liable to the plaintiff.

APPEAL from a decision of the Common Pleas Division giving judgment for the plaintiff upon a special case stated; the question for the opinion of the court being whether, upon the facts stated, the defendant was or was not a shareholder in the Didcot, Newbury, and Southampton Junction Railway Company.

The case in the court below is fully reported 34 L. T. Rep. N. S. 318, and the facts and the material sections of the Special Act, and the Companies' Clauses Consolidation Act, 1845, are there set out.

B. S. Wright, for the defendant.—First, the defendant was never a shareholder in the company. Until there is an allotment by deed or other instrument, there are no shares. It does not follow that because the defendant is a member he is therefore a shareholder of the company. He cannot be said to be a holder of thirty shares, for although the qualification for a director is placed at thirty shares by the Special Act, that provision does not apply to directors nominated by the Act, but to future ones. Secondly, it is contended that the defendant did not by sects. 4, 16, or 18, of the Special Act, contract to take shares in the company, but if he did he never was the legal owner of any shares—none having ever become vested in him. Thirdly, even if the defendant was ever the legal owner of some unidentified shares, he was never liable as a "shareholder" within the meaning of the Companies' Clauses Consolidation Act 1845. There must be an actual register of shareholders, and an actual and specific share in the capital of the company to make the defendant liable to a scire facias. He cited

Forbes' case (1), L. Rep. 8 Ch. App. 768;

Forbes' case (2), L. Rep. 19 Eq. 353;

Thames Tunnel Company v. Sheldon, 6 B. & C. 321;

Wolverhampton New Waterworks Company v.

Hawkesford, 6 C. B., N. S., 366; 7 C. B., N. S., 765;

11 C. B., N. S., 456;

Brown's case, 29 L. T. Rep. 713; L. Rep. 9 Ch. 106;

Ness v. Angus, 3 Ex. 805; 18 L. J. 470, Ex.;

Kincaid's case, 23 L. T. Rep. 460; L. Rep. 11 Eq.

192;

Yelland's case, 5 De G. & S. 395; 21 L. J. 822, Ch.;

Bristol Canal Company v. Amos, 1 M. & S. 587;

Burke v. Letchmere, L. Rep. 6 Q. B. 297;

Irish Peat Company v. Philips, 1 B. & S. 398; 9

L. J. 363, Q. B.;

Moss v. Steam Gondola Company, 17 C. B. 799.

W. G. Harrison, for the plaintiff.—The defendant is a shareholder of the company. The 3rd section of the Companies' Clauses Consolidation Act defines "shareholder" to be a convertible term with "member" and "proprietor." The defendant is a founder or incorporator of the company. There can be no possible member who is not a shareholder. Every member must have one share at least.

Cockburn, C.J.—I have come to a conclusion in this case that the decision of the Common Pleas Division was right and must be affirmed. I take my stand on the ground stated shortly in the course of the arguments by *Mellish, L.J.* The special Act was obtained at the instance of *Mr. Emmens* and two other gentlemen, and these three gentlemen are constituted the directors and first members of the company. The defendant, therefore, is a party to, and is bound by the engagement set out in the Schedule to the Act between the plaintiff and the company. Now, the persons who are constituted directors under the special Act form a double engagement. They enter into an agreement with respect to the public, who may become shareholders, and into another with respect to the plaintiffs. As regards the general public, they may or may not act as directors, but as regards the plaintiff they have entered into a binding agreement with him for good consideration, and they must be taken, as far as he is concerned, to have exercised their powers under the special Act as far as it was necessary to do so in order to fulfil their engagement with him. They might if they chose still exercise those powers. Under these circumstances I think they cannot now say that they are not directors, and therefore have not the power of fulfilling their obligation to the plaintiff. I think that they are estopped, as it were, from setting up that defence, and that they are liable to *scire facies* as shareholders. The judgment, therefore, will be for the plaintiff.

Jessel, M.R.—I am of the same opinion. I entirely concur in the judgment of my Lord, and I also agree with the decision in the court below. The first question is, what is the meaning of "shareholder" in the 36th section of the Companies' Clauses Consolidation Act. It appears to me that that section is governed by sect. 3, where it is enacted that the word "shareholder" shall mean "shareholder, proprietor, or member" of a company. Can it be denied that the defendant is a "member" of the company, under the special Act which constitutes him one of the directors, and first "members" of the company? By the 4th section of the special Act the defendant and his co-directors are made a body corporate, so that, apart from the 3rd section of the Companies' Clauses Consolidation Act, can it be said that any one corporation can be anything but a shareholder? Every member or corporation of a company must be a shareholder. That being so, it is clear that on the terms of the special Act, at all events, *Mr. Emmens* held one share in the company. Then comes the question, Did he hold more than that one share? I think he did. The special Act says by sect. 16 that the qualification of a director shall be the possession in his own right of not less than thirty shares of 10*l.* each, and he is to be a director, and continue so, until the first ordinary meeting. I think that, having himself promoted the act, the defendant agreed to

his appointment, and to act in that way, and that he is, therefore, a shareholder to the extent of thirty shares. It is said that the 18th section of the special Act shows that the directors need not necessarily possess thirty shares, and that sect. 16 therefore does not apply; but the answer to that is to be found in sects. 85 and 86 of the Companies' Clauses Consolidation Act. A decision of mine upon those sections has been referred to in argument. I thought I had made the matter clear; but it appears that I had not put it so clearly as not to be misunderstood, and I take this opportunity of explanation. As I understand sects. 85 and 86 of the Companies' Clauses Consolidation Act they amount to this, that no one shall be a director unless he holds the prescribed number of shares, and, if he ceases to hold the prescribed number, he ceases to be a director. He must be qualified at the time of his election, so that these provisions do not apply to the directors named in the special Act who are not elected. Therefore, as a director constituted by the special Act might cease to be qualified the day before his election came on, the Act takes the precaution of saying that he shall not be re-elected unless qualified; but that does not show that sect. 16 does not apply to directors named under the special Act. This disposes of all the objections except one, that there must be a register of shareholders. Now there cannot be a register until after the first general meeting. It is plain that there must be a shareholder before there is a register, because the shareholders are, under the Act, to hold the first general meeting. The company may have to form large liabilities before there is a first general meeting, or a register. I think the shareholders, before a register is made, are liable to a *sc. fa.* under the Companies' Clauses Consolidation Act, in respect of their shares in the company. The only remaining question is, are the directors liable to the plaintiff under the general Act in respect of their shares. I agree with the Lord Chief Justice that there was a contract between them and the plaintiff, and that for the purposes of that contract they were not able to abandon the powers given to them by the Act. They are in the same position as if the contract had been made after the passing of the Act. I am of opinion that they are "members," they are "shareholders," and that they are liable to an execution in respect of their shares under sect. 36 of the Companies' Clauses Consolidation Act.

Mellish, L.J.—I also agree with the judgment of the court below. If the special Act was passed, the plaintiff became a creditor of the company for his costs. Now, has the Act provided machinery for carrying out that contract? In other words, Can these persons, by omitting to form a company, escape from the performance of their contract? The special Act says that they shall be directors of the company, but it does not go on to tell us in respect of how many shares the defendant and his friends were members of the company, but by the 6th section the shares are to be 10*l.* each, and it is plain that each of them was meant to hold one share at least in the company. The 4th section treats the defendant as having subscribed to the undertaking, and the awkwardness no doubt has arisen from adopting the terms used when there were subscription contracts as there used to be, but the subscribing

such contract is not the only way of subscribing. The defendant and two others petitioned Parliament to pass an Act by which they were to be constituted directors of the company, and the qualification for a director was to be thirty shares. It would, I think, be putting no strained construction on the meaning of the Act to say that the moment the Act passed the three became directors and were the holders of thirty shares. Then the only question is are they persons against whom execution can be had within the meaning of sect 36 of the Companies' Clauses Consolidation Act. I agree with the court below on this point that sect. 36 must be taken in accordance with the definition in sect. 3. Then it is contended that there must be a register of shares in order to maintain an action for calls, but I am of opinion that under the 36th section execution may issue against a person whom the special Act constitutes a director, a member, and a shareholder of the company. If not the three directors might defeat the Act entirely and evade their contract with the plaintiff by omitting to take the necessary steps and to make a register. I think the defendant is clearly a shareholder, and therefore liable to the plaintiff.

POLLOCK, B.—I also think that the judgment below ought to be affirmed. I will only add that I think the defendant is entitled to show the facts of the case, but when he has done so he is not, in my opinion, entitled to relief. The three directors are made shareholders to the extent of thirty shares each by the terms of the special Act. They cannot be absolved from the consequences of what they themselves have brought about merely because no machinery has been provided by the Act, they themselves having failed to exercise their functions as directors.

Judgment below affirmed.

Solicitors for plaintiff, *Clarke, Rawlins, and Clarke.*

Solicitors for defendants, *Tatham and Sons.*

May 30, 31, and June 1, 1876.

(Before COCKBURN, C.J., JESSEL, M.R., MELLISH, L.J., and POLLOCK, B.)

WILLIAMS AND OTHERS v. THE NORTH CHINA INSURANCE COMPANY. (a)

Marine insurance—Insurance on freight—Freight advances—Construction of charter-party—Valued policy—What is valued—Opening to show want of interest in—Ratification after knowledge of loss—Double insurance.

A charter-party contained the following clause: "Sufficient cash, not exceeding 600*l.*, to be advanced against freight, if required, at ports of loading, subject to insurance and 2½ per cent. commission." The charterers submitted to the captain, as agent for the owners, and he accepted a disbursement account made up of three items, (1) cash actually advanced; (2) commission due to the charterers under the charter-party; (3) premium on a policy of insurance on freight made on owners' behalf.

Held, that such sums, though not all representing actual advances, were nevertheless "freight advances" within the meaning of the charter-party,

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

and were, therefore, rightly insured by the charterers on their own account.

A policy of insurance on freight, valued at a certain sum, was made by charterers on behalf of themselves and those interested, in the usual terms. It came to the knowledge of the shipowners, but not till after they had heard of the loss. They then claimed the benefit under it.

Held that, there being satisfactory evidence of the policy having been made on the owners' account, it was open to them to ratify it, even after they had knowledge of the loss.

Routh v. Thompson (13 East. 274) and Hagedorn v. Oliverson (2 M. & S. 485) followed.

Under a valued policy it may be shown what it was that was intended to be valued, with a view to disputing interest in the whole subject of valuation, though the amount of the valuation can be disputed only on the ground of fraud.

This was an appeal from a decision of the Common Pleas Division.

The material facts of the case were as follows:

The plaintiffs were the owners of a ship called the *Queen of the Colonies*. They chartered her for a voyage from Batavia to the United Kingdom, to a firm who then assigned the charter-party to Lorrain and Co., of Batavia. The firm of Lorrain and Co. have a house at Glasgow, under the name of Lorrain and Gillespie, and another in London under the name of Gillespie.

The charter-party contained this clause amongst others: "Sufficient cash, not exceeding 600*l.*, to be advanced against freight if required at ports of loading, subject to insurance and 2½ per cent. commission." Plaintiffs effected an insurance on freight, valued at 5500*l.*, in several London insurance houses.

The ship was loaded at Paseroean, in Batavia, by Abraas and Co., the agents there of Lorrain and Co.; and subsequently the following disbursement account was submitted by them to the captain of the *Queen of the Colonies*.

Note of disbursements of the British *Queen of the Colonies*. Captain R. Jones.

	£	s.	d.
To cash per Receipt	165	11	4
2½ per cent. commission on £5796 3s. 2d.	144	18	0
3 per cent. Insurance on £5941 1s. 2d....	178	4	7

Total.....£488 13 11

which was signed as "correct" by the Captain.

Abraas and Co. notified what they had done, and enclosed the above accepted account to their principals, Lorrain and Co., who then effected two policies of insurance (hereinafter called the China Policies) with the defendant company, (1) for 5491*l.* 1s. 2d. for themselves and all who might be interested (in the usual terms), "on estimated amount of freight valued at 5941*l.* 1s. 2d." at a premium of 1½ per cent.; and (2) (on the same day and in the same office), an "advance against freight valued at 512*l.* 13s. 5d." This sum, it appeared, they arrived at by adding to the account of 488*l.* 13s. 11d. above mentioned a commission of 2½ per cent. on 343*l.* 15s. 11d. (being the sums of 165*l.* 11s. 4d. and 178*l.* 4s. 7d. in that account)—which they were entitled to do by the charter-party, but which Abraas and Co. had omitted to include in their account—and the premium on this policy to the whole sum so arrived at.

Both the China policies were then sent by post

to their house of Lorrain and Gillespie at Glasgow, arriving about the 10th or 15th Dec. 1874.

The *Queen of the Colonies* was totally lost on the 25th Jan. 1875.

The plaintiffs having been apprised of the loss, obtained settlement, but not payment, of the English policies on the 4th Feb. 1875.

On the 5th Feb. the China policy on freight came to the knowledge of the English underwriters, who thereupon delayed payment on their own policies.

A little later it came to the knowledge of the plaintiffs, and was subsequently given up to them; and they, on receipt from the various English underwriters of the sums for which they were respectively liable, purported to assign to them their (the plaintiffs') own interest in the said China policy.

Lorrain and Co. were paid the full amount on the other China policy for 512*l.* 13*s.* 5*d.*, the valuation of their advances against freight.

Plaintiffs brought their action for 441*l.*, the excess of the China policy on freight over the English policies, admitting, and showing by the receipts, that they had been paid the full amount of 5500*l.* due on those policies. They were awarded such excess by the Court of Common Pleas below.

At the trial a nominal verdict was taken; and it was agreed that the judge (Denman, J.) should enter all the material facts on his notes, which should then be treated as a statement of a special case before the Court of Appeal.

The present appeal was made by the defendant against that decision.

The court to draw inferences of fact.

Benjamin, Q.C. (with him *Cohen*, Q.C., and *Lanyon*), for defendants (appellants).—I have two points. (1) As to the excess of 441*l.* that this China policy was a policy on an interest which did not wholly belong to plaintiff, and the fact of its being a "valued" policy does not prevent that being shown. (2) As to the whole sum, that plaintiff could take no advantage under it, since it was made by a stranger (though for his benefit), and not ratified till after loss. A decision in my favour on the first point will make it unnecessary to argue the second. As to the first point: From the facts it is clear that this policy was made by Lorrain and Co. on the whole freight, and that the shipowners were not interested to that amount, and the fact of the policy being a valued one does not debar me from showing that. That is well established by authority (*Duer* II. 79.) It is not opening a valued policy to show over-valuation. I simply ask what it is that was intended to be valued, and does it all belong to you? There is nothing to prevent me doing that. Now, here I say it is clear that what was intended by Lorrain and Co. to be valued was the whole freight. Plaintiffs were not interested in the whole freight; but in the whole freight less the sum advanced. That is fully covered by 5500*l.*, and that sum they have already recovered from the English underwriters. They are the only people who have any right to sue us. They can sue us for contributions, and they are about to do so. [The COURT intimated that they would now hear the other side on this first point.]

Butt, Q.C. and *J. C. Matthew*, for plaintiffs (respondents).—Freight does not necessarily mean all freight. Whatever be the actual interests

in the freight it is usually insured simply as "freight." [JESSEL, M.R.—*Prima facie* "freight" means all freight. It must be shown that it means something less in the particular case.] It is clear how Lorrain and Co. came to effect a policy at all. They had charged the shipowners with premiums for insurance, and felt therefore that if they were not already insured, or if their underwriters should turn out to be insolvent, they would have a right to call on them (Lorrain and Co.) for the policy, the premium on which had been charged against the owners in the account given to and accepted by the captain. Lorrain and Co. therefore insured, and insured the shipowners' interest and nothing else. That is clear by his making another policy, on the very same day, on his own account, to cover his advances. It is all a question of intention.

Barker v. Janson, 17 L. T. Rep. N.S. 473; L. Rep. 3 C. P. 303;

Lidgett v. Secretan, 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616.

The sum of 5941*l.* 1*s.* 2*d.*, it is true, is somewhere about the actual amount of gross freight; but I say that the intention was not to insure the gross freight, but only shipowners' interest. It may be that they thought his interest extended to the whole freight; but it does not matter by what calculation they arrive at the sum, so long as it is the shipowner's interest alone which they intend to insure. The shipowners' interest was the gross freight, plus the premiums less the advances. This sum of 5941*l.* 1*s.* 2*d.* was arrived at, we say, by a rough calculation on that basis. These calculations are never supposed to be strictly accurate. They are always made on a liberal scale. In the case of valued policies insurance is no longer a contract of indemnity; it is a contract of indemnity subject to mercantile usage. In the smaller policy, made on his own account, Gillespie included items in which he had no interest. Underwriters like over-valuation. The English policy was not large enough to cover the premiums. Probably Gillespie added the address commissions as well, which were, as a fact, included in the freight; but he added everything in which the owners could, by any possibility, be interested, meaning to cover their interest, and that is done every day in a valued policy, and is no ground for impeaching it.

Benjamin, Q.C., in reply.—It must be observed that this policy was made after the accounts had been made up, and therefore with full and exact knowledge of all the facts. The sum was arrived at by adding the address commission to the gross freight. The whole of the 512*l.* 13*s.* 5*d.* was in the nature of an advance against freight under this charter-party. The wording of the advance clause is peculiar, and has that effect. Therefore the interest of the owners in this policy was 512*l.* short of the whole. Moreover, the owners have been paid 5500*l.*, and the charterers 512*l.* 13*s.* 5*d.* 6012*l.* odd in all has, therefore, been paid on freight, considerably beyond its value. [After some time the court intimated that they would like to hear Mr. Benjamin on the second point before coming to any decision.] The second point is whether an insurance made by strangers, and not known till after loss, can then be adopted by the person on whose behalf it was intended to be made. A man cannot ratify at a time when he could not make the contract he seeks to ratify.

of the loss, and for some time afterwards, there was no contract in existence at all. Gillespie did not contract for himself, and he had no sort of authority to contract for the owners. They first hear of it after loss; they could not then have made the contract, and how could they transform what was then but a piece of paper into a contract? [JESSEL, M.R.—That is the rule in equity, and no doubt it is the true rule; but the contract of insurance differs somewhat from an ordinary contract—say of sale—for you may insure what was at that moment actually gone to the bottom, if no one is aware of the fact.] The contract is against risk; it cannot be made after risk has ceased to exist, either directly or retroactively. If it were a question of the amount of knowledge, here there was, one may say, absolute knowledge; for the captain had returned from the wreck. In France the law is as I say it should be in this country. It is a fair argument against me that the rule has been now a considerable time in existence, but such a case must always be very rare. The rule is based on the authority of only two cases, which are in some measure distinguishable from this case; and there are cases, on the other hand, in my favour. The first case against me is that of *Routh v. Thompson* (13 East. 274), decided in 1811. That was the case of ratification by the Crown, by an order in council, of the insurance of a prize effected by the captors, the vessel being lost at the time of the ratification. But the judgment proceeded on the ground that the Crown was in constructive possession of the prize at the time of insurance, since the captors were officers of the Crown on board a ship of war, and therefore its servants and agents. The captors, Lord Ellenborough said, "could not have insured for themselves." This case, then, does not support the proposition I am contending against. The case was not argued or decided as a question of adoption, though it is on that point that it is cited as an authority in the text books. There is nothing in the case to show it was not adopted before loss. The second case is *Hagedorn v. Oliverson* (2 M. & Sel. 485), in 1814. There is not a trace of such a doctrine in the books before *Routh v. Thompson*. As to the general question of ratification, *Jardine v. Leathley* (7 L. T. Rep. N. S. 783; 32 L. J. 132, Q. B.; 3 B. & S. 700), is an authority for the proposition that a man cannot ratify at a time when he cannot contract; so is *Bird v. Brown* (4 Exch. 796). [MELLISH, L.J.—Both those cases were ratifications of acts and not of contracts.]

Butt, Q.C. was not called on to reply on this point.

COCKBURN, C.J.—I am of opinion that the decision of the court below must be reversed. The first question is, was this policy of insurance made by Lorrain and Co. on their own behalf or on that of the shipowners? I come to the conclusion, looking at all the circumstances, that it was on behalf of the shipowners. They had charged the shipowners with the premium and the advances, and the policy was intended to cover the whole of those items. Having charged the shipowners with the premiums, they deemed it advisable to insure on their account. The efficiency of the insurance, therefore, depended on that of the ratification. That was not made till after the

may be good in itself, but the cases are of too great historical authority to be now overruled; they have been too long accepted and acted upon. But, further, I think this exception is a good one on its own merits. The loss is very likely to happen before ratification, and that is a circumstance which is in the minds of the underwriters at the time they subscribe the policy. Ratification, then, as a fact, having taken place, can the whole amount be recovered on the policy? Now you cannot open the policy to inquire into the question whether there has or has not been overvaluation, but you can do so to see if the claim of the assured is co-extensive with the subject matter of the insurance. Here it is clear that it is not, for, if it were, the assured would be paid twice over.

JESSEL, M.R.—The first question is, was the insurance on behalf of the shipowners? I have no doubt at all that it was. Then, what did they insure? In a valued policy you cannot open the policy; but that does not touch the question of what it was that was valued. Here the wording of the policy may cover either the whole or the residue only of the freight still remaining due to the owners. We must look at the evidence. Now, 5941l. 1s. 2d. is got by adding together the gross freight, the advances, the address commission, and the commission on the advances. Thus the address commission has in reality been twice included, but we cannot look to that. But as to the question of intention, the figures speak for themselves. Then, has it been ratified? I agree with the Lord Chief Justice; the decisions on that point are now too old and have been too long acted upon to be now upset. They have also long been incorporated in the text books, which does not make them law it is true, but causes the merchants to act upon them. It is an exception to the general rule no doubt, but there are other exceptions, and this is a convenient one. Then what has happened since? The shipowners have received 5500l. There is a question whether or not the 441l. has also been paid. Defendants say it has. It belonged to Lorrain and Co., they say, and not to you, and more, they have been paid it under their other policy. That policy was for 512l. 13s. 5d. in three items: (1) 231. 19s. 6d., commission and premium on advances; (2) 343l. 15s. 11d., premium and advances; (3) 144l. 18s., address commission. This address commission was also an advance under the charter-party, for Lorrain and Co. might have asked for it at once, or the captain might ask it to be lent him, which was actually done in this case, as it was included in the account accepted by him. Therefore the whole sum was advanced against freight. But it would have been so as to this address commission quite independently of the charter-party, for it is not set off but retainer. Freight is to be paid less that which the charterer has a right to retain by mercantile usage. The sum, therefore, has been already paid, and it cannot be again recovered.

MELLISH, L.J.—I am of the same opinion. I agree with the Common Pleas on all the points of which they took notice. Our decision turns on a point which they did not notice. The question is, what was included in the 5941l. 1s. 2d.? Was it the whole freight, or the whole freight less the

advances? Now the insurance was for the benefit and on account of the shipowners. They were interested in the freight less advances, not in the advances at all. The words may mean only freight less advances; and, therefore, I should have felt inclined to conclude that they did mean what they must be taken *prima facie* to mean. But the sum exceeds not only the residue of the freight, but the whole freight including the advances. Therefore, the question comes, what did they estimate? From the facts I draw the inference that the whole freight was insured, and not only that but some other sums that were added to it. There is no rule of law preventing us, on those facts, from looking into the valued policy. The sum the shipowner is entitled to recover is that proportion of 5941l. 1s. 2d. that his interest in freight is of the whole freight. The amount of the advances, therefore, becomes important in this calculation. The premium they have a right to charge is not three per cent. but one and three-quarters per cent., but that leaves this decision the same.

POLOCK, B.—I am of the same opinion. It is clear, in my opinion, that the policy was for the shipowner, and that the insurance was on the whole freight. We are not debarred from looking to see what was the subject-matter of the insurance. We therefore arrive at the same conclusion, whether we regard it as an insurance without interest, or as an insurance already paid. As to ratification, I think there is no strict analogy between an insurance contract and another; and I also am of opinion that the present rule should be upheld on grounds of policy.

Attorneys for appellants, *Hollams, Son, and Coward*.

Attorneys for respondents, *Waltons, Bubb, and Walton*.

June 22 and 23, 1876.

(Before **JAMES and MELLISH, L.JJ.**, **BAGGALLAY, J.A.** and **QUAIN, J.**.)

THE TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL (a)

The Public Health Act 1848—11 & 12 Vict., c. 63, ss. 69 and 129—Local Government Act 1858—Amendment Act 1861, 24 & 25 Vict. c. 61, s. 24—11 & 12 Vict. c. 43, s. 11—Paving and sewerage streets—Proceedings by local board in County Court to recover expenses—Limitation of time within which such proceedings may be taken.

The plaintiffs, a local board acting under the provisions of the Public Health Act 1848, on the 25th Oct. 1864, served a notice on R. (amongst others) requiring him to sewer, level, channel, and repair a street upon which property belonging to him abutted. R. not having complied with the notice of the plaintiffs, early in 1865, themselves executed the necessary works, and their surveyor made an apportionment amongst the different owners and occupiers of property abutting on the street of the expenses incurred by the board in completing the works. On the 18th Feb. 1873, a notice of the apportionment was duly served on R., stating that the amount payable by him was 13l. 5s. and interest, and informing him

(a) Reported by **W. APPLETON Esq.**, Barrister-at-Law.

that unless he disputed the apportionment three months it would be conclusive. R. did not dispute the apportionment three months had expired a demand was served upon him for the money shortly afterwards died, and on the money not having been paid issued a plaint in a County Court from the defendant, who was R.

Held (affirming the decision of the County Court of Appeal), that the plaintiffs were entitled to sue in the County Court for the money, as six months had elapsed since the expiration of the period of three months within which R. might have disputed the apportionment and the limitation provided by 12 Vict., c. 43, applied as taken in the County Court as to justices.

THIS was an appeal from a decision of the County Court of Appeal. The facts appeared from the head note to the Divisional Court of Appeal (C. Field, J.) gave judgment for the plaintiffs, on the authority of the *West Ham Local Board v. Maddams*, (a) that the plaintiffs were not entitled to maintain their action, six months had elapsed before the action was brought, so that their right to sue accrued was barred by the limitation. The plaintiffs appealed from this judgment.

By the 11 & 12 Vict. c. 43 (Jersey Act) it is enacted "that in all cases where a complaint is made for making any such complaint upon which an order for the payment of money otherwise can be made, or laying out in the Act or Acts of Parliament each particular case, such complaint may be made, and such information shall be given within six calendar months from the time when the matter of such complaint or information first arose."

By the Public Health Act 1848 (c. 63), s. 59, "In case any present or any part thereof (not being a sewer, levelled, paved, flagged, or otherwise improved to the satisfaction of the local board) such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting on the street, thereof as may be required to be paved, flagged, or channelled, or to be sewered, level, pave, flag, or channelled, or to be specified in such notice; and if the same be not complied with, the said local board may, if they shall think fit, execute the work themselves."

(a) *The West Ham Local Board of Health v. Maddams* was heard before the Queen's Bench Divisional Court from the County Court of Middlesex. The action was brought in the County Court of Middlesex. The defendant, the West Ham Local Board, sought to recover the expenses incurred by the board in sewerage works on certain streets on which the defendant's property abutted. The defendant's proportion was settled by the County Court in May 1875. (Harrison with him) for plaintiffs.—G. Harrison, J. The Queen's Bench Divisional Court (C. Field, J.), held that the limitation within which proceedings could be taken was six months from the date when the board first took proceedings (under 11 & 12 Vict. c. 43) applied also to proceedings taken at the County Court (under 12 Vict. c. 43, s. 24).

or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

Sect. 129, "In all cases in which the amount of any damages, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices."

By the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 24, "Proceedings for recovery of demands below 20*l.*, which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the County Court as if such demands were debts within the cognizance of such courts."

11 & 12 Vict., c. 63, and 21 & 22 Vict., c. 89, are repealed by the Public Health Act, 1875 (38 & 39 Vict., c. 55.), s. 343; but s. 261 of the last-named statute re-enacts 24 & 25 Vict., c. 61, s. 24, the jurisdiction of County Courts being extended to demands below 50*l.*

J. Brown, Q.C. and *R. E. Webster* for the plaintiffs.—The action was brought by the plaintiffs when more than six months had expired after notice of the apportionment had been given to the defendant, and after the time had elapsed within which he could dispute that apportionment. The question is whether the general limitation of six months mentioned in sect. 11 of the 11 & 12 Vict., c. 43, applies to proceedings by local boards in a County Court, as well as to proceedings taken in a summary manner before justices. We contend that the limitation does not apply in the former case. Sect. 129 of the 11 & 12 Vict., c. 63, says that in all cases in which the amount of any damages, costs, or expenses is by the Act directed to be ascertained or recovered in a summary manner, the same may be ascertained and recovered before two justices. The six months limit applies there. Sect. 11 of the 11 & 12 Vict., c. 43, applies only to all cases where no time is provided within which proceedings may be taken for the recovery of money before justices, but by sect. 24 of the 24 & 25 Vict. c. 61, demands below 20*l.* may be recovered in the County Court as if such demands were debts within the cognizance of such courts. The proceedings of the local board in the County Court, therefore, become the same as if the action was for debt, and such action can be brought within the time fixed by Act of Parliament—six years. The effect of the acts is that you may go before the justices to recover a demand under 20*l.* within six months, and you may afterwards go before the County Court within six years.

Manisty, Q.C. and *Kelly* for the defendant.—If the contention for the plaintiffs is right, a claim by a local board under 20*l.* can be recovered in the County Court at any time within six years, whilst a claim above that sum which can be en-

forced only before two justices, can only be recovered within six months. The true meaning is that, under the 11 & 12 Vict. c. 69, the local board must take proceedings within six months before justices, and under the 24 & 25 Vict. c. 61, s. 24, they may, at their option, take proceedings in the County Court within the same time. [*MELLISH, L.J.*—I think there would be no option to go before the County Court when the six months had expired. The option ceases when the jurisdiction of the County Court comes to an end.]

J. Brown, Q.C., replied.

JAMES, L.J.—I am of the opinion that the decision of the court below ought to be affirmed. The very point which is now argued before us was considered and decided by the Court of Queen's Bench before this case (*The West Ham Local Board v. Maddams* (*ubi sup.*)). It was there decided that the six months limitation as to proceedings before magistrates applied also to the proceedings in the County Court. I should be loath to overrule that decision unless I was sure it was wrong, but, on the contrary, I am of opinion that the true construction of these sections of the Act fully bears out the view taken by the Court of Queen's Bench. It is the general provision of the Act that sums claimed by Local boards shall be recoverable in a summary manner before two justices within six months, and then there is an option given to the local board by a subsequent Act to proceed before the County Court instead of justices. There seems to me no sufficient reason why the general object aimed at by the Act should not apply as well to proceedings before the County Court as before the justices. The claim may be enforced in the County Court so long only as the remedy exists before the justices, but I am of opinion that when the time has gone by within which the claim would be enforced before the justices, the plaintiffs are also barred from proceeding in the County Court.

MELLISH, L.J.—I am of the same opinion. The question turns on the construction of sect. 24 of the 24 & 25 Vict. c. 61. Before the passing of that Act, the expenses incurred by the local board in paving and sewerage streets were recoverable before two justices within six months and not afterwards. The jurisdiction of the justices was not then confined to claims under 20*l.* This being the state of things the Legislature passed the new enactment enabling local boards to enforce payment of claims under 20*l.* in the County Court. It is quite impossible to suppose that the Legislature meant by sect. 24 that claims under 20*l.* might be recovered at any time within six or twenty years, whilst proceedings to recover sums over 20*l.* must be taken within six months. That would be an absurd construction of the section, and we ought not so to construe it unless obliged to do so by the express words of the Act. What is said is that in order to recover claims below 20*l.* you may, at your option, go before the County Court as well as before the magistrates. I think the meaning is clear that as long as you could take proceedings before the magistrates to recover, so long may you go to the County Court. It follows that inasmuch as the right to go before the justices was gone at the time when these proceedings were taken before the County Court, the plaintiffs had

Saturday, Nov. 18, 1876.

Re SMITH'S ESTATE. (a)

Will — Mortgaged estate — Trustee — Residuary devise and bequest — Title — Vesting order.

A mortgagee, who was trustee of the mortgage debt, devised and bequeathed his residuary, real, and personal estate to his wife, without referring to his trust estate. The mortgage was transferred by the executrix of the original mortgagee, and re-conveyed by the transferee to the mortgagor on payment of the mortgage debt. On a sale by the mortgagors the purchasers took the exception that the executrix had no legal estate, but that at the first mortgagee's death the legal estate passed to his heir-at-law.

The mortgagors presented a petition for a vesting order.

Held, that the legal estate did not pass under the will, and vesting order granted.

(*Re Packman and Moss*, 34 L. T. Rep. N.S. 110; 1 Ch. Div. 214; *Re Brown and Sibley's Contract*, 3 Ch. Div. 156, distinguished).

PETITION.—By an indenture dated 20th March 1866, the petitioners conveyed freehold hereditaments, situate at Stoke Newington, to George Smith, in fee simple, by way of mortgage as security for the sum of 3000*l.*, then advanced, of which the said George Smith was trustee.

George Smith made his will, dated 12th June 1866, whereby, after making certain bequests, he devised and bequeathed all the residue of his real and personal estate unto and to the use of his wife, Eliza Smith, her heirs, executors, administrators, and assigns, according to the respective natures thereof, in trust, either to have the same or any part thereof, in the state of investment in which it was at the time of his decease, or to sell and call in the same, or any part or parts thereof from time to time, and convert the same into money, and out of the proceeds thereof to pay his debts and personal and testamentary expenses; and in the next place on trust to pay certain legacies to his wife and servants, and to invest the residue as therein mentioned; and upon further trust that his said wife should retain during her life for her separate use the income of the remainder of his said residuary estate, whether the same should have been converted into money and re-invested or not; and subject as aforesaid the remainder of his said residuary estate should remain and be in trust for Philip Smith absolutely. And the testator appointed his said wife sole executrix of his will.

The will contained no express devise of trust or mortgaged estates.

The testator died 3rd Feb. 1867, and his will was duly proved.

On the 30th April 1867, the mortgage was transferred to R. B. Noel. The petitioners paid the mortgage debt to Noel, who reconveyed the estate to them on 14th Sept. 1876.

The petitioners had entered into a contract of sale of part of the mortgaged property, and the purchaser raised the objection that, there having been no devise of trust or mortgaged estates in

descended to his heir-at-law.

In order to satisfy the purchaser and clear the title of doubt, the petitioners asked for an order to vest in them the legal estate in the property.

Everitt, for the petitioners, stated that the petition was necessary, because Vice-Chancellor Malins, in *Re Brown and Sibley's Contract* (L. Rep. 3 Ch. D. 156) declined to follow the decision of the Master of the Rolls in *Re Packman and Moss* (34 L. T. Rep. N. S. 110; L. Rep. 1 Ch. D. 214).

JESSEL, M.R.—With great deference to Malins, V.C., I cannot help thinking that he has not understood my decision in *Re Packman and Moss*. In *Packman and Moss* one part of the property was mortgaged to the testator, the other was trust property. When a man has a mortgaged estate and gives the beneficial interest in the mortgage, Giffard, V.C. decided that the executor could make a title to the legal estate: (*Re Stevens' Will*, L. Rep. 6 Eq. 597). It was not a question of mere mortgaged estates, but of ownership. I am sorry to say that I do not think I should have decided *Brown and Sibley's Contract* as Malins, V.C. did, although the two cases are distinguishable. This case, however, is not *Packman and Moss*, nor is it *Brown and Sibley's Contract*, and I shall make the order.

Solicitor, R. H. Pearpoint.

Dec. 18 and 20, 1876.

Re COOPER AND ALLEN'S CONTRACT OF SALE TO LORD HARLECH. (a).

Contract of sale—Trust property—Sale of trust estates in one lot with others—Apportionment—Succession Duty Act (16 & 17 Vict. c. 51), ss. 2, 33, 38, 15, 14.

Trustees for sale can lawfully join with either the owner of another property, or the trustees for sale of another property in selling their trust estate, and the other estate in one lot, provided the trust estate is sold to the best advantage, and proper measures are taken for a due apportionment of the price.

Rede v. Oakes (4 De G. J. & S. 505; 11 L. T. Rep. N.S. 549); *Cavendish v. Cavendish* (33 L. T. Rep. N. S. 219; L. Rep. 10 Ch. 319); and *Morris v. Debenham* (34 L. T. Rep. N. S. 205; 2 Ch. D. 540) discussed and explained.

A tenant for life and the reversioner in fee under a will mortgaged their respective interests with the usual powers of sale, to the same persons. This power of sale was exercised, and the transferee of the mortgages became absolutely entitled, and devised the estates on trust for sale. Succession duty was paid on the succession to the vendor, the transferee of the mortgages. On a sale exception was taken by the purchaser to the title, on the ground that succession duty was payable also on the succession to the original testator.

Held, that the duty was not so payable.

By a contract of sale dated 5th Aug. 1876, Sir Henry Cooper and George Allen contracted for the sale to the Right Honourable William Richard Bann Harlech, of certain lands and hereditaments, commonly called *Acra Galed*, *Tyn-y-Morfa*, *Crogan*, and *Groeslas*, in the county of Merioneth.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re COOPER AND ALLEN'S CONTRACT OF SALE TO LORD HARLECH.

[CHAN. DIV.]

By the will of Sir Thomas Mostyn, dated 8th June 1818, and on his death on the 18th April 1831, Edward Mostyn Lloyd Mostyn, now Lord Mostyn, became tenant for life of certain estates, including those contracted as above to be sold to Lord Harlech, without waste with remainder to his first and other sons in tail male,

His eldest son was Thomas Edward Mostyn Lloyd Mostyn, who barred his estate tail in 1851. Lord Mostyn conveyed, on the 9th June 1849, his life and all other interests under Sir Thomas Mostyn's will to mortgagees, subject to redemption and to the ordinary power of sale on default.

Thomas E. M. Lloyd Mostyn mortgaged his reversion in fee simple to the same mortgagees with a like power of sale on the 1st of Jan. 1852.

Between 1852 and 1864 various transfers of the respective mortgages took place, and by an indenture dated the 19th Feb. 1864, the then mortgagees, in exercise of their powers of sale, and in consideration of a specific price for the life estate, and of a further specific price for the remainder in fee, conveyed portions of the mortgaged property, including the property contracted to be sold to Lord Harlech, to the Rev. Hugh Ker Cokburne in fee.

The said Hugh Ker Cokburne, by his will, dated 20th May 1864, devised the said hereditaments, with other hereditaments, to the use of the said Sir Henry Cooper and George Allen, their executors and administrators, during the life of the testator's nephew, Edward Foster Coulson, upon trust for him, and after his death to the uses and upon the trusts in his said will mentioned. The said H. K. Cokburne died in 1866. The succession duty due on Mr. Cokburne's death has been paid. Lord Harlech, the purchaser, who is a trustee for other persons, contended that succession duty would become payable upon the death of Lord Mostyn, upon the succession of Thomas Edward Mostyn Lloyd Mostyn to Sir Thomas Mostyn, and that he was entitled to have the property discharged from liability to the same.

A summons was taken out by the vendors under the Vendor and Purchaser Act 1874 (37 & 38 Vict. c. 78), s. 9, to have this question decided by the Master of the Rolls.

Chitty, Q.C. and *Sweet* for the vendors.

W. Barber for the purchasers.

The cases and arguments are fully stated in the judgment.

JESSEL, M.R.—I must say that I am of opinion that this is a perfectly good title on both points; and I will give my reasons with regard to both, for the matter is of very considerable importance, not merely as affecting this estate, but as affecting a great many more. The first question is, whether under the circumstances stated in the case, which may be stated very shortly, the mortgagee can sell at all, so as to make a title. Now, the circumstances which are material to state were these: The legal estate in Lord Mostyn's property, which was freehold, was outstanding in mortgages. There was a settlement made, under which Lord Mostyn was tenant for life with remainder to his eldest son in tail, who barred the estate tail, and became the eldest son entitled in fee simple—that is, an equitable fee simple—Lord Mostyn being then entitled to the equitable estate for life. Under these circumstances, Lord Mostyn in 1849 mortgaged his life estate to mort-

gagees, and then in 1852 Mr. Mostyn, the eldest son, mortgaged his remainder in fee to the same mortgagees, upon an advance to him. They were distinct mortgages, although the mortgagees were actually the same persons. As I understand the law, there was no merger either at law or in equity. There could not be at law, for the legal estate was outstanding; and in equity the mortgagees of course had several charges for distinct sums, and wholly independent sums, on the life estate, and on the remainder in fee respectively. Those mortgages were accompanied with powers of sale. Then the Succession Duty Act passed. Then, subject to the succession duty, those mortgages were transferred. Subsequently to the transfers, default took place, which entitled the mortgagees to exercise the powers of sale. Then the mortgagees put up the fee simple in possession for sale by auction, and sold the full value of the fee simple in possession to the testator, a gentleman of the name of Cokburne, who purchased and completed the purchase in fee in the year 1864, I think it was, and a conveyance to him was made in what I consider the proper mode, that is, although it was recited that they had sold the fee simple to him for the whole amount, they also recited that they had apportioned the purchase money between the life interest and the remainder in fee, according to the value put upon them, and nobody quarrels with the apportionment or value, or says they are otherwise than fair. Then the testator, Mr. Cokburne, died in 1866, and he devised the estate in strict settlement. Then the court has sold under the Leases and Sales of Settled Estates Act. It is equivalent to the trustees selling if they had been named in his will. The court, in fact, under the new powers, puts trustees for sale in the will. The result, therefore, as far as that is concerned, is clear, that on Mr. Cokburne's death the duty must be paid in respect of the fee simple. That is not denied. They say it has been paid. There is only one other fact that remains to be stated, which was mentioned to me at the Bar, and I believe it is not denied, that the original settlor, Sir Thomas Mostyn, who settled the Mostyn estates, was the uncle of Lord Mostyn, that the deviser, Mr. Cokburne, was the uncle of the tenant for life, Mr. Coulson, so that the same rate of duty happens to be payable under both settlements; and the question does not arise what will happen if a higher duty is payable on one than on the other. Now, as I said before, the first point to be considered is, can a good title be made at all? That depends upon the consideration of whether trustees for sale can join with either the owner of another property or the trustees for sale of another property in selling both properties together. Now, first of all, on principle—what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can—that is, in the manner most beneficial for the *cestuis que trust*. It is further their duty to take care to receive the purchase money and to invest it properly, according to the trusts. If, therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts, and performing their duty, in obtaining that higher price. It is very astonishing for me to find that any judge could otherwise decide. Secondly, it is their

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duty, as I said before, to receive the purchase money. If, therefore, they do join with anybody else, whether that other person be a trustee himself, or be a beneficial owner, they must take care that the share of the purchase money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, when they do join with other people, the purchase money must be apportioned before the completion of the purchase, and must be paid by the purchaser. The apportioned part coming to the trustees must be paid to them. Those two things seem to be required in principle. Is there anything else required? Yes; I think it is quite clear that the purchaser must have notice that the apportionment is an improper one; in other words, he is to pay, "to the trustees less than they are entitled to." But who is to decide upon the apportionment? Surely, the trustees for sale, that is, in a reasonable manner. They have power to sell their property to anyone. If the person joining with them in the sale is an absolute owner, or even a trustee with a power of purchasing, they might sell to him. Therefore, if they sell at a fair value, judging of the fair value in the same way as trustees in all cases judge of what is the fair value, that is, taking proper advice as to the value, and acting on that advice, of course they have committed no breach of trust; nor can the purchaser have any notice of any breach of trust. Therefore, as a general rule, the trustees are the persons to decide, under proper advice, in a proper and reasonable manner, as to the share of the whole of the purchase money which is to be paid to them. The purchaser, having no notice of their acting in that fair and reasonable manner, cannot be prejudiced by somebody else who may be of opinion that they ought to have a larger share. This seems to me to be the case in principle. Well, then, if we find that the titles to the properties are the same, so that there can be no question of conditions affecting one property not the subject of this trust, being prejudicial to the property which is the subject of the trust; or, if the prejudicial conditions affect the title to one trust property, and do not affect the title to the other trust property, so that the insertion of them does not damage the trust property, there can be no objection to their joining with other persons. But then, I think, we might distinguish the two cases. First of all, there are those cases in which evidence is required that there will be a higher price paid, and those cases where no evidence is required that there will be a higher price paid, but evidence might be adduced the other way to show that this would not be. The first class of cases applies to those instances in which there are two properties sold together. That is, two sets of houses or two sets of lands, or a house and land, when one house belongs to the trust and the other house does not, or when land belongs to the trust and the other land does not. In those cases, as a general rule, it is the duty of trustees to sell their own property alone, and not mix it up with that of other people. You must have evidence that the sale is more beneficial. It is very easy to ascertain that. Suppose there were a house belonging to trustees, and a garden and forecourt belonging to somebody else. It must be obvious that those two properties would fetch more if sold together than if sold separately. You might have a divided

portion of a house, belonging to trustees, and another divided portion belonging to somebody else. It would be equally obvious, if those two portions were sold together, that a more beneficial result would take place. Or you might have a piece of land in the centre of a park or pleasure grounds, and another part in the centre of a courtyard, which would be worth little or nothing if sold separately; but in those cases when it is manifest, on a mere inspection of the property, that it is more beneficial to sell them together, then you ought to have reasonable evidence to satisfy the purchaser that it is a prudent and right thing to do, and as we know by experience that evidence is obtained from surveyors and other people who are competent judges, if they had given that advice to trustees before the sale, and the trustees had acted upon it, that would also satisfy the purchaser. But in those cases, as a general rule, the purchaser should see that there is evidence that the combination of the property in one lot, for the purpose of sale, is beneficial to the *cestuis que trust*. In the second class of cases you require no such evidence. The common experience of mankind tells you that. They are mostly cases where the trustees are the owners of an undivided share, and other persons, whether they are trustees or not, are the owners of the other undivided share, so that these two people together, or the two sets of people together, can sell the entirety. In these cases we do not take any special evidence, because everybody knows that generally the entirety of a freehold estate fetches more as a general rule—of course there are exceptions to every rule—than the sum total of the price of the undivided shares. In that case again, we want no apportionment, because the money apportions itself. Another case is where the trustees are the trustees of the reversion, and the owners of the lease, or the owners of the life interest, or some other limited interest, will join them in selling the fee simple in possession. Then, again, we want no special evidence. Everybody knows that the fee simple in possession will fetch more than the sum of the value of the reversion, plus the value of the limited interest. As a general rule, that is a prudent and wise thing to do. In that class of cases, again, no special evidence is required. As I said before, in all the cases you must see that there are not conditions of sale applicable to other property, not subject to the trusts, which damage the value of the trust property for the purpose of sale. In other words, the purchaser must see that the sale is beneficial as regards the price for the persons entitled in equity to the ownership in the property sold. But if it is beneficial, then I am of opinion, on principle, that it is not only the right, but the duty of the trustees to join with other persons in selling the property in one lot. So much for the principles applicable to this case. Now, is there any authority the other way? At first sight it seems as if there were. But I think a careful examination of the authorities will show that there is nothing which binds me to hold the contrary. For a moment I must say a word about the case before me. It is not exactly the case of a trustee for sale, it is the case of a mortgagee with a power of sale; and you also have a mortgagee with reference to the property comprised in the trust. There is this peculiarity also in the case, that the mortgagee happens to be

the same mortgagee of both properties. You might have one mortgage of two separate properties, under two different settlements, or a will and a settlement. The same rule evidently applies. The mortgagee in the case before us must have taken and have acted upon the advice of an actuary, or some person competent to give an opinion as to apportionments. Of course there may be a case of a mortgagee selling, in which the trustee might have attempted to act wrongfully, and which is a case I have not forgotten. It might be that one of the two properties is overcharged, and it might be his interest, therefore, to apportion a larger sum, and to find out a valuer who would apportion a larger sum. If the purchaser had no notice, and it was shown that the value of the apportioned sums was wrong, he would be free, although as between mortgagor and mortgagee, the mortgagee must account to the mortgagor for the utmost value for which the property would be sold. The title would still be good, although the mortgagee could not set up that value improperly obtained, as against the claim of the mortgagor, who had been defrauded by too small a sum being apportioned to his interest in the property. That being so I will now consider the authorities. The first and most important authority upon the subject, because it is a carefully worded judgment, and, no doubt, was one which excited considerable attention at the time, is the case of *Rede v. Oakes*, which is reported in 4 De G. J. & S. 505, and 11 L. T. Rep. N. S. 549. Now, *Rede v. Oakes*, at the first blush, looks as if it were an authority against what I consider to be the principles which ought to govern this case. But when it is looked at more carefully, it really is not. In that particular case there were three properties sold together. The great bulk of the estate in question was devised by the will of the testator to four daughters of the person named. The trustees of that portion were joined in the sale. Another portion of the property, a small part of it, was vested in the trustees of the marriage settlement, and the rest of the estate belonged to Mrs. Rede in fee. Therefore there were two trusts and one ownership. They agreed together in selling the fee to the purchaser for an entire sum. After the estate had been agreed to be sold, then by a subsequent contract they agreed to apportion the purchase money, and they apportioned it without apparently taking any advice on the subject. They then asked the purchaser to complete, but he declined, although I think the title was good, and thoroughly good, and that they might have made a good title to the purchaser, and forced him to complete. I must admit that the Lords Justices did not compel the purchaser to take the title, but dismissed the Bill. But the fact seems to have been that they dismissed the Bill upon a totally different ground, which I have not adverted to. I have said that it was certainly good, subject to this, and on that ground I think the decision can clearly be supported. The estate had been put up for sale under special conditions, but it turned out that the conditions did not specify that a certain number of them, which were of a special character, which limited the title, applied only to a small portion of the estate, and not to the whole, and the purchaser might have thought that they applied to the whole, and might therefore have given a less price than the full value, by reason of those special conditions. At least one of the Lords

Justices came to the conclusion that it had been so damaged by the nature of the sale that the sale could not be considered for the vendors, that is, *cestuis que vendunt*; therefore they had not got the title to the property. Of course, if that (but I do not think it was, because of my experience, they do not generally give the value), then I should only differ from the Lordships upon a question of fact. It has been proved, that the trustees' conduct really damaged the sale, so that the property had not been obtained for the vendors of the same opinion as the Lords Justices. But that, as I have shown, is not the ground of the decision, although the Lordships are dicta which go the other way. The case was decided before *Alexander v. Alexander*, 10 Rep. N. S. 396; L. Rep. 6 Ch. 124, decided by one of the judges who were in the former case. Nothing is so easy as to say there is a doubt on the title, but it will not compel specific performance. The ground of this decision which was laid down by one of the Lord Justices, Lord Justice L. J., says this: "My judgment, based upon consideration, is that the bill was dismissed; my reason for that judgment is that I am unable to find any ability to satisfy myself that the contract of March 1862, sought by it to be enforced, was not a breach of trust—expression with any intention of inducing the vendors to any motives to anyone—on the part of the vendors, or that the plaintiffs were parties to it; or that the plaintiffs or is assisted by the agreement of the vendors in it were, as vendors, a contract went to render the sale of property contracted to be sold as in the earliest settlement, and the fact that it was or might be, of that portion of it liable to be affected by the trustees and matters with which proper concern." By that he means, as Lord Justice Turner, L.J.'s judgment, the words are: "And to render the sale of so much property contracted to be sold, as with the other settlements respectively, whatever it was or might be, of the trustees of it liable to be affected by considerations and matters with which they had no concern." That is a mere sentence, leading to the same conclusion, the same thing. "The trustees of the settlement ought not, in my judgment, to be made liable to be affected by any part of the lands sold, belonging to the vendors respectively; nor should the trustees of the later settlements have been made liable to be affected by any defect in any part of the lands sold, or his trustees." So that the ground upon which his Lordship goes upon is the fortunate conditions of sale, and the opinion, should be proved as a fact, the theory of the judges, as to the sale affecting the price, but by the auctioneers as to whether the price was really asked for them. It is all right for the judges to say that they think such a sale will damage the sale; but when it has been effected, it can be proved a

ditions of sale. It does seem to me, with the very greatest possible respect to those eminent judges, that a time might arrive, not for guessing what the effect of the condition would be, but for ascertaining by evidence whether such effect had really been produced or not. The fact of the purchaser wanting to get off the purchase I do not think is a proof that the estate had been sold for under value. But, however, assuming them to be right upon the facts, that the conditions had damaged the sale, then I think their law, if I may say so, will be assailable, because it was a case in which the best price had not been obtained. That is the sole ground given by Knight Bruce, L.J., who says: "The doctrine and principles applicable to cases of specific performance are, in my judgment, opposed to granting specific performance in this case, for if it is not clear that the contract of March 1862 was a breach of trust on the part of each set of trustees, it must be held, I think, to be at least reasonably and seriously doubtful whether it was not so." That is the second part; if not bad, it is doubtful. But the only reason Knight Bruce, L.J., gives for saying it was bad, was the defective title, as covered by the conditions as to the whole of the property. Turner, L.J., gave a much more elaborate judgment, and I am afraid it is from that judgment that the difficulties have arisen in the minds of practitioners. Turner, L.J., put forward two distinct points. He did not rely on the single one taken by Knight Bruce, L.J. He says, "The case presents two distinct points for consideration. First, whether a specific performance of this agreement ought at all to have been claimed; and, secondly, assuming that specific performance was proper to be claimed, the claim and order under appeal was proper to be made. The second of these questions does not arise, if the first of them ought to be decided in the negative; and in my judgment it ought to be so decided. The argument on the part of the defendant upon this point was carried to a very great length. It was argued on his part that in no case could trustees for sale properly join in selling the trust property conjointly with other property not subject to the trust. I am not disposed to assent to this proposition. I think it would be in the highest degree detrimental to trust property that any such general rule should be laid down. There are and must be many cases in which it is obviously beneficial to the persons interested under trusts, that the property not subject to the trusts should be sold conjointly with the trust property; and I cannot agree that in such cases the two properties cannot be sold together." So to that extent certainly he goes the whole length of the principle. "But I agree in this, that where such a sale is made, due precautions ought to be taken that the trust property is in no way injured by the other property being united in the sale, and that the sale ought to be so made that the portion to be attributed to the trust property can be settled upon some fair and reasonable basis, and is not left to rest upon speculation and conjecture." That is a question of apportionment, with which no one will disagree that a proper opinion should be taken. But when he says, "in no way injured," I think he is not stating the proposition with his usual accuracy. If he had said, "in no way injured as

have agreed with him. But if, by selling the two properties together, the increase of price obtained from the nature of the property sold far outweighs any diminution which would be caused by making special conditions applicable to the entire property, then I should disagree with his Lordship, because the question is whether on the whole the result of the sale is beneficial to the trust. I think, if he had kept that in view, he would have seen that it is a mere question of evidence as to whether it proved beneficial or not. "The true question on which the validity of such a sale must depend, seems to me to be this: Was or was not the sale made under such circumstances, and in such a manner as that the *cestui que trust* ought to be held bound by it? If it was, the title of the purchaser could not, I conceive, be impeached. If it was not, his title would, I apprehend, be liable to impeachment at the suit of the *cestui que trustent*." Then he goes on (I am omitting a portion of it because it is a very long judgment), "There are two difficulties which here present themselves, first, do the terms of the contract furnish the means of ascertaining upon any fair and reasonable basis the proportion of the proceeds of the sale, which ought to be attributed to the trust properties? And, secondly, has the sale been so made as that the bulk of the trust properties may not have been injured by the other properties, having been united with it in the sale?" There I agree with him. But in this case the bulk of the property was very large, and the special conditions only affected the smaller portions of it. As regards the injury, in my opinion, it was not either one proportion or the other that was quite correctly or accurately stated, and I say so with great deference to the eminent judge. The first proposition is not correct, as it appears to me, for this reason: It is not necessary that the contract with the purchaser should furnish the means of apportioning the money. He states that the terms of the contract should furnish the means. In my view of the law that is not necessary. The other Lord Justice did not say so. He decided, as I have said, on the other point. It is immaterial to the purchaser. All he wants to know before the complete apportionment is made, is what sum he is to pay to the trustees, so that they may give him a receipt for their share. Whether that is ascertained before the sale or after the sale can make no difference if it is properly ascertained. If there is a proper valuation by a competent valuer after the sale, and the three properties which have been put up are apportioned proportionately, what difference can it make? What has the purchaser to do with it except to see that the apportionment is proper? Why should it be set out in the contract with the purchaser? It seems to me, speaking with the greatest possible deference to the learned judge, that nothing of the kind is required, and that is not the question. The question which he first considered appears to me wholly immaterial. The second point appears to me also to be not quite accurately stated. "Has the sale been so made as that the bulk of the trust properties may not have been injured by the other properties having been united with it in the sale?" If he means that the price had been diminished, I agree with him; but if he

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means merely that a larger price might have been got if the conditions and titles had been framed separately for the three, and then the properties were sold, then I disagree with him, because the other parties would not have agreed to join on those terms. They might have said, we will only join on the terms of having one set of conditions for the whole; and still if they had been advantageous, so that you could get more by a sale of the whole, generally you would receive a great deal more, notwithstanding the special conditions. But, however, that is a very trifling consideration, because in substance I have no doubt the second proposition of the Lords Justices is sound and founded in good law. Now, he says, as to the first proposition, "I assume, for the purposes of this case, that upon a sale of this description, trustees would have, or this court would have, the power of apportioning the purchase money, although I am not satisfied even of this." Why he is not satisfied I for one cannot conceive. As I said before, the trustees have got the discretion of settling the proper price; and if they had acted upon proper advice in the usual way, why they should not have the power I do not know. "But, assuming it, I cannot but doubt whether trustees could be warranted in making, or the court could be justified in directing or acting upon, an apportionment based on no sufficient data, and one which must in a great degree, if not wholly, be founded on conjecture." To that I assent, but here was time even then. The purchase had not been completed with the consent of the bidders, and now a valuation of the apportionment might have been made, and they certainly would have consented, although the variation was very trifling in value. The answer was, they did consent to it. They might have taken the opinion of a surveyor. There is time to do that now. He says: "I doubt whether *cestuis que trustent* could be bound by such an apportionment. I much doubt, therefore, whether, upon this ground alone specific performance of this agreement ought not to have been refused. I do not, however, decide the case upon this ground alone." He decided on the other ground the same as Knight Bruce, L.J. Then he says: "There appears to be a still more substantial difficulty in the case, which is this, viz., whether this sale has not been so made, as that the bulk of the trust property may have been injured by the properties having been sold together." Then he goes on as to the particulars and conditions of sale, and he says this: "The particulars and conditions of sale nowhere specify the extent of the property held under the different titles, and as to part of the property, the extent of which is not specified, but which now appears to be of very limited extent, it is stipulated that seventeen years' title only shall be required. A purchaser of the property, therefore, might well suppose that he was to have a seventeen years' title only, as to a large part of the property, and might fix the price which he would give accordingly. I cannot but think that it is at least doubtful, whether *cestuis que trustent* can be bound by a sale made by their trustees under such circumstances." I am respecting myself when I say he could have obtained positive evidence of it. If you sold freehold land for thirty, forty, or fifty years' purchase, and the auctioneers said that was the highest value which could be obtained with the best title in the world,

then it would be plain that the seventeen years' condition had not damaged the sale. How, then, was a judge (because he was told that the property had only a seventeen years' title, and he was not told what part) to act on his own notion that he could give less for the property? It does not follow that the purchaser, or the rest of the world, entertained the same opinion as to the title as the learned Lord Justice did. As I said before, he is establishing his own notion for that which could be ascertained by the purchaser, by the aid of proper evidence. But still that was his ground, and however much I may differ, most respectfully, as to the sufficiency of it in the absence of evidence, yet if it was proved that the sale was damaged by improper conditions, so that the proper value was not got for the property, I should have arrived at the same opinion. Then he winds up by saying, "Looking to both the difficulties to which I have referred, but more especially to the latter, my judgment is that this is not a case in which specific performance ought to have been decreed." Now that is the case of *Rede v. Oakes*. I say when you carefully study *Rede v. Oakes*, you will see that so far from that being an authority against the application of the general principle, which I have ventured to lay down, it supports it, and shows that it may have been proper to have allowed the purchaser's objection in that case, on the ground that the joining in the sale was not a proper thing; but the joining in the sale under improper conditions, which, in the opinion of the Lord Justice, without evidence, as it appears to me, damaged the sale, and prevented the property being sold for the best price. The next case upon the subject is again a decision of the Lords Justices, and I am very sorry that it has been reported. I am sorry for this reason: that it is a judgment without reasons. It is the case of *Cavendish v. Cavendish* (L. Rep. 10 Ch. App. 319; 33 L. T. Rep. N. S. 219). As regards this case I think both the judge and the Bar have come to a wrong conclusion, and I say so without hesitation because I shall refer to a decision of Malins, V.C., who seems to think it decided something which I think it did not decide. It was cited to me as an authority for a general proposition, which I do not think it supports. I may be entirely wrong. Neither the reason which has been attributed for it by the Bar, nor the reasons which were attributed for it by the Vice-Chancellor, nor the reason which I myself am about to attribute to the learned judge, may be the true reason, but something else. What it is I cannot see, but I can see a reason why this case can be supported, and why it seems to me to be very good law, and why it has nothing to do with the question I have to decide. *Cavendish v. Cavendish* was a case of this kind. There was a freehold house belonging to a testator who devised his real estate in trust for sale. There was an adjoining house rented by the trustees of his marriage settlement which had been purchased with the proceeds of some personalty. It was subject to what we call reconversion. There was money and land. It was purchased with money, and was again subject to certain sums payable out of the bulk of the fund of the settlement, that is, fixed charges. The whole of the funds, the testator having left no children, became part of his personal estate, so that the title stood in this way. One freehold house devised to trustees for sale under the will, and

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another freehold estate in which the testator's estate was entitled to the equity, subject to fixed charges. Now I must add one more fact which I get from the marginal notes, and which has been confirmed by Mr. Phear, who was counsel in that case, that undoubtedly the value of the house was larger than the charge upon the house, and there was a surplus which belonged to the testator's estate. Under those circumstances it was that the realty, was directed to be sold and the proceeds applied in the same way as the residue of the personal estate, so that the beneficial title to the proceeds of the sale of the one house, and to the proceeds of the sale, after paying the fixed charge on the other house, was in the same people. So, then, it appears further, that this suit of *Cavendish v. Cavendish* was a suit to administer the testator's estate, and consequently it was a suit in which an order for sale, which had been made, would bind everybody beneficially interested in that estate, and was equivalent, so far as an order of the court of equity would be treated as equivalent, to a certain conveyance by every beneficial owner, assuming every beneficial owner to be of full age and competent to convey. That was the effect of the order for sale. Under those circumstances the order for sale was made of both houses, which were situated in a most singular way. I happen to know the property personally. But the houses were so situated that it was manifest to every body concerned that the two houses should be sold together. In fact, one house was excessively narrow at one end, and the house which was bought at the other end of the street gave the requisite width. But I need not say anything more about what I know myself, because I find this stated in the report. It was not disputed that the two properties if sold together would sell better than if sold separately. That being the position of matters, the trustees for sale under the second came in. As I said, this clause only affected the estate of the testator. But the trustees came in, and with their consent an order was made in the suit for the sale of both houses. The whole of the purchase money was ordered to be brought into court in that suit, and then the purchaser objected to the title, because the two trustees joined. All I find that James, L.J., says is this: "The money is to come into court, and the trustees of the settlement are before it. The court will see that the money comes to the right hands." Then he says, in giving judgment, "The sale of the two houses is clearly beneficial to all parties, and the objection taken is of the most technical character. The purchase money may, however, at once be apportioned in chambers, which will only require an affidavit by the surveyor who has been employed about the sale. The part apportioned to 33, Old Burlington-street, may be paid into a separate account so as to distinguish it. We vary the order in this way, not because we differ from the Vice-Chancellor, but through tenderness for the over scrupulosity of the purchaser." Therefore, we have no reasons. But when we come to look at the facts it is about as clearly right, if I may say so, as any judgment can be. It was not the case of trustees of two properties, subject to different terms selling them, the *cestuis qui trust* not being bound by the order of the court. It was a sale by the beneficial owner of two houses, with the consent of the mortgagees, that is, the trustees of the settlement, who were

entitled to receive definite sums charged for the benefit of the persons entitled to those charges. When you come to examine it, it has nothing whatever to do with the doctrine in question; it was a sale which most clearly can be supported by every beneficial owner of a house subject to the mortgages. If the owner and the mortgagees come in and consent, you may pass the money into court to one account, and let the owner and the mortgagees apportion it out. If the mortgagees consent to the whole money coming into court, then it can be apportioned by the court. That is what James, L.J. meant when he said, "The money is to come into court, and the trustees of the settlement are before it. The court will see that the money comes to the right hands." Therefore, it is as plain a case, I should have thought, of unquestionable title as I can conceive. If my account for James, L.J. giving no reasons, because he thought it was so plain a case. The result has been, as I shall show in a moment, that it has been quoted by a Vice-Chancellor and cited at the Bar as an authority, not only for the proposition that the owner and trustees may join, but as a decision throwing some doubt upon the decision of *Rede v. Oakes*. Then turn to the third case, which is a decision of Malins, V.C. That is the case of *Morris v. Debenham* (L. Rep. 2 Ch. 540; 34 L. T. Rep. N. S. 205). If I may say so, I think again, that that was a decision which is clearly right. I say so, because it does not conflict with any proposition which I am laying down, or I should not say so. There the trustees had power to sell. It was a reversion subject to a lease for thirty years. The lessees were willing to join, and they joined in the sale; and then after the sale the purchase money was apportioned between the two interests according to the valuation of a skilled valuer. The Vice-Chancellor held the sale to be good, and the purchasers were ordered to complete. He made some observations on the case of *Rede v. Oakes*, which I think are not justified, but which he thought authorised, although at the same time there was room for some observations, and I have made more than he did. He says: "The objection to the title is that the property was sold at one entire price, 15,250*l.*, although the house was the property of the assignor, and the reversion in fee was trust property. It is true the conditions of sale do not say that the lessee has any beneficial interest, or that any portion of the purchase money will be attributable to him: but no one can read the particulars without seeing that the purchaser is buying subject to the lease. It might well have inferred that the lessee had some interest. It is said that property which is held in trust and property which is not held in trust cannot be put up in one lot together. I am of opinion that such an objection cannot be sustained. Something of the kind has undoubtedly been said in the case of *Rede v. Oakes* by Turner, L.J. Turner, L.J. did not say anything of the sort, but he said the exact contrary. He said that what it was beneficial it might be done. I have read the passage to show that he did not say so. As I said before, I do not think there is any doubt at all about the judgment. I do not think they proceeded upon evidence, but the facts were as they stated them, with the evidence before them. "And I certainly cannot sanction the notion that a sale under such circumstances is vitiated when the court has provided ample means of ascertain-

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vocable except on payment of a sum of money; but still a sale agency ought to put it in the most favourable terms for the vendor. Lord Mostyn and the alienee, and Mr. Mostyn and the alienee, before the Act passed, conveyed to a purchaser to merge. There is no doubt that is within the very words of the statute. Again, as to Lord Mostyn, it is quite immaterial to the purchaser, whether he buys from Lord Mostyn or Lord Mostyn's alienee. Then take the case of a power. That makes no difference. Supposing Lord Mostyn, instead of conveying absolutely according to the Act, conveyed to such uses as he should appoint, and in default Mr. Mostyn conveyed to such uses as he should appoint, it would have been better if they had conveyed to B. and C. before the Act passed. Nor would it have made any difference if, instead of conveying to B. and C., he had conveyed to B. alone, to hold to such uses as he should appoint. In both cases you insert the appointment in the terms of the settlement, *i. e.*, or parts of the settlement, and not to override the settlement, but to be derived from estates which were created by this settlement. It appears to me that all these things can make no difference. Then, as regards the 38th section, when you come to look at the 38th section, it cannot really have the meaning which is attributed to it. "When any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just, in respect of the value of such property." That was put as if when a tenant for life and remainderman had both conveyed after the Act—because this applies as well after as before the Act, to a purchaser for value—that the purchaser could be entitled to say, on the dropping of the tenant for life, I am to lose the life interest and consequently be bound to relinquish as much as I get (that is the argument put) and, therefore, I shall pay no duty. That is absolutely contradictory to the very terms of the 15th section. It obviously means having relinquished a benefit, not meaning the life interest, which has just expired, which is a thing we are not dealing with.

Now, the 33rd section, relates, as I say, simply to the donee of a general power: "When the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property." That means this: A tenant for life with a power of appointment exercises the power, and he has paid only a portion of the duty. He is not to pay any more, but he will make up the whole sum to be paid by himself in fee. That is all it means. He is not to pay double duty. He is only to pay one duty, being the duty payable by himself in fee. Then an argument was made that when a person becomes the owner the same rule and the same principle should apply. I cannot adopt this interpretation of the terms of the Act. Of course, I am free to admit that the Act is a difficult Act. The dicta are not less difficult to consider than the Act itself. But there is no decision that I know of, which supports any one of the propositions. I now

very much simpler one; and that is, turning aside all the distinctions with which we have been dealing, and assuming that Lord Mostyn and Mr. Mostyn had been in the same position to all intents and purposes, as if the settlement had been made, even after the passing of the Act, *à fortiori*, if it was made before the passing of the Act, and then that they had conveyed to a purchaser. It cannot be denied that, as far as the Government are concerned, it would be less advantageous to take that assumption on the facts which we have to deal with. Suppose the purchaser dies, and then succession duty becomes payable? The question is, whether the Government can get more than one set of succession duties—*viz.*, that on succession? Upon that I am clearly of opinion (as far as anybody has a right to say he is clearly of opinion about anything, with reference to the Act of Parliament) that the Government cannot. Then, again, you must look at the meaning of the Act. First of all, what is the meaning of the 2nd section? "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition, or devolution, a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived. "Now, if you take these words literally, they certainly do cover every case of alienation, that is, where the original successor, as I have called him, has alienated his succession, because the person becomes beneficially entitled on the death of the person, and he becomes beneficially entitled after the passing of the Act. If you read the words literally, the words would include an alienee. I see no reason why they should not, because an alienee after the passing of this Act certainly might take the duty into consideration in fixing the price he paid first, if he was an alienee for value. If he was not an alienee for value, but an alienee by donation or gift, then of course he would be subject to duty upon the same principle as the original successor, who takes gratuitously. So that there seems to be at first sight no reason in the world unless you get a reason from the word "derived" to show that the purchaser was not within the purview of the Act at all. From the words in general, you could say that the alienee was as immediately within the 2nd section as the original successors, although there may well be a difference, where the settlor or disponent has not created an original gratuitous title at all. If, therefore, the 2nd section does not apply to an alienee, you would have a fixed alienee without any 15th section at all. If, however, you take the other view and say, that the 2nd section

does not apply to an alienee, but only to an alienee by gratuitous title, then you would not fix the alienee, unless he came in with gratuitous title. But even then he would be liable to duty, in the place of the original settlor, by reason of the words of the 2nd section. Then the 15th section is this: "When at the time appointed for the commencement of this Act, any reversionary property expectant on death, shall be vested by alienation, or other derivative title, in any person other than the person who shall have been originally entitled thereto, under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested, shall be chargeable with duty in respect thereof, as a successor at the same time and at the same rate, as the persons so originally entitled would have been chargeable with, if no such alienation had been made, or derivative title created." Then it goes on to say: "And where after the time appointed for the commencement of this Act any successor shall, before the successor shall have become entitled thereto, or to the income thereof in possession." That evidently means originally entitled to, because in the first part of this section it says: "Shall be vested by alienation or other derivative title in any person other than the person who shall have been originally entitled thereto." Then it goes on to say: "Have become vested by alienation or any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created, and when the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable, if no such acceleration had taken place." Now, the first question I have to consider is, what do the words, "Or by any title not conferring a new succession," mean? Do the words "not conferring a new succession" apply to the word "alienation," as well as the words "any title?" I think they do. I do not say that the grammar is perfect or beyond criticism, but I think it means either by alienation or by any title other than alienation, in both cases not conferring a new succession. It would have been very difficult to say what title would be "not conferring a new succession," and not a new alienation. That shows at once that these words must override both; and as I read the case, they have been so construed. That is, "not conferring a new succession" applies to the word "alienation" as well as to the words "any title." The result, therefore, is that alienation does not confer a new succession. I asked Mr. Sweet—and probably no one could know better than he—by what possible title could a man, there not being an alienation, confer a new succession. He was not aware of any, nor am I sure that I am aware of any. Of course, all new successions are by death, devolution, or something of that kind, or by alienation. If that is the meaning of the term, we have for some reason or other an exception from the 15th section of titles conferring a new succession, or alienations conferring new successions. They are out of the statute. In all those cases you pay at the same time and at the same rate. Why is he to pay at all in the

place of the person originally entitled of the original successor, and liable at the same time and at the same rate? What is fixed by the 20th section duty imposed by this Act shall same time when the successor, or his right, or on his behalf, shall be possession to his succession or to the income and profits thereof;" when it is to become payable when entitled in possession. So that imposed until he becomes entitled the succession. The 15th section time is to be the same as when the person conferring a new succession, if a successor had come in. So that in this case had not died, the result would have been, as I read it, that the duty payable on Lord Mostyn's death, by Sir 1 if he had remained the owner, would have been payable on Lord Mostyn's death by the purchaser, and there would have been no duty. But the purchaser dies, and there is a new successor, and the duty is payable on the new successor coming in under that title. But when the new successor comes in, he is to pay this succession duty. But when the new successor comes in, he is to pay more than one succession? No. Why, when Lord Mostyn was still in possession, is it to be supposed that he was to pay over again? I cannot say. The Government has got the benefit by reducing the estate once more. It is simple, on which there is a duty, that successor coming in pays the duty, looking at the Act as a whole, and finding it according to its fair meaning, it never could have been intended that succession duty should be paid in every case which has happened, the successor paid the duty, the estate is free. The argument both ways to be deduced from the 14th section. The 14th section is this: "Interest of any successor in any property shall, before he shall have become entitled thereto in possession, have passed by reason of any other successor or successors only shall be paid in respect of such duty as shall be due from the successor, before he becomes entitled thereto in possession. The duty shall be at the highest rate, such successor had been subject to have been payable by any one of them." This is twofold. On the one hand it may be found that the provision as to personalty; duty is to be paid; but you find no real estate." Therefore more than the duty shall be paid. That would be very singular. The Act was not intended to assimilate personalty and realty. But there is a section it may be answered, when the argument is not well founded. The argument is that the last succession to real estate the object of the last succession prevail, that is, the last succession, which came into effect under the Act, regards personal estate, it is at the highest duty shall be paid, and the section was put in for the purpose of a successor with the highest duty, will be the case if the last succession is the case. That is the argument I prefer of it will be seen that it is very difficult meaning to the exception, "not a succession" in the 15th section, in

same time. That is, you are to wait for the payment. If it confers a new succession, then of course you will get payment on whichever succession comes first. Therefore you do not want to specify that you are to wait. The moment there is a new succession created, and that succession comes first, that new succession appears to me to fix the time itself, and that the time for the payment of the duty shall be the time of the opening or coming into effect of the other succession. It appears to me, upon a fair construction of the Act, that only one duty is payable, and that being so, I think the title is a good one. I regret very much that I have not the Crown before me in any way, so as to guide my decision in the case. If my decision is wrong, the purchaser will still have a remedy, which I have not forgotten, against the vendor at a future time, if he is called upon to pay the duty.

Solicitors: *Allen and Son; Dean and Taylor, agents for Longueville, Jones, and Williams Oswestry.*

(Before Vice-Chancellor BACON.)

Thursday, Dec. 14.

EUSTACE v. LLOYD. (a)

Administration suit—Decree—Claim for specific performance of an agreement—Suit in Foreign Court for same object—Injunction.

Under a decree for the administration of a testator's personal estate in England P. carried in a claim for the specific performance of an agreement to grant a lease of lands in Ireland. P. afterwards commenced a suit in Ireland against the executor and others for specific performance of the same agreement.

Held, that the executors were entitled to an injunction to restrain P. from further prosecuting the Irish suit against them.

MOTION.

Charles Eustace, by his will dated 10th Nov. 1870, devised his real estates in Ireland to three trustees, to the use of Rosetta Eustace for life with remainder to the use of Robert Robertson and his children in strict settlement, and bequeathed all his personal estate to the same trustees upon certain trusts. The will contained no powers of leasing.

The testator died in Feb. 1875, and in the month of June following the above suit for the administration of the testator's personal estate in England was instituted by the tenant for life against the trustees, who were also the executors of the will.

On the 26th June 1875, a decree was made directing the usual accounts and inquiries. Under this decree a claim was carried in by one Frederick Pilkington for specific performance of an agreement by the testator to grant a lease of part of the settled estates in Ireland. The agreement was not disputed.

In July 1876, Frederick Pilkington filed a bill in Ireland against Rosetta Eustace, Robert Robertson, and the executors of the will to compel specific performance of the agreement. This bill erro-

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

The executors of the will now moved that Frederick Pilkington might be restrained from further prosecuting his suit in Ireland as against them.

Kay, Q.C. and C. Batten, for the executors, in support of the motion.—Whatever claim Mr. Pilkington may have against the tenant for life, and probably he has a good one, he has no claim whatever against us for specific performance of the agreement to grant a lease. Having made a claim in this suit, under which he can obtain damages for the breach of the agreement, he cannot also proceed for damages in the Irish suit against us. That suit is quite perfect without us. We have no legal estate in the property, but are only seisinées to uses. This court will protect the executors from being harassed by double litigation for the same object:

Hope v. Carnegie, L. Rep. 1 Ch. App. 320; 14 L. T.

Rep. N. S. 117;

Dryden v. Foster, 6 Beav. 146;

Graham v. Maxwell, 1 McQ. & G. 71.

No one appeared for the respondents.

The VICE CHANCELLOR.—The executors are now the officers of this court, and are bound to administer the personal estate in a due course of administration. Upon principle and upon plain authority they are, in my judgment, entitled to an order to restrain the further prosecution of the suit in Ireland, so far as it seeks relief against them. There will be an injunction in the terms of the notice of motion, with leave to serve the same on the respondent in Ireland. The costs of this motion will be costs in the administration suit.

Order accordingly.

Solicitors, *J. and H. Muskett Yatts.*

Thursday, Dec. 14.

Re COMPAGNIE GENERALE DE BELLEGARDE. (a)

Company—Debentures issued at a discount—Right of directors to purchase—Set off—The Companies' Act 1862, s. 165.

A company proposed to issue a large amount of debenture bonds which, in the first instance, were offered to the public at par, but which were subsequently all issued at a discount of 7½ per cent., that is, at 92½.

Held, that a director who purchased some of the debenture bonds upon the same terms as the public was not liable to account to the company for the discount.

ADJOURNED SUMMONS.

This was an application by the official liquidator in the winding-up of the above company to compel Robert Orr Campbell, formerly a director of the company, to pay two sums of 99l. and 51l. with interest under these circumstances.

In October 1872, the directors of the company, in pursuance of the powers conferred upon them by the articles of association, resolved to borrow a large sum of money upon mortgage of the property of the company in France, and to offer bonds to the public for the sum so to be borrowed at the price of 92l. 10s. for every 100l. The prospectus, however, which was issued pursuant to this resolution represented that the

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

bonds were to be issued at par, but, as the fact was, all such bonds with two exceptions were actually issued at 92l. 10s.

Robert Orr Campbell, who was a director of the company at this time, took bonds of this issue to the nominal value of 1320l., and in 1873 took further bonds of such issue of the nominal value of 680l., making in all bonds to the nominal value of 2000l., for which he paid 1840l., being at the rate of 92½. The two sums of 99l. and 51l. referred to in the summons, being 160l., represented the difference between the price at which the bonds were issued and the total amount thereby secured.

The company was indebted to R. O. Campbell in the sum of 1186l. 19s. 3d. for money advanced by him to the company independently of 198l. 3s. 9d. due to him for director's fees. These sums appeared in the books of the company to his credit as a debt owing to him by the company.

On the 12th May 1876, the official liquidator took out a summons under sect. 165 of the Companies' Act 1862, to enforce payment by R. O. Campbell of the 160l. as being moneys of the company in his hands.

Sir H. M. Jackson, Q.C. and Terrell, for the official liquidator.—We contend, first, that the issue of debentures by the company at a discount was illegal; secondly, that it was not competent for Mr. Campbell, who was then acting as a director of the company, to make or retain any profit by way of commission or discount out of the transaction, however honest.

Imperial Mercantile Credit Association v. Coleman, L. Rep. 6 E. & I. App. 189; 29 L. T. Rep. N.S. 1; *Delhi Bank's case*, 15 Sol. J. 923.

Further, the difference between the nominal value of the debentures and the price at which they were issued was assets of the company, in respect of which there can be no set-off as against this claim.

Gloag's case, Eur. Arb. L. T. 82.

Kay, Q.C. and W. Renshaw, for Mr. Campbell.—As to the power to issue the debentures, the 16th clause of the Articles of Association empowers the directors to raise money by mortgage, "or by bonds, debentures, or promissory notes, or in such other manner as the directors might think expedient," and it is not illegal to issue them at a discount.

Re Anglo Danubian Steam, &c., Company, L. Rep. 20 Eq. 339;

Re Regent's Canal Iron Works, L. Rep. 3 Ch. D. 47.

Then, as to the discount, all the debentures were issued at that rate but two, which for special reasons which appear on the minute book were issued at par. How, then, can it be said that this gentleman is accountable as having money of the company in his hands when the debentures were issued to all the world at that price? Suppose he were liable, his liability would be for money had and received; but on the books of the company, apart from this transaction, there appears a liquidated sum due to him from the company considerably more than what is alleged to be due to him in respect of these debentures. He has, therefore, a clear set-off against the claim.

Sir H. M. Jackson, Q.C., in reply.—I admit that the debentures were properly issued at a discount, but there is no authority for saying that directors

can buy debentures so issued. The real nature of the transaction was an issue at par and a return to him of 7l. 10s. on each debenture.

BACON, V.C.—This case in one point of view is one of the utmost importance, because it touches this principle, which the courts of equity have always adhered to, not to permit an agent or director or any other person in a fiduciary character, and having power and influence in a concern, to make a profit by his dealings with the concern. But that making of a profit I find to be wholly wanting in this case. It is not profit. The directors publish a prospectus in which they say, "We are going to issue debenture bonds at par." It is all very well to say so, but when they come to issue them people will not take them at par. What are they to do? They find they cannot get them at par and they get them on the best terms they can; and, except in the two particular cases mentioned, they issue all the debentures on the same terms as those which were taken by Mr. Campbell. What is there unlawful in that, and what profit does Mr. Campbell derive from that transaction? Probably when the thing is looked into, it was anything but profit. What profit could there be in any sense, shape, or way? If a company bought a stable full of horses and advertised them for sale at 100 guineas apiece, and found that they could not sell them at that price, what is there to prevent them selling them at 70 or 80 guineas apiece; and what is there to prevent directors from buying on the same terms as any other people? It does not approach the principle upon which alone this application is made. The Act of Parliament which has been referred to is extremely wide of the present case. It prohibits the conduct of directors when they shall have misapplied or retained in their own hands, or become liable or accountable for any moneys of the company. When did the difference between par and 92½ ever become the money of the company? the money which they would have had if they had received it, but which they never did receive, and which never was theirs. The Act proceeds, "or has been guilty of any misfeasance or breach of trust." What misfeasance or breach of trust is Mr. Campbell guilty of? Undertaking a loss for the company, that is to say, advancing them money which they were in want of upon exactly the same terms as anybody else did. That is the nature of the transaction. In which way, therefore, had he ever become liable or accountable for any moneys other than that which he had paid to them? The books are kept, as I have said, in the proper and natural way of keeping books by the company. They enter on the credit side of the ledger the aggregate amount of all the debentures representing the debt due from them, or they could not keep their books; and on the other side they debit the whole amount, and whether it is called commission or discount cannot obscure the true nature of the transaction. The directors did that which it was lawful for them to do. They issued debentures at a certain discount. Mr. Campbell took them as other people took them, and paid his money for them, and he derived no sort of profit. The advantage was all on the side of the company, as it seems, and it would in no way appear that he was in any respect liable. Something has been said about the conduct of the liquidator. Mr. Campbell in his affidavit stated this fact, which is uncontradicted, and not capable

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Re PEPITT'S ESTATE; CHESTER v. PHILLIPS.

[CHAN. DIV.]

of being contradicted, that all these debentures were issued on the same terms, and then the liquidator, not well advised I think, says they were not issued to all, for there are two instances in which they were issued on different terms, and then when the matter comes to be explained there is nothing in it. The liquidator, I think, was ill-advised in bringing that forward to justify his original statement that Mr. Campbell had derived a benefit from this transaction, which was inconsistent with his duty to the company as a director. In my opinion there is no ground whatever for that suggestion. The set-off I need not say a word about, after what I have said. There is no doubt in my mind about this being a set-off. The summons must be dismissed with costs to be paid by the liquidator.

Solicitors for the liquidator: *Elmslie, Forsyth, and Sedgwick.*

Solicitors for Mr. Campbell: *Lawrence, Plews, and Co.*

Saturday, Dec. 16, 1876.

Re PEPITT'S ESTATE; CHESTER v. PHILLIPS (a).

Practice—Administration—Appointment of persons to represent heir-at-law, next of kin, and classes—Rules of court, 1875, 1876, Order XVI. rr. 9, 9a. Form of order under Order XVI. rules 9, 9a, directing some proper person or persons to be appointed to represent, for the purpose of determining questions of construction arising under a will, the heir-at-law and next-of-kin of a testator, and also classes of persons who might in certain events take interests under the will.

A TESTATOR gave his property to his wife for life, and after her decease "to be divided equally between my heirs and to their children, with Henry Richard Powell, to be share and share alike."

The testator's wife died on the 20th March 1876, and thereupon this action was brought for administration by an administrator *de bonis non*, with the will annexed, and also by a son of one of the testator's next-of-kin, who died before the tenant for life. The defendants were the children of another of the next-of-kin who died before the tenant for life.

The testator was known to have had two brothers, but both had been unheard of for more than forty years. One of them was believed to have had children, but none could be found, and no answer had been received to advertisements. All the next-of-kin of the testator at his death were believed to be dead, and it was not known who was his heir-at-law.

The questions of construction arising under the will were whether the word "heirs" meant heir-at-law or next-of-kin; and whether the gift to the children imported a gift by way of limitation, or was a gift over to the children of such heir as died before the period of distribution, in which latter case there would be two classes of children, namely, children who survived their parent and died before the period of distribution, and children who survived their parent and were living at the period of distribution.

The action now came on for trial upon motion for judgment.

H. Burton Buckley, for the plaintiffs, asked for

inquiries as to two classes in respect of which answers could be readily obtained, and, as to others, applied under Order XVI., rules 9, 9a, for the appointment of some person or persons to represent the following classes: (1) The heir-at-law; (2), the next-of-kin at the death; (3), the children of the heir-at-law who survived their parent and survived the period of distribution; (4), the children of the heir-at-law who survived their parent but did not survive the period of distribution; (5) and (6) similar inquiries to (3) and (4) as to the children of the next-of-kin; also for an inquiry as to the death of Henry Richard Powell, and that, under the 44th section of the Chancery Procedure Act some person might be appointed to represent him; and that the chief clerk might be directed to certify in respect of the matters aforesaid without waiting to make his certificate in respect of the inquiries after directed; then allowed inquiries as to debts and other matters as in an ordinary administration decree; and that further consideration might be reserved until the chief clerk had made his certificate as to the first-mentioned inquiries and appointments.

Housley, for the defendants, consented.

BACON, V.C. made the order.

The following was the form of the order:

1. An inquiry whether any of the persons who were the next of kin according to the statutes of distribution of the testator at the time of his death died before the 20th March 1876, and if so, whether any such left any child or children them respectively surviving who died before the 20th March 1876, and any child or children who survived that date. And if it shall appear that any of the said next-of-kin so dying left any such child or children who died before the 20th March 1876, then let a proper person be appointed at chambers to represent such child or children so dying for the purpose of obtaining the judgment of the court upon the construction of the will of the testator. And if it shall appear that any of the said next of kin so dying left any such child or children who survived that date, then let one of the said last-mentioned children, if any are still living, and if they are all dead, then let some proper person be appointed in chambers to represent such last-mentioned children for the purpose aforesaid.
2. An inquiry whether Henry Richard Powell is living or dead, and, if dead, whether or not he survived the testator, and in case he survived the testator who is his legal personal representative? And if it shall appear that he survived the testator and has no legal personal representative, then let some proper person be appointed at chambers to represent his estate for the purposes of this action. Refer it to chambers to appoint proper persons to represent for the purpose of obtaining the judgment of the court on the construction of the will, the following persons and classes respectively, that is to say (i.), the persons who were at the testator's death his next-of-kin, according to the Statutes for the Distribution of Intestate Estates; (ii.) the heir-at-law of the testator at his death; (iii.) the children, if any, of the said heir-at-law who died before the 20th March 1876; (iv.) the children (if any) of the

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

Q.B. DIV.]

LEASK v. SCOTT.

[Q.B. DIV.]

Jan. 29.—FIELD, J.—This was an interpleader issue, in which the plaintiff, Mr. Leask, affirmed as against the defendant, Mr. Scott, that he was entitled to certain goods which were the subject of a bill of lading, dated 29th Dec. 1875, and the facts of the case shortly were these: The plaintiff, Leask, was a fruit broker in the city, and he had as what we may call one of his constituents, a firm of Geen, Stutchbury, and Co., who were fruit merchants in the city, and for many years—four or five—I forget precisely the exact number, Mr. Leask acted as fruit broker for that firm in their various transactions for buying and selling fruit. In the course of that time, the firm had become considerably indebted to him, and I think it may be taken that at Christmas, 1875, there was something certainly like 10,000*l.* or 11,000*l.* due to him from the firm of Geen, Stutchbury, and Co. Now the firm did not improve in their pecuniary position during 1875, and very early in the following year they were in such difficulties that on the 1st Jan., which was the prompt day—the day on which they were bound to meet their prompts—they were unable to do so, and were short by a sum of 2000*l.* of the sum required for that purpose. Accordingly, on the morning of Saturday, the 1st Jan., the prompt day, according to the evidence of Mr. Leask, confirmed by Mr. Geen, Mr. Geen called upon Mr. Leask (at that time they owed him 10,700*l.*), and what passed is described precisely in the same manner by Mr. Leask and by Mr. Geen. Mr. Geen said, “I want 2000*l.*,” whereupon, as Mr. Leask said, “I said you may have it, but you must first cover up your account.” Upon that Geen said that he would, and he proceeded upstairs to Mr. Leask’s cashier, and there he obtained a cheque for 2000*l.* Now, that was on the Saturday. There was a little doubt as to the exact date on which the bill of lading was deposited, but it could not have been before the Wednesday, because I believe I am right in saying that Geen himself did not obtain the bill until the 5th; at all events he did not obtain the bill later on. On one day, in the early part of the week, Mr. Geen, who had previously entered into a contract with the defendant, Mr. Scott, who was a merchant at Naples, for an unascertained quantity of nuts, in pursuance of that contract, received from Scott’s correspondent in London the bill of lading in question, and it was indorsed to him in pursuance of the previous contract, and he accepted in exchange for that endorsement a bill at three months for the price of the goods. On the following day, in pursuance of the promise which had been made on the Saturday to cover up the account, Mr. Geen took this bill, endorsed in blank, to Mr. Leask, and deposited with him, along with a great many other securities similar in character, for the purpose, as the jury have found, of covering up the account—that is, securing the whole balance due. Now, at the trial there was no evidence given against the plaintiff, but the learned counsel for Mr. Scott went very fairly and properly into dates. I ought to add, on the 8th, the following Saturday, Geen, Stutchbury and Co. stopped payment, and were insolvent. The securities that were handed to Mr. Leask were said to be worth something like 5000*l.* Now, that being so, at the trial, it was denied that it was competent to Mr. Scott, the undor, to stop the goods at the time that that is to say, there was no question raised

about the *transitus* being at an end. There was no question about Geen, Stutchbury and Co. being insolvent, and it was conceded that he had a right to stop the goods as against Geen, Stutchbury and Co., but Mr. Leask said: “You have no right to stop the goods as against me because I come within the protection of the law, which says that the indorsee or transferee of the bill of lading for valuable consideration taking it without notice, taking it fairly and honestly, is entitled to the property as against the original vendor.” That was contested hotly at the trial. I left questions to the jury in order to raise the facts of the case, and the jury in answer to my questions gave these answers: “We first of all find that the plaintiff received the bill of lading honestly and fairly. We find that valuable consideration was given on the understanding of security being given, and we also find that the security given was to secure 2000*l.* and also the old account.” Now upon these findings, Mr. Murphy, with Mr. Webster, moved before me to enter the judgment for them. They did not contest the findings of the jury, but they said that the point that they disputed was this: They alleged that although it might be, and after the verdict of the jury must be taken to be, that the plaintiff did receive the bill of lading honestly and fairly, and that he received it in pursuance of that promise that security should be given, yet they said he was not such a transferee or indorsee of the bill for such valuable consideration as entitled him to hold it as against Mr. Scott. Now in support of that position, they relied upon two cases: One of them is the well-known case of *Rodger v. The Comptoir d’Escompte de Paris* (L. Rep. 2 P. C. 393). In that case there was a firm of Lyall and Still, and they were in the anticipation of receiving certain bills of lading for certain goods which were about, as they expected, to arrive. They were very much pressed for money, and they obtained an advance from the person out at Hong Kong, upon the promise of which he got large advances upon the undertaking to furnish shipping documents for silk cargoes to be ready for the mail of the 15th December from Hong Kong. Now it seems to me, therefore, that we went one step further than this case. That case pointed to a particular class of documents which he was in anticipation of receiving, and he undertook therefore to furnish the cargo on certain shipping documents which he expected to receive. Now in this case it is quite certain that no specific cargo of any kind whatever was in the consideration of Mr. Leask. We do not know whether Mr. Geen on that Saturday expected that bill of lading to come as it did the following week. It may be that he did not. It may be that the documents were so far in advance that he might possibly have expected to get the bill of lading the following week, but he made no specific mention of the bill of lading—he made no specific condition with Mr. Leask that any particular security should be lodged. All he said was, “If you will give me 2000*l.* now, I will cover up the account.” Now, that being so, in this case of *Rodger v. The Comptoir d’Escompte de Paris*, Lyall and Still were unable or unwilling to complete their promise, whereupon the manager of the bank assisted, in a very strong letter, that they should give him that security which they promised holding out a threat of criminal proceedings: they did not do so. There was another banker

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pressing them also, and the result was that Lyall and Still executed a deed of assignment, by which, after reciting the agreement referred to, and reciting that certain advances had been made on the faith of certain documents, it then proceeded to make over to the bank "the whole of the property, premises, and chattels specified in the schedule at the foot, with all the estate right, title, interest, claim, or demand of Lyall, Still, and Co., therein, or thereto, or arising thereout or therefrom." The schedule included amongst other things "all goods and bills of lading or other documents for all goods now on the way hither to arrive in December, 1866, or January, 1867," being the class of goods which had been referred to when they first made their promise to the banks to find security. Now, after that date the bill of lading which was in question in the case of *Rodger v. The Comptoir d'Escompte de Paris* arrived: "The documents arrived on the 27th Dec. 1866, and the 1st Jan. 1867, including the bills of lading for the goods." "These were then indorsed and handed over by Maclean (together with the policies on the goods) to Mr. Kaiser in performance of the agreement." After that the vendor stops the goods, and so the question arose between the indorsee of the bill of lading and the vendor, and the indorsee failed in that he was not assignee for valuable consideration. Now, it is worth while for a minute or two to advert to the important parts of the judgment. After setting out all the facts as I have stated them, it goes on in this way (p. 405): "The general rule so clearly stated and explained by Lord St. Leonards in the case of *Mangles v. Dixon* (3 H. L. Cas. 702) is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it"—and refers to the well-known case of *Lichbarrow v. Mason* as to that. Then the court go on to say why in their judgment that principle applies to such a case, but they say, "But in this case, at the time of the assignment, Maclean had not possession of the documents. Nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents, or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors"—as it is in this case—"and can it be contended that before Maclean got possession

of the documents, when his firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the respondents by this assignment the benefit of a prospective breach of trust and violation of contract?" And then, proceeding upon the general rule that you must give an honest interpretation and a fair interpretation to the words of any assignment, the court go on to say that they must read the words "all goods and bills of lading or other documents for all goods" to mean this,—such a security as I can fairly and honestly give. That is, not any actual property I may have, but subject to the equities between me and anybody else. Then the following observation is made, which I adopt in this case:—"Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value he has a prior claim. But the rule is founded on the reason of it as already explained; *cessante ratione, cessat ipsa lex*. Where there is no advance made or value given upon the faith of the documents, where the object is simply by a sweeping clause to gather in whatever may be got to recomp the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment, and without other consideration whatever, it appears to their Lordships that a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim." Now, that case and that principle came into discussion a little later on before the same tribunal, in the case of the *Chartered Bank of India v. Henderson* (L. Rep. 5 P. C. 501), and that case is valuable for this. As regards Lyall, Still, and Company, there was a similar promise to furnish shipping documents, a similar failure, and then there was a transfer by endorsement, but on the occasion of the transfer by endorsement of the bill of lading, the vendees, the transferors of the bill, had the bill in their custody, that is, in their possession, and although they had broken their previous promise the court said that the previous promise would not have been enough, but there was a sufficient bargain and agreement on the part of the bank not to proceed—to delay, give time, and to forbear upon the faith of the transfer of the bill of lading. Upon that ground the court, although distinguishing it from *Rodger v. The Comptoir d'Escompte de Paris*, in every way upheld the principle of that case. Now, that that is so is very clear from the judgment of Sir Barnes Peacock. I will not go through the case, but he says this (p. 510):—"It appears, then, that the bank purchased bills of exchange to the extent of 15,000*l.* from Messrs. Lyall, Still, and Company, and that they paid them the amount upon the stipulation that Messrs. Lyall, Still, and Co. were to hand them over shipping documents to the extent of the bills." Then they failed to do so. "They were urgently pressed to do so by the defendants; and the said firm, having been threatened by the defendants with immediate legal proceedings in the event of their failing to

promised the defendants that if they would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other China produce, and allow the said sum of 15,000*l.* sterling, which had been paid to them in advance for the said bills upon the faith of their undertaking, to deliver the said shipping documents as aforesaid to constitute an ordinary debt for money lent, they would deposit with the defendants other security for the repayment of the said sum; and they offered to deposit with the defendants at once in part fulfilment of such proposed substituted arrangement a bill of lading for goods of the value of 10,000*dols.* or thereabouts," the bill of lading in question in that case. Now, says the judge, "It appears that the bill of lading was indorsed and handed over by Messrs. Lyall, Still, and Co. to the bank in consideration of the bank's releasing them from the obligation which they had come under, to hand over shipping documents of the value of 15,000*l.*, and of their undertaking not to take the legal proceedings, criminal or civil, which they had threatened. It appears, therefore, to their Lordships that there was a sufficient consideration for the indorsement of the bill of lading to Messrs. Lyall, Still, and Co. to the bank." Then the attention of the court was naturally drawn to this case of *Rodger*, and the principles are laid down by Sir Barnes Peacock, in the passages I have already read; but then they say further that this case differs entirely from *Rodger's* case, because the bill of lading in *Rodger's* case was not handed over at the time, but was handed over in pursuance of the agreement generally to hand over all the documents. Now those being the two cases, and the law having been thus clearly and explicitly laid down, the only question is whether this case falls within the principle of those two cases. I think it does, and in my opinion, the defendant in this case is entitled to my judgment. Let us compare and see what the thing is. In the present case, as in *Rodger v. The Comptoir d'Escompte de Paris*, at the time of the promise made to cover up, which was on the 1st Jan., this bill of lading was not in the authorised possession of Geen, Stutchbury and Company. As I said before, I do not even know that they expected it, but I should think they did. That was the only occasion on which the plaintiff had made any advance. He had made the advance of 2000*l.* How could Mr. Scott be said to enable Geen, Stutchbury and Company to make the advance, when at the very time the advance was made the bill of lading referred to would not have been in the possession of Geen, Stutchbury and Company? How could it be said that Mr. Leask parted with his 2000*l.* on the faith of that endorsement, when in point of fact he knew nothing at all about it? It seems to me, therefore, that the whole consideration in this case came into effect, and had its full legal operation on the 1st Jan. At that time according to the finding of the jury there was a binding bargain between Geen, Stutchbury and Company and Mr. Leask, that further security should be given; and the facts of the case do not show that Mr. Scott has by any act of his enabled Geen, Stutchbury and Company to commit a fraud on Mr. Leask, which undoubtedly has been committed upon him. Again,

very different from that of the indorsee of a bill of exchange. The indorsee of a bill of exchange takes the bill freely, fully, and fairly, subject to any equities of the indorser. The indorsee of the bill of lading occupies, on the contrary, a mean position as between the indorsee of a bill of exchange and that of the transferor or indorser of a bill of lading; and as in *Rodger v. The Comptoir d'Escompte de Paris*, the indorsee has no better title than the indorser can give. For these reasons I come to the conclusion that the defendant is entitled to my judgment.

Judgment for defendant with costs.

Solicitors for plaintiff, *Hollams, Son and Coward.*

Solicitors for defendant, *Lowless, Nelson, Jones, and Thomas.*

EXCHEQUER DIVISION.

Wednesday, Dec. 20, 1876.

STUBBS v. BOYLE (a)

Practice—Report of official referees—Judicature Act 1873, sects. 58, 59; Order XXXVI., rule 34.

When an official referee has made a report on a cause or matter before him, the court will not entertain an application under Order XXXVI., rule 34, to remit the same back to him for re-trial or further consideration, unless the application be supported by affidavits.

MOTION for a rule to show cause why the judgment on the finding of an official referee should not be entered for the plaintiff, or why the case should not be referred back to him for a more detailed report, or for a new trial on the ground that the verdict was against the weight of the evidence.

By sect. 58 of the Act of 1873, it is enacted that:

In all cases of any reference to or trial by referees under this Act, the referees shall be deemed to be officers of the court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of court, or (subject to such rules) by the court or judge, ordering such reference or trial, and the report of any referee upon any question of fact on any such trial shall (unless set aside by the court) be equivalent to the verdict of a jury.

R. O. B. Lane, in support of the motion.—The motion to enter judgment for the plaintiff on the finding cannot be supported, inasmuch as by rule 7 of the December rules 1876, such application must be made to the Court of Appeal. But I am entitled to a rule on the two latter parts of my motion. By the above section the report of the official referee is made equivalent to the finding of a jury. Now what took place at the trial was this: [MELLOR, J.—Have you any affidavits?] No; but no affidavits are necessary.

KELLY, C.B.—In an application of this nature you must come before us furnished with affidavits. We will extend your time for moving to procure affidavits.

MELLOR, J.—We must have something to go on besides the statement of counsel. At present you confound a reference with a trial in a Superior Court. That is not so. To show a miscarriage you must have affidavits showing what took place.

Motion adjourned for affidavits.

Solicitors, *Emmett and Son.*

(a) Reported by HENRY F. DICKENS, Esq., Barrister-at-Law.

DIVISIONAL COURT FOR APPEALS
FROM INFERIOR COURTS.

Thursday, May 18, 1876.

FULHAM BOARD OF WORKS (apps.) v. GOODWIN
(resp.). (a)

Cost of sewer—New street—Previous sewer—Metropolis Local Management Act 1867 (25 & 26 Vict. c. 102, ss. 44, 52, 112).

In 1867, a sewer was built in a street, formed since 1862, of some houses in which the respondent was owner, at his expense, under 25 & 26 Vict. c. 102, s. 44.

In 1875 the appellants removed this sewer, and another in the next street, and constructed a new sewer in connection with the houses in both streets. They apportioned the cost and expenses of the works upon the owners of houses and land in the two streets. The respondent refused to pay his apportionment, and a magistrate dismissed the summons against him.

Held, upon a case stated, that this was not a sewer constructed in or for the drainage of a new street within the meaning of sect. 52 of the said Act, and that the apportionment was bad.

This was an appeal from the decision of the magistrate at Hammersmith Police Court.

The appellants herein are the District Board of Works for the Fulham district, and the respondent is a builder owning property in the district.

1. Complaint was made by the clerk to the said board of the non-payment by the respondent of the sum of 64*l.* as owner of certain premises situate and being in Mayland and Conningham roads, in respect of certain sewer works carried out in the said roads, which said roads were formed and laid out as new streets since the 7th Aug. 1862. A summons was duly issued, and the parties attended, and the following facts were proved before the said magistrate:

2. The respondent is, and at the time of the making of the sewer was, in the year 1867, and still is the owner of houses in a road which in the year 1867 was and is now called the Mayland-road, and the tenants thereof had previously to the making of the new sewer paid sewer rates.

3. The respondent is not the owner of any house or land in the Conningham-road, which is a continuation of the said Mayland-road, and is hereinafter referred to and called Conningham-road.

4. On or about the 1st Feb. 1867, the Metropolitan Board of Works, sanctioned the construction of a sewer in the centre of the said Mayland-road by the owners, under the 44th sect. of 25 & 26 Vict. c. 102.

5. Such sewer was built and drainage works were made at the expense of the said John Goodwin, the respondent, according to the plans submitted to and approved by the Metropolitan Board of Works, and extended the entire length of the said Mayland-road, about 1050*ft.*

6. The construction of a sewer in the Conningham-road by the owners, with an outfall in the Uxbridge-road, was sanctioned by the Metropolitan Board of Works, and constructed in two sections. The first section was in accordance with such sanction; the second section, about 500*ft.* in length, was not in accordance with such sanction, with its outfall in the sewer in the Mayland-road, instead of into the Uxbridge-road.

7. In April 1875, the Board Fulham district determined to before mentioned taken up and

8. The provisions of the severment relating to sewers, in compliance with by the respondent of the sewer constructed in the year 1867, referred to in paragraphs of this case.

9. In the month of June 187 board caused the said sewers constructed a brick main sewer whole of the Mayland-road, of the Conningham-road, w gulleys sufficient to take the populous neighbourhood, as drainage of the houses in the and of several houses in the with the said new sewer.

10. The cost and expenses of last paragraph mentioned amount of 25*27l.*, and the Fulham district the same upon the owner and land in the Mayland and as shown upon certain plans set forth in an apportionment 1875; which said plans accompanied, and were to be part of this case.

Upon the hearing of the case contended on the part of the respondent.

(1.) That the apportionment against the respondent was sought to be charged amounted to the sum of 64*l.* because the district board, having the old sewer in the Mayland-road made as stated in the 4th and the case, were bound to substitute but not at the cost of the owner.

(2.) That the sewer in respect of present claim is made against a sewer for taking the sewage of the neighbourhood, including the side of the said Mayland-road and Conningham-road, and that, therefore, the owner of the Mayland-road ought not to pay the cost of the sewer.

(3.) That any sewer replaced in the district board, ought to be paid for by the ratepayers of the parish.

The said magistrate was of opinion that the said summons ought to be dismissed the same accordingly, and the said district board.

The question for the opinion of the court was whether the respondent, John Goodwin, ought to pay the said sum of 64*l.* in respect of the apportionments.

If the court shall be of opinion that the respondent is to be entered with costs.

But if the court shall be of opinion that the respondent is not to be entered with costs.

Boddam (with him *Philbrick*) for the appellants.—The section of the Act relating to sewers are alleged to have been made under the 44th of the Metropolitan Management Act 1862 (25 & 26 Vict. c. 102) and the respondents are lawful for the owners or occupiers of premises in any parish, district or limits of the metropolis as defined by the said Act, with the consent

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

to construct sewers at their own expense for the purpose of draining such land or premises, and it shall be lawful for any vestry or district board in whom the sewers in any parish, district, or part are vested, if they shall deem it just and proper so to do, to contribute out of the rates under their control, applicable to the execution of works of sewerage, to the cost of any sewers constructed for the purpose aforesaid." Amongst the regulations and conditions mentioned in the subsequent sections, 45 to 51, is one requiring the sanction of the district board and the approval of the metropolitan board, which in this case had not been obtained. The section, therefore, which is applicable to the sewer charged upon this apportionment is the 52nd of the same Act: "Where any sewer shall, after the passing of this Act be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gulleys, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such streets or houses, and of the land bounding or abutting on such street respectively." By section 112, "the expression new street shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." This unsanctioned sewer was the same for the purposes of the Act as if no sewer existed, and the case comes within the authority of *Sawyer v. Padington* (L. Rep. 6 Q. B.). There the appellant, about 1866, built some houses abutting on the Harrow-road, and about the same time the vestry of the parish constructed a sewer along the Harrow-road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to 1856. Before 1866 no sewer existed in this road, which was and continued to be a turnpike road until the 1st July 1864, on which day the vestry took charge of it for the first time. It was held that the Harrow-road was a new street within the meaning of section 112, and that the appellant was liable to be rated under sect. 52 of this Act.

Dwy, Q.C. (with him *Kemp*), for the respondent. —Sect. 68 of Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120) vests all sewers then vested in the metropolitan commissioners in vestries or district boards; "and all sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works, as hereinafter mentioned, shall be vested in such vestry and board respectively." And by sect. 69 the vestry of every parish and the board of works of every district mentioned "shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up, or

shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works as may be necessary for effectually draining their parish or district." Under those sections of the earlier Act the appellants ought to have charged the repair of this sewer upon the district rates. This was not a sewer constructed under sect. 52 of the Act of 1862, in or for the drainage of a new street. [Stopped by the Court.]

CLEASBY, B.—We need hear no further argument for the respondent. We have no doubt this appeal must be dismissed. It has been contended that the respondent and other persons, who are owners of the houses and land bounding or abutting upon the street through which this sewer has been made, should pay for the expenses of the sewer. It was said this is a new street according to the definition contained in the Act, and the sewer was constructed by the appellants in or for the drainage of this street. But it appears that in 1867 a sewer was constructed under the 44th section of the Act of 1862, in the centre of the respondent's street; it was brought into use for the neighbourhood, and became vested in the appellants. The expense was paid by the respondent, and it appears to me that persons who have thus paid for a sewer once cannot under this Act be charged again for the construction of another. In 1875, for some purpose the district board determined to make a fresh sewer to serve the district, not merely for this particular street, but having connections with the houses in Conningham-road, which is a continuation of it. They have, however, attempted to charge the respondent for his apportionment of the expense of this fresh sewer, as if the 52nd section of the Act of 1862 applied to it. That section authorises such an apportionment when any sewer shall be constructed by a "district board in or for the drainage of any new street or of any houses erected since the 1st Jan. 1856." Although the definition of "new street" may apply to this Mayland-road, it is unreasonable to apply this section under the circumstances here stated, and this is strongly confirmed by the provisions of the following section 53, which relates to streets in which previously to the construction of the sewer there had been no sewer or only an open sewer. The expenses are then to be defrayed in part only by the adjoining owners, the remainder to come from the general rate. It would be an inconsistent conclusion that the owners in this street should be charged entirely for the new sewer, although they had a sewer before; and where there was no sewer or an open sewer before, the adjoining owners should only be charged part of the costs incurred. I am satisfied, too, that this sewer was made for the district generally, and cannot be said to be in or for the drainage of any new street. This sewer could only have been made at the charge of the parish rate-payers, and the apportionment appealed against is bad. The appeal, therefore, from the dismissal of this summons cannot be allowed.

GROVE and FIELD, JJ. concurred.

Judgment for respondent.

Solicitors for appellant, *Watson, Sons, and Room.*

Solicitor for respondent, *W. A. Downing.*

PROB.] In the Goods of JOHN HUX—In the Goods of A. THRIFFLETON—MEYERN v. MEYERN. [Div.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

(Before the Right Hon. the PRESIDENT.)

Tuesday, Jan. 30.

In the Goods of JOHN HUX (deceased) (a).

Will—Attestation—Witnesses—Affidavit of execution—Presumption of execution—Practice.

Where a will is found, upon the death of the testator, which is imperfectly attested, but in other respects is on the face of it a good instrument, the court will, if satisfied of the bona fides of the applicant, grant probate of the will, and will dispense with the affidavit of execution if, after every attempt being made, it is impossible to find either of the persons whose names appear on the face of the will as attesting witnesses.

In this case John Hux, a retired watchmaker, died on the 14th Dec. 1876, and on his death a will was found sealed up in a tin box, which was dated the 5th June 1871. This will was, with the exception of a slight imperfection in the attestation clause, a good instrument on the face of it, and bore the names Joseph Cole Lawson, and William Martin as attesting witnesses, and appointed the testator's daughter Louisa Hux and his nephew Thomas James Hux, his executors. The deceased left behind him a widow and two daughters, one of whom was married, the other being the executrix, with his nephew, of his will. An only son had left his father's house in 1851, being then twenty-one years of age, and was presumed to be dead.

Thrupp now moved, on behalf of the daughter, Louisa Hux, for probate of the will.—The difficulty in the case was that it had been found impossible to obtain an affidavit of execution from either of the persons whose names appeared on the will as attesting witnesses. Due search had been made for them, and advertisements had been inserted in many papers on many occasions for them; but no persons bearing those names were forthcoming, and under the circumstances it was necessary to ask the court to presume "*Omnia esse rite acta*." In support of the application it might induce the court to assist the applicant if it were mentioned that she would be personally more benefited by the refusal of the court to grant the application than she would be under the will, should the court grant probate of it.

The PRESIDENT.—I think, considering that I have before me the application of a person whose bona fides is so clearly shown, and considering that she is the only person who can be injured by my making this grant that I am justified in dispensing with the usual affidavit of execution, and I decree probate of the will.

Solicitor for the applicant, A. P. Oldershaw.

Tuesday, Feb. 6.

In the Goods of ALICE THRIFFLETON (deceased) (a).

Will of married woman—Probate of draft—Limited grant—Consent of persons interested in personalty.

Where a married woman has executed a will during coverture with the consent of her husband, and the will is not forthcoming at her death, and no

copy can be found, the court will make a grant of probate of the draft of the said will limited until the original will, or an authentic copy of the will, be brought into the registry, and limited also to all such personal estate and effects as the deceased had power and a right to dispose of, and has in and by the said draft appointed and disposed of.

ALICE THRIFFLETON, of Lowtown, near Pudsey, Leeds, the wife of Benjamin Thrippleton, died on the 25th Jan. 1876, having during her coverture with the said Benjamin Thrippleton, by and with his consent, executed a will dated the 22nd May 1869, and therein appointed William Harrison and George Sugden her executors. Since her death the will had been lost or mislaid, and could not now be found. The will was originally prepared from a draft, now in the registry of the Probate Division, and there was no authentic copy known to be in existence. The said William Harrison and George Sugden now wished for a grant of probate of the said draft limited to such personal estate and effects as it was in the power of the said Alice Thrippleton to appoint and dispose of by will.

Swabey, for the executors, moved for the grant stating that the consents of all the persons interested in the personalty of the deceased in the event of the grant being refused had been obtained and filed, and that all possible means had been taken to find the will, or a properly authenticated draft of the will, and that the husband of the deceased had been examined on commission with a view to ascertaining what had become of the will, but without effect.

The PRESIDENT.—You may take a grant of probate in this case of the draft of the will which was executed on the 22nd May 1869, but it must be a limited grant until the will itself, or a copy of it, duly authenticated is brought into and left in the registry of this division. The grant will also be limited to all such personal estate and effects as the deceased person had power and a right to appoint or dispose of, and which she has in and by the said will as contained in the draft appointed and disposed of. An affidavit must be filed setting forth what the said personal estate so disposed of may be.

Solicitors for executors, Few and Co.

DIVORCE BUSINESS.

(Before the Right Hon. the PRESIDENT.)

Tuesday, Nov. 21, 1876.

MEYERN v. MEYERN AND MYERS. (a).

Divorce suit—Damages—Children—Apportionment of damages—Costs.

Where a decree for a divorce has been pronounced after a verdict by a jury, and damages have been paid into the registry under the verdict and in pursuance of an order of the court, the apportionment of the damages will be made by the court after due consideration of the children, if any, of the marriage and of the respondent. The petitioner will not be entitled as of right to the damages assessed and awarded to him by the jury, but the court is at liberty to deal with the money in any way which in the opinion of the court is most conducive to the interests of the

Div.]

PERRET v. PERRET AND ALLT.

[Div.]

parties affected by the decree. The costs incurred by the parties in the motion for apportionment of the damages are costs in the cause, and are recoverable by the petitioner against the co-respondent.

IN this suit a jury had found all the issues in favour of the petitioner, and had awarded 7500*l.* damages against the co-respondent. These damages, however, having been reduced by consent to 5000*l.*, the court pronounced a decree *nisi* for a divorce with costs against the co-respondent, and ordered the damages to be paid into the registry.

Spinks, Q.C., now moved the court to apportion the damages, and on behalf of the respondent applied that the damages, after payment thereout to the petitioner of his extra costs, might be settled for the benefit of the four children of the marriage: Frederick, aged 26; Ida, aged 24; Alfred, aged 23; and John Joseph, aged 5.

Inderwick, Q.C. (*Bayford* with him), for the petitioner, opposed the application as made on behalf of the respondent for the following reasons. It appeared from the affidavits before the court that the respondent was living at a house in Westbourne Park, and that she had living with her against the wish of the petitioner, two of the children Ida and Alfred. The co-respondent Myers was an habitual visitor at the house, and was generally in the company of the respondent and the two children, and there was good reason for believing that he bore all the costs of the establishment in question. Frederick, the eldest son, was married, and he, his wife and three children, were supported by the petitioner, and did not ask for any portion of the damages. John Joseph was an infant, and was being educated, clothed, and maintained by the petitioner. On behalf of the petitioner, therefore, it was contended that the conduct of the respondent and of the two children Ida and Alfred, was such that it would be improper to award them any share of the damages that Frederick did not desire a share, and that the justice of the case might be met by awarding 1500*l.* for the benefit of John Joseph, and the residue to the petitioner. In further support of this application it was pointed out to the court that in addressing a jury for damages in a suit for divorce a counsel was not permitted to appeal to the jury except as to the loss which the petitioner had sustained by being robbed of his wife, and the benefits of which he was consequently deprived, and that after a jury had awarded damages to a petitioner on such grounds, the whole basis upon which such damages were awarded would be destroyed, if the court, in apportioning the damages, were to refuse to apportion them for the benefit of the petitioner.

The following cases were cited in the course of the arguments:

Latham v. Latham and Gelting, 30 L. J. 43, P. & M.;
Keats v. Keats and Montezuma, 1 Sw. & Tr. 335;
Clark v. Clark and Bourke, 2 Sw. & Tr. 520;
Foster v. Foster and Bourke, 3 Sw. & Tr. 158;
Callwell v. Callwell and Kennedy, 3 Sw. & Tr. 259;
Narracott v. Narracott and Hesketh, 3 Sw. & Tr. 408.
Cur. adv. vult.

Sir JAMES HANNEN.—In this case the damages, 5000*l.*, have been paid into the registry, and I have been called upon to apportion them. I direct first that the sum of 1500*l.* shall be settled on John Joseph, the youngest child. I direct

further that all the petitioners' extra costs be paid out of the damages, and that the sum of 1500*l.* be also paid to him; and, lastly, I direct that the residue of the sum of 5000*l.*, whatever that may be, shall be applied to the purchase of an annuity for the life of the respondent, to be paid to her so long as she shall live chastely; but in the event of her forfeiting it by reason of her not living chastely, or in the event of her ever becoming the wife of Myers, the co-respondent, then that the annuity be paid to the petitioner during her life. My reasons for making this apportionment are as follows: The co-respondent is a married man, and it is said that the respondent, since her separation from the petitioner, has been visited and supported by the co-respondent. I am asked to believe further that their adulterous intercourse has been uninterrupted by the pronouncing of the decree in this suit. I am anxious, so far as I can, to place before the respondent as strong a motive as possible to induce her to refrain from troubling the married life of the co-respondent, and with that object in view I have ordered an annuity to be paid to the respondent so long as she shall live a chaste life. I do not impose the condition that the respondent shall not marry again; that, perhaps, would be the best thing that could happen to her; but in the event of the death of the co-respondent's wife, and his marriage with the respondent then, as she would have to be supported by him there would be no reason why she should receive any longer this annuity, and in that event it ought to go to the petitioner. I pass over all the children but the youngest, John Joseph, but not on the ground that being of full age they are therefore not entitled. I do not think that that would be a sufficient reason for passing them over. There might be some circumstances under which I should have allowed some portion of the damages to have been paid to them. In this case, however, two of the children, knowing the circumstances under which their father and mother were separated, and knowing the whole truth, have thrown in their lot with the respondent, and in putting her in possession of this annuity I leave it to her to apply a portion of it for their benefit and maintenance if she see fit, and I hope that the desire to assist her children if any necessity should arise may furnish an additional and powerful motive to live a chaste life and observe the conditions which I have made.

Spinks, Q.C., asked for the costs of the motion.

Sir J. HANNEN.—You are entitled to your costs, but they will be costs in the cause, and the petitioner will be able to recover them upon taxation against the co-respondent.

Solicitors for the petitioner, *Allin and Groom*.

Solicitors for the respondent, *Travers, Smith and Co.*

PERRET v. PERRET AND ALLT.(s)

Return of citation to the registry—Rule 14—Service.

The court will not make an order dispensing with the necessity for the return of a citation into the registry as required by rule 14, even where it is satisfied that the original citations have been lost by the carelessness or fraud of a defaulting party.

(a) Reported by H. B. DEANE, Esq., Barrister-at-Law.

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MIDDLESEX SESS.] *Ex parte* PHILLIPS; *Ex parte* ALEXANDER (1); *Re* ESCLICK.

[BAIL]

show upon the face of them everything required to give the magistrate jurisdiction, and that, therefore, in reciting the statute under which he acts, care must be taken to state it correctly, and not to omit qualifying words which add an indispensable element to the character of the offence with which the law authorises him to deal, and that, therefore, the facts themselves must be set out so that the court may judge whether they amount in law to the specified offence. The clause in the Vagrant Act upon which this conviction proceeds enacts that "every person, pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of his Majesty's subjects, shall be deemed a rogue and a vagabond within the meaning of the Act, and be committed to the House of Correction, and there be kept to hard labour for any term not exceeding three months." The conviction, as the learned serjeant has objected, does not charge the offence in the words of the Act. Contrary to the general rule to be observed in this respect, in its statement of the offence, it follows them in part only, inasmuch as it omits the words "by palmistry or otherwise," which are of vital importance, being descriptive of the character of the craft or device intended by the statute. The reasons for this omission and for framing the conviction in its present form are not far to seek. If the particular description, "by palmistry," were applicable to the case, it was unnecessary to avoid it; and if the facts had been such as to bring the case within the meaning of the general words preceded by the particular description, it would be sufficient to quote the language of the enactment and then proceed to set out the acts and circumstances relied upon to constitute the offence. From either point of view the omission of these qualifying words occurring in the statute is significant of the difficulty felt in placing them in juxtaposition with the actual facts. Mr. Hill, however, contends that the conviction is sufficient on the face of it for this purpose. The court is of the contrary opinion. The word "otherwise" following the particular description or example in a penal statute must, of course, be construed in accordance with the restrictive rule applicable in such cases—that is to say, the means used to deceive and impose must be by palmistry or a craft or device *ejusdem generis*. The judgment of the Court of Queen's Bench in *Johnson v. Fenner*, referred to by the learned Serjeant is conclusive on this point; and, inasmuch as the conviction omits these essential and qualifying words, and then sets out facts which might possibly constitute an offence under the enactment had it contained no such qualifying words, but which might or would amount to no offence had the Act been properly set out, we think it is bad upon the face of it; and, as the learned counsel for the Crown has declined to ask the court to amend it, we must quash this conviction.

Solicitors: Munton; Solicitor to the Treasury.

COURT OF BANKRUPTCY.

(Before the CHIEF JUDGE.)

Dec. 4 and 11, 1876.

Ex parte PHILLIPS; *Ex parte* ALEXANDER (1)
Re ESCLICK. (a)

Bill of sale—Reputed ownership—Withdrawal of consent—What sufficient—Possession of part.

A. instructed his agent, the evening before he debtor filed a liquidation petition, to take possession under a bill of sale, which he held from the latter, and which included property in two houses at different places. The next morning the agent, shortly before the filing of the liquidation petition, entered into possession of the property in one of the houses, and in the course of the same day took possession of that in the other house.

Held, that the property was not in the reputed ownership of the debtor with the consent of the true owner, for that such consent was revoked when A. instructed his agent to take possession.

Held, also, that the taking possession of the property in the first house was, under the circumstances, a taking possession of the whole property comprised in the bill of sale.

THESE were cross appeals from a decision of the judge of the County Court of Glamorganshire holden at Aberdare.

By a bill of sale dated 2nd March 1876, and made between Stephen Joseph Eslick, of No. 12, Dean-street and No. 15, Seymour-street, Aberdare, Glamorganshire, cabinet maker and upholsterer of the one part, and Moses Phillips of the other part, S. J. Eslick, in consideration of 300*l.* advanced to him by M. Phillips, assigned all the furniture, chattels, and effects specified in the schedule thereto and being in and about No. 19, Dean-street, "and also all or any goods, chattels, and effects whatsoever which at any time thereafter should be in or about the same or any other premises of S. J. Eslick whether brought there in substitution for, renewal of, or in addition to the goods, chattels, and effects thereby assigned, or any of them or otherwise howsoever," to M. Phillips subject to redemption on payment of the 300*l.* in twelve monthly instalments as therein provided. The schedule contained a summary of the chattels and effects at 19, Dean-street, and also of the "household furniture and effects at 15, Seymour-street." The bill of sale was duly registered. The instalments which fell due in April, May, and June were duly paid.

On the 28th June, and before the next instalment became due, M. Phillips, hearing that Eslick was in difficulties, instructed his agent, W. Bidgood, to take possession under the bill of sale. Accordingly the next day, shortly before 10 a.m. Bidgood went to 19, Dean-street, entered on the premises, and commenced to take an inventory. In the afternoon of the same day he sent a man to take possession of the property comprised in the bill of sale at 15, Seymour-street. Eslick filed his petition for liquidation at ten o'clock the same morning.

On the 19th July the first meeting of his creditors was held, and was adjourned to the 23rd when resolutions for liquidation by arrangement were duly passed, and Thomas Alexander was appointed trustee.

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Ex parte ALEXANDER (2); *Re* ESICK.

[BANK.]

perty. I am of opinion, therefore, that the mortgagee is entitled to the proceeds of the goods in Dean-street, as has been established by order of the court, and in Seymour-street, which has been so much in question in the course of this discussion. The trustee must pay the mortgagee's costs of both the appeals, but I make no order as to the costs of the hearing in the County Court.

Solicitors for the appellant, *Hacon and Turner*.

Solicitors for the respondent, *Bell, Brodrick, and Gray*.

Monday, Dec. 18, 1876.

Ex parte ALEXANDER (2); *Re* ESICK (a)

Mortgage of leaseholds and trade fixtures—Separate habendums—Non-registration—Bankruptcy—Title of mortgagees—Bills of Sale Act 1854, ss. 1, 7.

A. assigned to B., by way of mortgage, his leasehold steam sawmills and buildings, with the fixed and movable machinery, to hold the premises and such of the machinery as was in the nature of landlord's fixtures, to B., his executors, administrators, and assigns, for the residue of a term, and to hold such of the machinery as was in the nature of tenant's or trade fixtures to B., his executors, administrators, and assigns, absolutely. The deed contained the usual power to sell the premises, "or any part or parts thereof, either together or in parcels." The deed was not registered under the Bills of Sale Act 1854.

Upon the bankruptcy of A.,

Held (upon the authority of Ex parte Daglish, re Wilde, 29 L. T. Rep. N. S. 58; L. Rep. 8 Ch. App. 1072), that the deed not having been registered the trade fixtures passed to the trustees in bankruptcy.

Ex parte Barclay, re Joyce (30 L. T. Rep. N. S. 479; L. Rep. 9 Ch. App. 756), distinguished.

This was an appeal from the decision of the judge of the County Court of Glamorganshire, holden at Aberdare.

By deed dated the 22nd Aug. 1874, Elisha Eslick, a cabinetmaker, of Aberdare, in consideration of 1300*l.* then advanced to him, assigned to Marcus Moxham, his executors, administrators, and assigns, the piece of land and hereditaments comprised in and demised by an indenture of lease dated the 13th May 1874, "together with the steam sawmills, offices, erections, and buildings which have been or may hereafter be erected, constructed, and built upon the said piece of land, and the steam engines, boilers, fixed, and movable machinery, plant, implements, and utensils, now or hereafter fixed to or placed upon or used in or about the said hereditaments, sawmills, offices, and buildings, with the appurtenances, and all the estate, &c., to have and to hold the said hereditaments and such of the said machinery, plant, utensils, and premises hereinbefore expressed to be hereby assigned as are in the nature of landlord's fixtures, and cannot lawfully be removed by the lessee, unto the said Marcus Moxham, his executors, administrators, and assigns henceforth, for all the residue now to come and unexpired of the said term of sixty-eight years, less three days, and as to such of the said machinery and premises as are in the nature of tenant or trade fixtures, and can

be lawfully removed by the lessee thereof, unto the said Marcus Moxham, his executors, administrators, and assigns absolutely," subject, nevertheless, to a mortgage of the premises comprised in the lease to secure the repayment of 500*l.* and interest to one Robert Gery, and subject as to the premises to the proviso for redemption thereafter contained.

The deed contained a power for Marcus Moxham, his executors, administrators, and assigns, at any time after the 1st Jan. 1875, "to sell the said premises hereinbefore expressed to be hereby assigned, or any part or parts thereof, either together or in parcels, and either by public auction or private contract," and so on, in the usual form. This deed was not registered.

On the 11th Nov. 1874, M. Moxham advanced to E. Eslick a further sum of 700*l.* upon the security of the above deed.

By deed dated the 30th Nov. 1874, M. Moxham paid off Robert Gery, and took a transfer of his mortgage to himself.

In July 1876, E. Eslick filed his petition for liquidation. His creditors resolved upon a liquidation by arrangement, and appointed Thomas Alexander trustee, who at once took possession of the debtor's property.

M. Moxham having given notice to the trustee that he claimed the trade fixtures and other property comprised in the mortgage deed, the trustee disputed the validity of the claim, &c., and on the 9th Sept. the trustee applied to the judge of the County Court for an order, declaring that the steam engines, sawmill, machinery, and other trade fixtures formed part of the debtor's estate for the benefit of the creditors, and requiring the same to be delivered up to him, but the court, being of opinion that the property in question passed under the deed to M. Moxham, made no order accordingly.

Against this order the trustee appealed.

Little, Q.C. and *Romer*, appeared for the appellant.—This deed contained a distinct severance in the habendum between the landlord's fixtures and the tenant's fixtures; and the power of sale was also several in its application, for it was a power to sell the whole or a part, either together or in parcels, so that it was clear that the term could be sold separately from the fixtures. The question then remained, what was the operation of the deed upon the title to the tenant's fixtures, the deed not having been registered? Fixtures were within the mischief of the Bills of Sale Act, ss. 1, 3, 7; and it had been decided that, where there was a grant of the land simply, they passed as incident to the land, but if there were a distinct testamentum as to the fixtures, then registration was necessary. They cited

Mather v. Fraser, 4 K. & J. 536;

Waterfall v. Penistone, 6 Ell. & Bl. 878;

Boyd v. Shorrocks, 17 L. T. Rep. N. S. 197; L. Rep. 5 Eq. 72;

Bagbie v. Fenwick, 24 L. T. Rep. N. S. 53; L. Rep. 1 Ch. App. 1077 (n);

Ex parte Daglish, re Wilde, 29 L. T. Rep. N. S. 58; L. Rep. 8 Ch. App. 1072;

Havtrey v. Butlin, 28 L. T. Rep. N. S. 533; L. Rep. 8 Q. B. 290.

The cases of *Ex parte Barclay, re Joyce* (30 L. T. Rep. N. S. 479; L. Rep. 9 Ch. App. 756); and *Moxham v. Jacobs* (32 L. T. Rep. N. S. 171; L. Rep. 7 E. & B. App. 481) had no application to the present case, for in *Ex parte Barclay* the mortgagee could not

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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Ex parte LEWIS; *Re* MAYER.

[BANK.]

seize the fixtures separately, and, therefore, it was decided that the deed need not be registered; and the case of *Menz v. Jacobs* was a contest between two incumbrancers, and was in no way affected by the Bills of Sale Act.

De Gez, Q.C. and *Everett*, for the mortgagee.—The case was really on all fours with *Ex parte Barclay*, *re Joyce*. In *Ex parte Daglish*, *re Wilde*, the question entirely turned upon the power of sale, which was a totally different question from that involved in the present case, which was a mortgage by assignment of the term by way of underlease, and the question was, whether the fixtures would pass under that assignment without express words; if so, then the fact that they were mentioned in a separate habendum was mere surplusage. That was the *ratio decidendi* in *Mather v. Fraser* (*sup.*), and which also applied to the present case.

The CHIEF JUDGE.—The only question in this case is, whether the deed, so far as it relates to the trade fixtures, is within *Ex parte Daglish*, *re Wilde*, or *Ex parte Barclay*, *re Joyce*. Without referring to any of the earlier cases, in my opinion, *Ex parte Daglish* covers the present case. In *Ex parte Barclay*, the distinction was this, that although the mortgagee had power to sell the property, either together or in parcels, yet the court held that he had no power to sever the trade fixtures from the premises, and to sell them separately. If, however, there be an assignment of fixtures as a separate property, the intention being that the mortgagee shall deal with them separately, then the Bills of Sale Act applies. Now, in this case, the mortgagor, being possessed of leasehold premises with certain valuable machinery and other trade fixtures, which had been erected upon them, by deed, assigns them to Moxham [his Lordship read the operative parts of the deed]. The words of the assignment are sufficient to give the fixtures of every kind to the mortgagee. The habendum is in two parts, and nothing can be more distinct and separate than the description of that which is included in the second part of the habendum, and which is to be held by the mortgagee absolutely. Can it be doubted that it was the intention of the mortgagor to deal with the fixtures separately? The language of the power of sale renders the intention of the parties still more distinct. This being so, it is clear, as well from the cases at common law as in the Court of Chancery, that to render such a separate assignment of trade fixtures valid as against the trustee in bankruptcy of the assignor, the deed must be registered under the Bills of Sale Act. In my opinion, therefore, this case is clearly within the terms and the policy of the Bills of Sale Act, and is governed by *Ex parte Daglish*, and not by *Ex parte Barclay*. The order of the court below must therefore be discharged, and there must be a declaration that the fixtures belong to the trustee, and he must have his costs of this appeal.

Solicitors for the appellant, *Torr and Co.*, agents for *Griffith and Corbet*, Cardiff.

Solicitors for the respondent, *Tamplin, Taylor, and Co.*, agents for *Strick and Bellingham*, Swansea.

Friday Dec. 22, 1876.

Ex parte LEWIS; *Re* MAYER. (a)

Liquidation—First meeting—Notices summoning—Change of, without leave of court—Invalidity of proceedings—The Bankruptcy Rules 1870, rr. 252, 254, 259.

The affidavit of a liquidating debtor mentioned "Stone" as the most convenient place for holding the first meeting of his creditors. Before the notices convening the meeting were issued, it was suggested that "Stafford" would be a more convenient place. The notices were accordingly issued naming Stafford as the place of meeting: The meeting was held, and resolutions were duly passed.

Held, that the proceedings were irregular, for that the place of meeting could only be changed by an order of the court.

This was an appeal from the decision of the judge of the County Court of Staffordshire holden at Stafford.

On the 2nd Aug. 1876, Ralph Mayer, a boot-maker, filed his liquidation petition in the County Court of Hanley in Staffordshire. The usual affidavit was filed with the petition, stating that "Stone" was the most convenient place for holding the first meeting of the creditors. Whilst the notices were being prepared, it was suggested that "Stafford" would be a more convenient place at which to assemble, and accordingly that place of meeting was filled in in the request notices to the creditors, and in the advertisement for the *Gazette*, viz., "The London and North Western Hotel, Stafford;" but by an oversight the affidavit was not altered so as to correspond with the notices. The first meeting was held at Stafford on the 21st Aug., and resolutions were duly passed accepting a composition of ten shillings in the pound. Robert Lewis, a creditor, was present at this meeting, but took no part in the proceedings.

The resolutions were duly confirmed at the second meeting of the creditors held on the 2nd Sept., but Lewis did not attend the meeting.

When the resolutions were tendered for registration, an objection was made on behalf of Lewis, upon the ground that the first general meeting was not held at the place mentioned in the affidavit filed in support of the petition, or in the certificate of the solicitor annexed thereto. The registrar overruled the objection, and registered the resolution.

On the 8th Nov. an application was made by Lewis to the County Court judge by way of appeal from the decision of the registrar, which was dismissed with costs.

Against this order Lewis appealed.

Robertson Griffiths, for the appellant, referred to rule 252 of the Bankruptcy Rules, 1870, and contended that the proceedings were irregular. The venue of the meeting could only be changed by an order of the court upon an affidavit filed for that purpose.

Finlay Knight, for the respondent, argued *contrá*, that there had been no irregularity, but a mere defect in the proceedings on the part of the registrar by which no creditor was misled. Rule 252 only applied to cases where the notices had been issued, and it was afterwards found more convenient to hold the meeting elsewhere. In the

[BANK.]

Ex parte NEWLAND; Re CLARK.

[BANK.]

present case, before the notices were issued, the venue was changed by the act of the court itself, and there was no necessity for a formal order.

The CHIEF JUDGE.—The rules and procedure of the Act of Parliament must be observed. In this case nothing can be plainer than the proceedings that were to be taken. The 252nd rule provides that the proceedings by way of liquidation or composition with creditors shall be instituted by the debtor by petition and affidavit thereto annexed according to the forms given in the schedule. Then rule 254 says, "The first general meeting shall be summoned, to be held at the place mentioned in the affidavit filed with the petition, subject to such place being changed by order of the court, and the time of meeting shall be at the stated hour," and so on. And rule 259 provides that "upon sufficient cause, proved to the satisfaction of the court by the debtor, or by any creditor, either *ex parte* or otherwise, the court may order and direct the place of any general meeting to be changed." In one sense the objection which has been taken is purely technical, but the rules are distinct, and must be strictly adhered to in order to give validity to the proceedings. In my opinion the manner in which the change in the place of meeting was effected was not in accordance with the practice of the court, and was made wholly without the authority of the court. I am of opinion, therefore, that the course of proceeding was erroneous and irregular, and that the present resolutions cannot be upheld. A fresh first meeting of the creditors must be summoned. But as this application is founded upon a most frivolous objection, I will not give the appellant any costs of the appeal.

Solicitors for the appellant, *Cardwell and Tassan.*

Solicitor for the respondent, *H. G. Field.*

Friday, Dec. 22, 1876.

Ex parte NEWLAND; Re CLARK. (a)

Composition—Money in hands of debtor's solicitor to pay—Solicitor trustee for creditors—Lien for costs.

The creditors of a liquidating debtor agreed to accept a composition payable by instalments. The amount required for the payment of the second instalment was received by the debtor's solicitor, who issued a circular to the creditors stating that he would be prepared to pay the instalment on a certain date. The solicitor having afterwards claimed a lien upon the money for payment of his costs, charges, and expenses,

Held, that he had constituted himself a trustee for the creditors, and could claim no lien upon the fund.

THIS was an appeal from the decision of the judge of the County Court of Bedfordshire, holden at Luton.

On the 28th Oct. 1874, William Clark, a farmer, filed a petition for liquidation in the Luton County Court, Richard Hall acting as his solicitor in the matter.

At the first general meeting of his creditors, held on the 20th Nov. 1874, resolutions were duly passed accepting a composition of 5s. in the pound,

payable as follows, 2s. in the pound on the 21st Dec. then next, and 3s. in the pound on the 30th Sept. 1875, the second instalment to be secured by the joint and several promissory note of two sureties to be approved by the chairman.

These resolutions were confirmed at the second meeting held on the 3rd Dec., and registered. No trustee was appointed in the matter, and Richard Hall acted throughout as the solicitor for the debtor.

The first instalment of the composition was duly paid by William Clark, through Richard Hall, who received the money from W. Clark, with directions to pay it to those creditors who had proved.

On the 18th Jan. 1876, Richard Hall sent by post to all the creditors the following printed notice:

In the matter of the composition between William Clark and his creditors.

Sir,—I beg to inform you that on the 22nd instant I shall be prepared to pay to you the sum of 3s. in the pound, being the second instalment of this composition.

The amount will be payable at my office, No. 14, Abchurch-lane, London, between twelve and two o'clock on that day, or the same day in any ensuing week, between the same hours.—I am, Sir, your obedient servant,

RICHARD HALL.

Solicitor for the said William Clark.

At the time this notice was sent out Hall had in his hands the sum of 286l. 4s., belonging to Clark, the amount required for payment of the second instalment of the composition, and was expecting every day to see Clark, and receive his directions for paying it over to the creditors; but after the circular letter was sent out he never saw or heard from W. Clark, and subsequently ascertained that he had absconded.

Out of the 286l. 4s., Hall paid some of the creditors the second instalment of the composition, a balance of 184l. 7s remaining in his hands.

Henry Pigott Newland, a creditor, who had proved for 62l. 13s. 9d., received one of the circulars, and made frequent applications to R. Hall for payment of the second instalment due to him, but Mr. Hall refused, alleging that he claimed a lien upon the balance in his hands for his bill of costs.

On the 26th Sept. 1876, Newland applied to the County Court for an order that R. Hall should be directed to pay him the sum of 9l. 8s. 3d., the amount of the second instalment of the composition due to him, but his application was dismissed with costs. He thereupon appealed.

In an affidavit filed by Mr. Hall, he stated that he did not consider himself justified in parting with the balance in his hands except under an order from the debtor, and further that as he had acted entirely as the solicitor of W. Clark, and had received the money in that capacity, he claimed a lien thereon for his costs for work and professional services rendered, and moneys paid by him as such solicitor.

Cooper Wyld appeared for the appellant.

De Gex, Q.C. and Macne Moir, for the respondent.

The CHIEF JUDGE.—It is impossible to sustain the order of the County Court Judge. The money to pay the second instalment was placed in the hands of the debtor's solicitor, who was the author, manager, and conductor of the proceedings, for the special purpose of paying the creditors, and he is not entitled to any lien upon it for his costs. By his circular of the 8th of Jan.

he acknowledged himself to be a trustee of the money for the creditors, and that on the 22nd of Jan. he would be prepared to pay the amount of the composition due to them, and the court had jurisdiction over him as one of its officers. He now seeks to keep in his own pocket the money which he had plainly acknowledged by his circular had been intrusted to him, for and which he therefore owed to the appellant. The order of the court below must be discharged, and an order must be made for payment to the appellant of the amount of his composition with the costs of this appeal and in the court below.

Solicitors for the appellant, *Cordwell and Tasman*.

Solicitor for respondent, *G. Hancock*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Friday, Feb. 16.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

Re BAILLIE'S TRUSTS. (a)

Practice—Time for appealing—Orders on petitions under Trustee Relief Act—Rules of Court 1875, Order LVIII., rr. 9, 15.

Appeals from orders made upon petitions under the Trustee Relief Act must be brought within twenty-one days, such orders coming within the words "in any other matter not being an action," in rule 9 of Order LVIII.

THIS was an appeal from an order made by Malins, V.C., refusing a petition for the payment out of court of a fund paid in under the Trustee Relief Act.

J. Pearson, Q.C. (with him *Bush*), for the respondent, raised the preliminary objection that the appeal was too late, not having been brought within twenty-one days in accordance with rule 9 of Order LVIII., which provides that "the time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15." And rule 15 provides that no appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days. In *Re National Funds Assurance Company* (35 L. T. Rep. N. S. 689-90) Brett, J.A. said that such orders as orders made under the Trustee Acts and the Trustee Relief Act were clearly within rule 9, though the decision in that case was only that a winding-up order came within that rule.

Bristowe, Q.C. and *Everitt* for the appellant.—Orders made under the Trustee Relief Act are not interlocutory orders, and as for the words "or in any other matter not being an action," they mean *in pari materia*, the rule dealing with orders in

winding-up and in bankruptcy section of the Trustee Relief Act (c. 96), provides that every order made under the Act shall be subject to appeal, in the same manner as if the same had been made in a suit brought in the court. [JAMES, L.J.—The order must be equally subject to appeal, nothing to do with the time. The appeal must be brought.] The order must be brought in the court, and in no sense of the term an order.

Without calling for a reply,

JAMES, L.J., said.—There is no principle between an order made under the Trustee Relief Act and an order made in the matter of the winding-up of a company in the matter of a bankruptcy, is no reason why we should not follow the same in any other matter not being their natural meaning. This case is clearly within rule 9, and the appeal has been brought within twenty-one days of the circumstances we will give leave in this case, as we have power to do so.

BAGGALLAY and BRAMWELL, JJ.

Solicitors for the appellant, *F. Winslow*.
Solicitor for the respondent, *J. B. Bristowe*.

Thursday, Feb. 17.

(Before JAMES L. J., and BAGGALLAY and BRAMWELL, JJ. A.)

Ex parte ATTWATER; Re TURNER'S Bankruptcy—Practice—Appellate Jurisdiction—Leave of Court of Appeal—Act 1849 (12 & 13 Vict. c. 15) s. 83, s. 10—Bankruptcy Act 1849, s. 71.

The Court of Appeal will not grant leave to appeal to the House of Lords from a decision of the Court of Appeal in the above matter (p. 682) whereby it was decided that the provisions of the Bankruptcy Act 1849 (12 & 13 Vict. c. 15) s. 83, s. 10—Bankruptcy Act 1849, s. 71.

THIS was an application for leave to appeal to the House of Lords from a decision of the Court of Appeal in the above matter (p. 682) whereby it was decided that the provisions of the Bankruptcy Act 1849 (12 & 13 Vict. c. 15) s. 83, s. 10—Bankruptcy Act 1849, s. 71.

F. O. Crump, in support of the application, produced evidence that the estate value, and urged that the question was one of sufficient difficulty to require the decision of the House of Lords.

Winslow, Q.C., for the appellant.—It was now too late to apply for leave to appeal. It was now too late to apply for leave to appeal. It was now too late to apply for leave to appeal.

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

(c) Reported by H. FRAT, Esq.

the cited:

Ex parte Marcus, re The Royal British Bank,
26 L. J., N. S., 15, Bank.;
Ex parte Brown, re Jeavons, 30 L. T. Rep. N. S. 108;
L. Rep. 9 Ch. 304.

Crump, in reply.—Our delay is due to the court not having sat for some time, and we have made this application at the earliest possible moment. [During the arguments *BAGGALLAY*, J.A. referred to the 18th section of the Bankruptcy Act 1849, which allowed an appeal to the House of Lords "if the Lord Chancellor shall in any case deem any matter of law or equity brought before him by way of appeal to be of sufficient difficulty or importance to require the decision of the House of Lords," and to the 14 & 15 Vict. c. 83, s. 10, which provides that appeals to the House of Lords in matters of bankruptcy shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the judges of the Court of Appeal constituted by that Act.]

JAMES, L.J.—Though I am always eager to have any decision of mine, or of the court of which I am a member, reviewed by a higher tribunal, yet I am of opinion that we cannot escape the duty imposed upon us by the Act of Parliament. In order to justify us in giving leave to appeal to the House of Lords, there must be involved in the case a difficult point of law, which we consider to require the decision of the House of Lords. In my opinion there is no substantial difficulty in this case. The provision of the Bills of Sale Act, 1854, which renders an unregistered bill of sale void as against the grantor's assignees in bankruptcy cannot have been intended to be indirectly repealed by the protecting clauses of the Bankruptcy Act 1869. Therefore, I could not honestly certify to the House of Lords that there is any question in this case of sufficient difficulty to require their decision. No doubt the case is one of importance to bill of sale holders, for it may affect a large number of bills of sale; but I am clearly of opinion that it is not of that difficulty or of that importance which would justify us in giving leave to appeal to the House of Lords.

BAGGALLAY, J.A.—I am of the same opinion. The Bankruptcy Act of 1849 provided by its 18th section that if the Lord Chancellor should in any case deem any matter of law or equity brought before him by way of appeal to be of sufficient difficulty or importance to require the decision of the House of Lords, then and in such case the whole facts whereupon such question of law or equity should arise should be stated in the form of a petition of appeal to the House of Lords, and the party appealing might carry an appeal to the House of Lords in like manner as other appeals are preferred to that House. An Act passed two years afterwards (14 & 15 Vict. c. 83, s. 10) provided that "all decisions, decrees, or orders of the Court of Appeal, including decisions in matters of bankruptcy, shall be subject to appeal to the House of Lords in the cases, and under the conditions in and under which the like decisions, decrees, or orders of the Lord Chancellor would have been subject to such appeal if this Act had not been passed; but the appeal to the House of Lords in matters of bankruptcy shall be only on matters of law or equity, or on

stituted, whose determination on the settlement of such case shall be final and conclusive." The Act of 1869 (32 & 33 Vict., c. 71, s. 71), provides that any order made by the Chief Judge in Bankruptcy shall be subject to an appeal to the Court of Appeal in Chancery, and, "also with the leave of the Court of Appeal, to the House of Lords, but no appeal shall be entertained under this Act except in conformity to such rules of court as may for the time being be in force in relation to such appeal." No rules of court have been made on this point, and in the absence of express provisions we are bound to follow the old practice. In *Re Calthrop* (18 L. T. Rep. Rep. N. S. 194; L. Rep. 3 Ch. 256), Lord Cairns said: "Of course, it would be very much more agreeable to the court to find no impediment in the way of its decisions being reviewed by a Court of Appeal; but the Legislature has thought fit to impose upon this court the duty of determining whether in any case any matter of law or equity is of sufficient difficulty or importance to require the decision of the House of Lords, and that duty the court must discharge like any other duty which is put upon it." Two questions were raised in that case. The first was, whether a corporation could be a good petitioning creditor under the Act of 1861, and Lord Cairns could not say that he thought that a matter of sufficient difficulty to require the decision of the House of Lords, but as he could not say that it was a case of no importance, at all events to the bankrupt, and if there was no other way open, he said that he would be disposed to allow the appeal. As, however, the question could be tried at law, he refused to allow the appeal. The second question was with regard to the directions given by the Act of 1861 as to serving a debtor out of the jurisdiction, and Lord Cairns had concurred with the commissioner in thinking that those provisions had been complied with, and the Lord Chancellor wound up his judgment by saying: "I do not mean to say that in the decision which I gave there was not a scintilla of law, but still it depended on the question of fact of which I was the judge, and I came to the conclusion that the debtor knew of the proceedings; and I think I should be entirely departing from my duty if, upon this fragment of law, I should allow the expense of an appeal to the House of Lords to be incurred." I think the general principles enunciated by Lord Cairns in that case are still applicable in considering whether we should allow an appeal to the House of Lords. If there is any law in this case, it is a mere scintilla or fragment, which would not justify us in allowing the expense of an appeal to be incurred.

BRAMWELL, J.A.—I am entirely of the same opinion. I adopt an observation of the Lord Justice as to certifying that there is in this case a question of sufficient difficulty to require the decision of the House of Lords. If our judgment were *motivé*, as it is called, that is, if it had to contain a recital of the reasons why we allowed an appeal to the House of Lords, a recital that there was a question of law or equity of sufficient difficulty to require the decision of the House of Lords, I could not truthfully say so.

Application accordingly refused with costs.

Solicitor for the applicant, *A. E. Copp*.

Solicitor for the respondent, *O. F. Know*.

Friday, Dec. 15, 1876.

(Before JAMES, L.J. and BAGGALLAY, and
BRETT, J.J.A.)

HICKMAN v. UPSALL. (a)

Statute of Limitations (3 & 4 Will. 4, c. 27) s. 42—*Mortgage of life estate in possession under order of court—Death of tenant for life—Presumption of time of death—Account of rents and profits.*

In 1859 a tenant for life mortgaged her interest in certain leaseholds, part of an estate for the administration of which she had instituted a suit; and in the following year the mortgagee entered into possession under an order of the court, which directed the balance after payment of the interest on the mortgage to be paid to the tenant for life, and remained in possession down to 1875. In 1866 the tenant for life disappeared and was never heard of afterwards; and on a petition presented in 1875 by the persons entitled in remainder, it was held that she must be presumed to have died soon after June 1866.

On a petition by the persons entitled in remainder for an account of the rents and profits received by the mortgagee from 1866 to 1875:

Held, first, that the petitioners had not disentitled themselves to an account by laches as the court could not have presumed the death of the tenant for life until the expiration of seven years after her disappearance; but, secondly, that there was no fiduciary relation between the mortgagee and the petitioners, and therefore the latter were only entitled to an account of rents and profits for six years before the filing of the petition.

Decision of Hall, V.C. affirmed on the first point, and varied on the second point.

THIS was an appeal from a decision of Hall, V.C. The facts of the case were as follows:

John Upsall died in Nov. 1851, having by his will, made in the preceding January, given certain leaseholds and funds to trustees upon trust to pay the income to his daughter Sophia Hickman for life, and after her death to hold the leaseholds and funds in trust for certain other persons.

In July 1859 Sophia Hickman assigned to one Charlotte M. Samson her life interest under her father's will, and also a policy of assurance on her life, to secure the repayment of a loan and interest.

In Aug. 1859 and Jan. 1860 Sophia Hickman gave further charges on her life interest and assigned two new policies of assurance on her life to secure the repayment of further advances made to her by C. M. Samson.

The present suit was instituted by Sophia Hickman for the purpose of making the trustees of her father's will liable for not getting in and investing a certain debt, and of having the trusts of the will administered by the court.

On the hearing of the cause (see 2 Giff. 124), Stuart, V.C., ordered that during the life of Sophia Hickman, or until further order, payment of the dividends on the funds to which she was entitled for life under the will, should be made to C. M. Samson in discharge of the interest that might accrue due on the moneys lent to her, and of the premiums on the policies mortgaged by her; and as to the leaseholds, it was ordered that the trustees should pay the rents thereof to C. M.

Samson during the life of Sophia Hickman or until further order, to the extent necessary for keeping down the interest on the moneys advanced by her and the premiums on the policies, and that they should pay the residue to Sophia Hickman.

By an order made on further consideration, dated the 9th Nov. 1860, C. M. Samson was to be at liberty to enter into possession of the leaseholds, and, without the intervention of the trustees, to pay herself the sums due in respect of her securities, and to deal with the annual residue of the rents in manner previously directed. C. M. Samson accordingly entered into possession of the leaseholds.

On the 25th March 1866, Sophia Hickman left her home, and was never heard of again.

In 1875 a petition was presented by the persons entitled in remainder under the will for the purpose of having the trust funds transferred to them, and the leaseholds sold and the proceeds paid to them.

On the petition coming on to be heard on the 5th March 1875, the Vice-Chancellor ordered it to stand over for a month, directing inquiries to be made in the meantime for Sophia Hickman.

On the hearing of the petition on the 16th April 1875, the Vice-Chancellor held (see L. Rep. 20 Eq. 136) that, under all the circumstances, there was a fair presumption that Sophia Hickman had died soon after June 1866, and that, therefore, nothing became payable to the mortgagee after that time. The accumulated dividends on the trust funds, as well as those funds themselves, were accordingly ordered, subject to payment of costs and duty, to be distributed among the petitioners, and the leaseholds were ordered to be sold.

On the 10th March 1876, the petitioners presented another petition praying that an account might be taken of all sums which had been received by the mortgagee, C. M. Samson, since the month of July 1866, and that the amount found due on such account might be distributed among the petitioners in the proportions stated in the petition.

In granting this petition Hall, V.C. said: The mortgagee having originally entered into possession under an order of the court, I cannot hold that she became converted into a mere trespasser by the death of the tenant for life and mortgagor. No laches can be attributed to the petitioners, inasmuch as it would have been useless for them to apply to the court before the presumption of death arose. This case is not, in my opinion, within the Statute of Limitations (21 Jac. 1, c. 16), nor within that of the 3 & 4 Will. 4 c. 27, s. 42, which restricts the institution of suits or actions for arrears of rent to six years. The petitioners are, therefore, in my opinion, entitled to the account for which they ask; but under all the circumstances of the case I cannot give them their costs.

From this decision C. M. Samson appealed.

Method for the appellant.—The tenant for life cannot be presumed to have died till the expiration of the period of seven years after her disappearance. [JAMES, L.J.—It is not open to you to argue that. The Vice-Chancellor has decided that point, and it is not open on the present appeal.] Then, assuming her to have died in 1866, the petitioners are not entitled to have an account of the rents before the filing of the peti-

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

Turner, L.J., says the cases bearing on this question "may fairly be said to establish this general position—that in cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression, where in short there is a mere *bonâ fide* adverse possession, it is not according to the course of practice of the court to carry back the account of rents beyond the filing of the bill." Here the presenting of the petition is equivalent to the filing of the bill in the cases referred to. This is a simple case of *bonâ fide* adverse possession. None of the conditions exist here which, according to Turner, L.J., alone would induce the court to carry back the account beyond the filing of the bill. There is no fiduciary relation, nor is there any privity between the appellant and the petitioners. The petitioners are guilty of laches in having taken no steps for almost ten years after the disappearance of the tenant for life, and by that laches they have disentitled themselves to the account prayed for. At all events they can only recover arrears for six years under the 3 & 4 Will. 4, c. 27, s. 42. He also cited:

Hutton v. Simpson, 2 Vern. 722;

Thomas v. Thomas, 2 K. & J. 79; 6 Anne, c. 18.

E. Culler, for the petitioners.—*Hicks v. Sallitt*, when rightly understood, is really in our favour, for it establishes the rule that in the absence of laches or unfair dealing on the part of the person claiming, the party in adverse possession is bound to account for the rents during the whole period of his adverse possession. This view is borne out by all the cases:

Dormer v. Fortescue, 3 Atk. 129;

Bowes v. East London Water Works, 3 Mad. 375;

Thomas v. Thomas, 2 K. & J. 79.

We have been guilty of no laches, for it would have been useless to apply to the court till the seven years had elapsed. The appellant was put into possession by the court, and was a trustee for us, subject to keeping down her interest and premiums. Therefore, the 42nd sect. of the 3 & 4 Will. 4, c. 27, does not apply, and we are entitled to all the arrears since 1866.

Method, in reply.—This is really an equitable ejectment, and the authorities show that in such a case the plaintiff is only entitled to an account from the date of the filing of the bill:

Pulleney v. Warren, 6 Ves. 73;

Morgan v. Morgan, L. Rep. 10 Eq. 99.

JAMES, L. J.—In this case the Vice-Chancellor was of opinion that the tenant for life must be presumed to have died soon after June 1866, but that such a presumption could not have been made till seven years had expired from the time when she was last heard of. The Vice-Chancellor thought that the mere circumstance of her disappearing and not applying for payment of her quarterly allowance in June 1866 was not in itself sufficient to justify the petitioners in applying at that time to be let into possession of the property; but that the circumstances under which she disappeared, taken in conjunction with the presumption of her death which arose at the end of the seven years, entitled him to come to the conclusion not only that she is dead, but that she must be presumed to have died soon after June, 1866. I think the Vice-Chancellor was right in coming to that conclusion. That being so, the petitioners cannot by any possibility have been guilty of laches in not making their claim before

done so, the Vice-Chancellor would have been bound to dismiss their petition with costs. Therefore there was no laches, and there was no knowledge on one side which was not possessed by the other side; both sides were in the same state of ignorance, and neither party could act more than the other. Now it appears to me, looking at the rule as laid down in *Hicks v. Sallitt* (3 De G. M. & G. 782), that the principle of the rule is that in order to disentitle a plaintiff to an account of rents before the institution of the suit there must have been neglect to bring the suit after it might have been brought. Here the position of things seems to have been this: After the death of the tenant for life, a person claiming under her, who had been let into possession under an order of the court, remained in possession, holding over not improperly, but because ignorant of the death of the tenant for life. There was no fiduciary relation between the person so holding over and the remaindermen; the former was the mortgagee of the tenant for life, and the fact that she had been let into possession did not make any difference in the relation between her and the remaindermen. There was no more a fiduciary relation between them than there is between an ordinary tenant *pur autre vie* holding over after the life has dropped and the remaindermen. Then, what ought to be done under those circumstances? If the estates had been legal, the legal remainderman would have been entitled to eject the person in possession, and to recover six years' arrears of rents. That analogy appears to me to apply to the present state of circumstances, there being no equitable considerations affecting the parties. I am, therefore, of opinion that the account must be carried back for six years only before the filing of the petition, and the order of the Vice-Chancellor must be varied to that extent.

BAGGALLAY, J.A.—I am of the same opinion. Instead of the order made by the Vice-Chancellor, the order will direct an account of the receipts and profits received by C. M. Samson since March 1870.

BRETT, J.A.—The whole case depends upon the time of Sophia Hickman's death. The fact of her not appearing to receive the balance coming to her on one, two, or three successive quarter days, was not in itself sufficient evidence to entitle the court to come to the conclusion that she was dead. There was nothing from which it could be inferred that she was dead till the end of seven years from the date of her disappearance. But when the seven years are over, the presumption having arisen that she is dead, we have a right to look into the circumstances of her disappearance, and infer from them at what time she died. Suppose the case of a person starting on a certain night to arrive at a given place at ten o'clock. If he does not arrive, there is no inference that he is dead. But if after a week he is found in a wood by the side of the road to his destination with his skull broken in, then you can infer that he was killed before ten o'clock on the night on which he started. So here I think the Vice-Chancellor was right in presuming this lady to have died at the time at which he has held that she must be taken to have died. Then comes the question, when ought the present claim to have been made? If what I have said as to the mode of ascertaining

the time of her death be correct, it is clear that this petition could not have been filed until seven years after her disappearance. Therefore there was clearly no laches. But it was argued that, this being in the nature of an equitable ejectment, the question of laches was no ingredient in the case. If that were really so, I should think equity was more unjust than the law was ever thought to be. To say that the mere fact of a person not taking proceedings for relief grounded on circumstances of which he was ignorant, should afterwards preclude him from relief, is against every principle of justice. I do not believe there is any such rule in equity. If the petitioners had known of the death of the tenant for life, and had applied, they would have been allowed six years' arrears of rents; and now as they have applied as soon as they can be taken to have known of it, I think it is equitable that they should be allowed the same.

Order of the Vice-Chancellor accordingly varied. No costs of the appeal.

Solicitors for the appellant, J. and E. Gole.
Solicitor for the respondent, Proudfoot.

Friday, Jan. 12.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, JJ.A.)

ATTORNEY-GENERAL v. GREAT WESTERN RAILWAY COMPANY AND MIDLAND RAILWAY COMPANY. (a)

Railway—Opening of line—Inspector's report—Jurisdiction of Board of Trade—Incompleteness of works—Railway Regulation Act 1842 (5 & 6 Vict. c. 55), s. 6.

When the officer appointed by the Board of Trade under the 6th section of the Railway Regulation Act 1842, to inspect a railway, has reported that, in his opinion, the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works, together with the grounds of such opinion; the Board of Trade has exclusive jurisdiction to postpone the opening of the railway, and the court has no jurisdiction to inquire into the sufficiency of the grounds assigned in the inspector's report.

Where the inspector reported that the opening of a new line, which he had been called to inspect, could not be sanctioned without danger to the public using the same, by reason of the incompleteness of the works, assigning as the grounds of his opinion the insufficiency of station accommodation on a line with which the new line was connected, and the Board of Trade acted upon the report, and directed the opening of the new line to be postponed for a month,

Held, that as the report was in accordance with the provisions of the 6th section of the Regulation of Railways Act 1842, and as the Board of Trade had exercised its jurisdiction on the basis of the report, the court, though not satisfied with the grounds assigned in the report, would not interfere with the jurisdiction of the Board of Trade.

Decision of Jessel, M.R., affirmed.

This was an appeal from a decision of the Master of the Rolls.

The hearing in the court below is reported in 35 L. T. Rep. N. S. 302, where the facts of the case are stated.

It is only necessary to add to that statement a fuller extract from the inspector's report, the material part of which was as follows: "The Clifton Extension Railway, which is a double line, forms a junction with the Bristol Port and Pier Railway, which is a single line about six miles in length, between Bristol and Avonmouth, and there is no station for passengers at this junction who are to be carried on somewhere on the line to or towards Avonmouth. Seamills station on the Bristol Port and Pier Railway is somewhat less than a quarter of a mile beyond Sneyd Park Junction, and this station has a platform of about fifty yards in length, while the length of the platforms on the Clifton Extension Railway at Montpellier and Clifton Downs stations is not less than 400 feet. I am perfectly aware that the notice received from the railway company limits my inspection to the junction at Sneyd Park; and if a station had been constructed at that junction, I should have had no hesitation in recommending the Board of Trade to sanction the opening of the line for passenger traffic when the few other requirements which I have enumerated had been completed; but, as there is no such station, and no sufficient station on the adjacent single line at Seamills at which the passengers could be carried, I am compelled to report that the opening of the further portion of the Clifton Extension Railway cannot be sanctioned without danger to the public using the same, by reason of the incompleteness of the works.

The Master of the Rolls granted an injunction restraining the Great Western and the Midland Railway Companies from opening the new line for passenger traffic until after the expiration of the period for which the Board of Trade had directed, or might direct, such opening to be postponed.

From this order the railway companies appealed.

Thesiger Q.C., Davey, Q.C., and H. A. Giffard, for the appellants.—The 6th section of the Railway Regulation Act 1842 has no application to this case, and the jurisdiction of the Board of Trade never arose, for there is no incompleteness of the works of this new line. The incompleteness mentioned in the inspector's report is in the station accommodation of a new neighbouring railway, which is already opened for traffic. They cited

The Railways Clauses Consolidation Act (8 Vict. c. 20), ss. 2, 16, 86, 92;

Johnson v. Midland Railway Company, 4 Ex. 367, 74;

Attorney-General v. Oxford, Worcester, and Wolverhampton Railway Company, 2 W. R. 330;

Attorney-General v. Great Western Railway Company, L. Rep. 7 Ch. 767.

The Solicitor-General (Sir Hardinge Giffard, Q.C.), A. E. Miller, Q.C., and Rigby, for the respondents.—The Board of Trade has exclusive jurisdiction in this matter, and the court has no jurisdiction to interfere. The inspector reports the total absence of certain necessary station accommodation, and that was sufficient ground for reporting that the works were incomplete.

Davey, Q.C., in reply.

JAMES, L.J.—I am of opinion that the judgment of the Master of the Rolls in this case cannot be disturbed. It is very important, no doubt, that all these special jurisdictions and powers which are given to departments of the Government,

(a) Reported by H. FEAT, Esq., Barrister-at-Law.

which are given to officers in the departments of the Government, and to other bodies of that kind, should not be exceeded, and that those bodies should keep themselves within the jurisdiction which is given to them. But as it is important that they should do so, it appears to me that it is no less important that we should set them the example of keeping ourselves within our proper jurisdiction, and I am of opinion that we have no jurisdiction to act as judges on appeal from a finding of the Board of Trade on the facts properly brought before the Board in these matters, and that we ought not to try to find reasons for substituting our judgment and decision for their judgment and decision on the matter. The Act of Parliament says: "If the officer or officers appointed by the Lords of the said Committee"—that is now the Board of Trade—"to inspect any such railway or portion of railway shall, after inspection thereof, report in writing to the Lords of the said Committee that in his or their opinion the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railway, together with the ground of such opinion"—if he reports that together with the grounds of such opinion, "it shall be lawful for the Lords of the said Committee" and so on "to order and direct the company to whom such railway shall belong to postpone such opening" for such time as is therein mentioned. That is to say, if the officer shall make a report that in his opinion, by reason of the incompleteness of the works there would be danger, and shall accompany that opinion with the reasons for it, it shall be lawful for the Lords of the Committee to make the order. In the present case the inspector has made a report saying in terms: "I am compelled to report"—which in plain common English means, I do report—"that the opening of the further portion of the Clifton Extension Railway cannot be sanctioned without danger to the public using the same by reason of the incompleteness of the works." He has made that report, and has sent that report, together with the grounds of his opinion, to the Lords of the Committee. They have had before them the ground on which that opinion was formed, and having that before them they have come to the conclusion that they ought to exercise the power given them by the Act of Parliament, and they have exercised such power accordingly. Well, now we are told that if we read not only the sentence which I have read but the whole of the preceding sentences, we shall find that he has not in effect reported that the opening would be attended with danger to the public by reason of the incompleteness of the works, that is to say, that he did not mean it, that he ought not and could not have meant it. That seems to me really to be as much as to say that the grounds which he has alleged for forming that opinion are not sufficient grounds, although the Board of Trade who have had the matter before them under the Act of Parliament have come to the conclusion that the grounds are sufficient. Of course they must have come to that conclusion before they acted on the report and opinion of their own officer. If that is so, it seems to me that we are really invited to try the validity or insufficiency of the grounds on which they have formed their opinion. Though the inspector pro-

fessed to report it, he did not report that the works were insufficient. What he reported was that something upon a neighbouring railway was inadequate. That is what he really reported, and it appears to me that that was merely used as a means of compelling the railway company to complete and make adequate that which is now incomplete and inadequate. I do not know where we should be landed if we were to encourage litigation on this matter, and say that this is a very clear case of an improper conclusion. Of course I do not say that I have not any right to say that this is a very clear case of the inspector having drawn an improper conclusion from the facts; but then the next case would be something not so clear; another case would be something not so clear as that, and the result would be that in every case in which a report of this class was made to the Board of Trade and they acted on it, the whole matter would be brought within the jurisdiction of the ordinary courts of law which, in my opinion, was not the intention of the Legislature, and which it ought not to be our desire to do. I am of opinion, therefore, that the order of the Master of the Rolls was right, and that his judgment ought to be affirmed.

BAGGALLAY, J.A.—The question for our decision is whether the Great Western and the Midland Railway Companies are bound by the order of the Board of Trade of the 7th July 1876, by which they were prohibited from opening the Clifton Extension Railway between the Clifton Downs Station and the Sneyd Park Junction for certain periods named in that order. Now to make the order of the Board of Trade binding on the Companies it must have been founded on a report of one of their inspectors made in pursuance of the 6th section of the Act of the 5 & 6 Vict. c. 55, and the jurisdiction of the Board of Trade to prohibit the opening of a railway only arises upon the inspector's reporting in the terms of the section in question, that by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working the railway, there would be danger to the public in opening it, and the report has also to be accompanied with a statement of the grounds upon which his opinion was founded. I entirely assent to what has fallen from the Lord Justice, that where the jurisdiction of the Board of Trade has been properly exercised, that is to say, when it has been exercised on a report properly made under the provisions of the Act, neither this court nor any court of the Chancery Division nor any other court has any jurisdiction to question it or revise it. The simple question appears to me to be whether this report of Colonel Yolland is a report in accordance with the provisions of the Act of Parliament. Now, as I have said before, the jurisdiction of the Board of Trade only arises upon a report being made within the provisions of the Act of Parliament. The Act does not merely provide for a report being made generally; it must be a report of there being danger, in the opinion of the inspector, in the opening of the railway from one of two causes: incompleteness in the works of the permanent way, or the insufficiency of the establishments for working it, and the reasons are to be given and the grounds to be assigned for the opinion upon either of those two points or both of them. I do not think it was intended to be a matter of immateriality what the reasons were. I think it was

intended that there should be full and sufficient reasons assigned, because by a proviso at the end of the section, the order is not to become binding on the company until such time as they have had a copy of the report furnished to them, the object of that proviso being, I should apprehend, that they may have an opportunity of knowing in what respects their works are incomplete or their establishment is insufficient. Therefore, I apprehend, we must look on the reasons as a substantial part of the report. Well, now, Colonel Yolland, in making his report, has said that the opening of the further portion of the Clifton Extension Railway cannot be sanctioned without danger to the public using the same by reason of the incompleteness of the works. Now, if that had been the whole of the report it would have been difficult to say that he had not in terms complied with the provisions of the section. He says it would be accompanied with danger to the public by reason of the incompleteness of the works. That is in some sense the reason he has assigned; but then, those words are introduced by the expression "for a reason," which he has previously assigned, "I am compelled to make this report." That drives us back to what is the reason he has previously assigned. He has assigned as his reason that as there is no station at Sneyd Park Junction, and as there is no sufficient station at Seamills, therefore he has come to the conclusion that the opening of the line would be unsafe. Then again, if he had confined himself to saying "as there is no station at the Sneyd Park Junction, I consider it would be unsafe to open the line," the absence of that station might be a very insufficient reason for his reporting that the opening of the line would be unsafe; but I apprehend it would be a reason with which the Board of Trade and the Board of Trade alone would have jurisdiction to deal. But the inspector has not confined his report to that; he has shown that there might be a substitute for the station at Sneyd Park, namely, a sufficient station at Seamills. Now, he has previously pointed out in what respect the station at Seamills is insufficient; it has only got a platform 160 feet long, whereas the platforms on the Clifton Extension Railway are 400 feet long. I think it is a fair inference from that, that if he considers that the platforms which he found at Seamills station ought to be made 400 feet long instead of being only 150 feet long then the reason for holding that the opening of the line would be unsafe for the public would have been removed if the station at Seamills were so altered; but then the certificate is this, that the opening of the new line between the Clifton Downs Station and the Sneyd Park Junction cannot be sanctioned without danger to the public using the same by virtue of there being a want of sufficient accommodation at Seamills, for he says that if there were sufficient accommodation at Seamills, that would remove the necessity for the station at the Sneyd Park Junction. I must confess it appears to me that that it is a very unsatisfactory reason to give, and I think also that if I had myself to exercise my discretion on it—I do not think I am called to do so now—I should very much question whether this was not an unsatisfactory report. At the same time I am bound to say that I think we ought to be very careful in dealing with documents of this kind which are prepared under the direction of an Act of Parliament, and on which large public bodies are to be put in motion, and in

this case have been put in motion, and we ought to consider the full and complete discretion of the Board of Trade, as far as regards what is contained in this report. I should feel very loth, indeed, to come to a different conclusion to that at which we have arrived, and therefore for this reason, though with very considerable doubt and hesitation, I think we must consider the report as one made within the provisions of the 6th section of the Act, and if it is a report so made, the jurisdiction of the Board of Trade arises, and over that jurisdiction we have no control.

BRAMWELL, J.A.—I am of the same opinion. If the inspector has reported danger from the incompleteness of the works and has given reasons to the Board of Trade, we cannot examine into the matter at all. Now he has reported in words that there is danger, not following exactly the words of the Act of Parliament, but substantially he has reported that there would be danger to the public from the opening of the line, from the incompleteness of the works; but it is said that although he has done so in words, he has not really done so in fact, because the context shows he does not report that the works are incomplete. In my opinion it is enough that he has done so in words—that he has found it as a fact—although he may have shown that his conclusion is an erroneous one. If, indeed, he had stated facts only, and had left it to the Board of Trade to draw their conclusion whether the works were incomplete and there would be danger, as for instance, if he said, "I find there is no station" and no more, or, "I find there is no station at such a point and that there will be danger to the public from the opening of the railway," then the question would have arisen whether that was a finding that the works were incomplete. He has not, however, found the facts and left others to draw the conclusion, but he has found the conclusion as a matter of fact and complied with the provisions of the Act of Parliament. He gives his reason afterwards, which I think a bad one. I am really sorry for the conclusion I come to. It is perhaps in one sense a very narrow and technical one, because a very slight alteration in the words would have made me take a very different view of the case from that which I have done, and I am not only sorry for that reason, but sorry for the reason given by Sir Richard Baggallay, namely, that it is clear to my mind that this is an erroneous decision. Do not let it be supposed for a moment that I say a station is not desirable at this junction or at the other place, or that I set up my judgment against that of Colonel Yolland. He must know a very great deal more about it than I do; but I am satisfied in point of law that in finding these works were incomplete because there was no station there, he misconstrued the Act of Parliament, and found that which the facts did not justify him in finding.

JAMES, L.J.—The appeal will be dismissed with costs.

Solicitors for the appellants, *E. B. Nelson.*

Solicitors for the respondents, *Solicitors to the Board of Trade.*

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HOPE v. THE INTERNATIONAL FINANCIAL SOCIETY.

[CT. OF APP.]

Monday, Dec. 18, 1876.

(Before JAMES, L.J., BAGGALLAY and BRETT, JJ.A.)

HOPE v. THE INTERNATIONAL FINANCIAL SOCIETY. (a)

Company—Resolutions for diminishing capital by buying up shares—Ultra vires—Action by shareholder—Forfeiture of shares—Injunction—The Companies' Act 1862, sect. 6—The Companies' Act 1867, ss. 9, 13.

The shareholders of a company passed a special resolution authorising the directors to expend a large portion of the company's assets in purchasing the shares of those shareholders who desired to withdraw from the concern, the avowed object of the resolution being to effect a gradual winding-up of the company. The articles of association contained no clause authorising any such diminution of the company's assets, but contained a clause empowering the directors, with the sanction of a general meeting, to forfeit the shares of any shareholder who directly or indirectly commenced or carried on any action against the directors or the company. A shareholder having commenced an action against the directors and the company to restrain the carrying out of the above resolution, his shares were forfeited.

Held (affirming the decision of V.C. Bacon) that the resolution was *ultra vires*, and that it was the duty of the shareholder to prevent the directors from carrying it into effect.

Held, also, that the forfeiture of the shares did not deprive the shareholder of his right to prevent the application of the company's assets to an illegal purpose.

THIS was an appeal from an order of V.C. Bacon granting an injunction restraining the International Financial Society from carrying out a special resolution empowering the directors to buy up the shares of shareholders willing to retire from the company. The facts are fully set forth in the report of the case in the court below, *ante*, 623.

Cotton, Q.C., Davey, Q.C., and Macnaghten for the appellants, contended that the scheme was perfectly honest and *bonâ fide*, as a means of preventing a winding-up, which would be injurious to the interests of the shareholders. A power to buy up and accept surrenders of shares was not *per se* illegal; and it was not prohibited by the Companies' Act 1862 to introduce by special resolution a power to that effect when it was not contained in the original articles of the association, where it would have been valid. They cited:

Snell's case, 16 L. T. Rep. N. S. 36; L. Rep. 5, Ch. App. 22;

Teasdale's case, 29 L. T. Rep. N. S. 707; L. Rep. 9, Ch. App. 54;

Wright's case, L. Rep. 12 Eq. 336;

Campbell's case, L. Rep. 9 Ch. App. 19;

Buckley on Companies, p. 77.

Kay, Q.C., Hemming, Q.C., and E. Cutler for the plaintiff, submitted that the scheme, being in effect an alteration of the conditions as to share capital, contained in the memorandum of association, was *ultra vires*, and incapable of being confirmed even by special resolution at a general meeting. If it was thought to give validity to the scheme as being a reduction of capital, then it was equally invalid, having regard to the provisions of

the Companies Act 1867, from the way in which it had been attempted to carry it out. They referred to:

Ashbury Railway, &c., Company v. Riche, 33 L. T. Rep., N. S. 450; L. Rep. 7, E. & I. App. 653;

Foss v. Harbottle, 2 Haro. 461;

Scott v. Avery, 5 H. of L. Cas. 811;

Buckley on Companies, p. 549;

Lindley on Partnership, p. 757;

The Companies' Act 1867, ss. 9, 13.

Cotton, Q.C., in reply.

JAMES, L.J.—I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed. Mr. Kay, it appears to me, has succeeded in placing his opponents on the horns of a dilemma. Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorised by the memorandum of association, or it is an extinguishment of the shares, and therefore, a reduction of the capital of the company. But it appears to me, and did appear to me from the first, and the argument has strengthened me in that opinion, that looking at the transactions and the substance of them, it is really—however honestly it may be amongst these parties, for I dare say they thought no harm would come of it—a scheme to divide the assets between the shareholders under the guise of the company's purchase of the shares; a device in fact to evade the provisions of the law for reduction of capital. The Vice-Chancellor was right in saying that that cannot be done either in the form of additional articles or otherwise. Why the Legislature thought fit to prevent the reduction of capital, I do not know. There may have been very good reasons for it. The Legislature has made express provisions for preventing the reduction of capital in these limited companies, except in a particular manner, and with particular safeguards for the protection of trade. That has not been done here. As it seems to me there was an attempt to do it in another mode and without those safeguards. Now, we have been referred to several cases in which surrenders of shares, and a power to accept surrenders of shares, and the more common case to declare a forfeiture of shares and to deal with those, have been held to be good. I am reported to have said in one case that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and that it was not necessary for the decision of the case. But, however that may be, allowing a company, which is after all a distinct person from its shareholders, in dealing with an individual shareholder, to do that which was right under the circumstances, namely, to accept the surrender from the shareholder who could not pay, and to release him from some other bargain—dealing with one individual shareholder—that might be good although indirectly, and to a small extent, it may be said to have diminished the capital. Of course the diminishment of the capital would not be the object of a thing of that kind, and it would not be the intention of the Legislature to interfere with ordinary matters of business of that kind. The cases referred to seem to me to afford no kind of colour for a transaction like this in which out of 150,000 shares, 100,000 shares might have been properly intended to be extinguished, and which under the purchase ought to be extinguished. I think without reference to what passed at the meeting, the resolutions are on the face of them,

(a) Reported by E. S. ROME, Esq., Barrister-at-Law.

ultra vires; but I will refer to what passed at the meeting to this extent, that independently of anything said or done by the solicitor or by the directors there, it seems to me very questionable at least, whether any resolution passed at any meeting of shareholders would be a valid resolution if it was intended to result in their dividing the assets between them, or in their receiving some pecuniary consideration by the result of the vote which they were then passing.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me the resolutions which were passed on the 24th Aug., and which were confirmed on the 21st Sept. last, were, in substance, resolutions for the reduction of the capital of the company. No doubt it might have been done with a view to the winding-up of the company in preference to what is called the process of winding-up, but they were in substance resolutions to reduce the capital of the company which then consisted of one million and a half to an extent not exceeding one million. Now, I am of opinion that at the time when those resolutions were passed, there was no power to reduce the capital of the company, except by pursuing the course pointed out by the Act of 1867. The Act which was in force until the Act of 1867 was passed was that of 1862, which expressly provided that no alteration should be made by the company in the conditions contained in the memorandum of association, except those which were previously mentioned, which included the increase of the capital of the company, but did not include its decrease. And indeed, in 1868, that course seems to have been pursued by the company, for, when it was determined then to reduce the capital from three millions to one million and a half, having first of all varied the articles of association in a form which provided that the company might from time to time, by special resolutions, modify the condition contained in the memorandum of association so as to reduce its capital by passing one of the resolutions confined to one of the terms of the Act of 1867, it then proceeded by a second resolution to resolve that the capital of the company should be reduced from three millions to one million and a half. These appear to have been regularly registered and confirmed in manner pointed out by the Act of Parliament. That is the way, and I think the only way in which at the present time the capital should be reduced. I was anxious during one portion of the argument to ascertain whether the point was still open with regard to the intention to apply for a confirmation of what had been done, but I was distinctly answered—I think by Mr. Davey—that they rested their case on the present occasion on the ground that what was intended to be done by those resolutions was not a reduction of the capital. The case of *Ex parte Teesdale* and *Campbell's* case have been referred to in the course of the argument, but they do not appear to me really to have any material bearing on the case now under consideration. In *Ex parte Teesdale* the resolutions were only for the surrender of certain shares in the capital of the company in exchange for another issue of shares in the capital of the same company, and the resolutions were assented to by all the shareholders, and it is so expressly stated in the case. The amount of capital uncalled up was increased by the effect of the resolution, so that the credi-

tors really suffered no injury from it, and the transaction sought to be impeached, as far as regards the particular individual, had taken place seven years before, and everybody had acted upon the faith of it. I think there were sufficient grounds in that case to come to the decision which was arrived at. The facts in *Campbell's* case were somewhat different, for in that case, and also in *Hippisley's* case, which was disposed of at the same time, each of the parties to the transaction had accepted the shares on the faith of the resolution, and did not take proceedings to escape from liability for several years afterwards. That appears to me plain from Lord Selborne's observations in the course of his judgment, in which he says, "It appears, however, to us, upon the evidence as it now stands, that as a matter of fact, the Bank of Hindustan did really and *bonâ fide* acquire and purchase (by a title which, though originally defective as against some of the shareholders in the Imperial Bank, was in the end confirmed so as to become unimpeachable) the business and property of the Imperial Bank." It was confirmed by the action of the parties who thought at the time to escape from liability. On the whole, I think the conclusion arrived at by the Vice-Chancellor is correct, and that this appeal must be dismissed.

BRETT, J. A.—If these resolutions be made to have the force of articles, by reason of their being passed according to the provisions of sections 50 and 51, without modification by way of altering any conditions contained in the memorandum of association, they are void by reason of the 12th section of the Companies Act of 1862—I mean, if they altered or modified any conditions of the memorandum, which is forbidden by that section. Now, it has been said that even although some of these resolutions would have that effect, yet that others would not, and that the result ought to be that only part of these resolutions should be declared void; but it seems to me that it would be wrong to consider these resolutions as distinct resolutions. They are in effect, all one resolution for the purpose of producing a desired result, and they must be considered as a whole as if they were one article. Now, I think that the amount of capital which may be embarked in a company, and which amount is named in the memorandum of association, is a condition of the memorandum of association. So also is the kind of business which the company has to carry on. Both of these are conditions contained in the memorandum of association, and the alteration of either of these conditions is an alteration forbidden by the 12th section. Therefore, the question comes to be whether these resolutions, taken as a whole, if they were to have the effect of articles, would alter either the amount of capital which is named in the memorandum of association as the amount of capital which may be embarked in the business, or alter the kind of business which the company in the memorandum of association was framed to carry on. Now if these resolutions do amount to a resolution that the shares which are to be purchased are not to be re-issued, then if you assume them to be articles—if you assume them to be binding articles—no subsequent meeting can re-issue them, except for the words at the end of the second resolution. If they do amount really to a prohibition against a re-issue, assuming them to be binding articles, they bind the future

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HALL v. EVE.

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members of the company just as much as the present. Taking those to be the preliminary decisions to which we ought to come, I agree with the Lord Justice, that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, though the word is not used, yet inasmuch as Mr. Kay has pointed out that the shares, if they are to be purchased from the existing holders, are not cancelled, they are existing shares; therefore, the only way of getting rid of them again is to sell them. Now, it is said, that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-selling them. They do not say so in terms, but that is the necessary effect of what they intended to do by the resolution. Then the resolution amounts to a purchasing of shares for the purpose of selling them again. That seems to be a trafficking in shares, and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that is not to be a continuing business—a regular business—but no more was that which was done in the case of the *Ashbury Carriage Company*. That was only to be one transaction; but because the transaction was a business transaction, not contemplated or mentioned in the memorandum of association, it was not allowed. If that, therefore, was the intention of this resolution, then it broke the rules, by enabling or by forcing the company to enter upon a business which is not mentioned in the memorandum of association. But, if it was not intended to re-issue these shares, then it seems to me it follows that the amount of capital represented by them was necessarily extinguished. It is true to say that the mere power to accept a surrender does not alter the memorandum of association—it is true to say that a mere power of forfeiture does not, because it is only accepting a surrender from one shareholder, for the purpose of procuring another shareholder, or forfeiting the shares of one shareholder for the purpose of obtaining another shareholder. The amount of capital issuable, or which the company has power to issue, is not modified at all; but, in this case, if these 100,000 shares are to be purchased in the way contemplated by these resolutions, and are never to be issued again, then that which was a capital of the company of 1,500,000*l.*—that is, a capital which the company was capable of issuing—if that was the intention of the resolutions, instead of 1,500,000*l.* being capable of being issued, only 500,000*l.* would have been capable of being issued. Therefore the amount of capital which is named in the memorandum of association as the issuable capital is diminished from 1,500,000*l.* to 500,000*l.* It is true that the words of the memorandum of association are said not to be intended to be altered; but the 12th section does not say the memorandum of association may not be altered. It says that you may not alter the conditions contained in the memorandum of association, and if the amount of capital is one of these conditions, you may not alter that amount of capital. Therefore, if that be the meaning of the resolutions, then they break

the rule by altering the amount of capital, which is the amount contained in the memorandum of association. That the resolutions must mean one or the other seems to me clear. It is true that if you read the words in one sense, it may be said that there is a power to re-issue; but, looking at the resolutions by themselves, and at the scheme of them, it seems to me wrong, and, therefore, impossible to come to the conclusion that that was the real intention of the resolutions. The real intention was to diminish the amount of issuable capital, and that is an alteration of the capital named in the memorandum of association, and is a material alteration, therefore, of the memorandum of association.

JAMES, L.J.—The appeal will be refused with costs.

Solicitors for the plaintiff, *Kynaston and Gueket*.

Solicitors for the defendants, *Bircham, Dalrymple and Co.*

Wednesday, Dec. 20, 1876.

(Before JAMES, L.J., and BAGGALLAY and BRAMWELL, J.J.A.)

HALL v. EVE. (a)

Practice—Pleading—Reply—Amendment of Statement—Rules of Court 1875, Orders XIX, r. 14, 18, 19; XXIV. r. 2; XXXVI. r. 3; XXXVII. r. 5.

To an action for specific performance of an agreement to grant a lease, the defendants pleaded that plaintiff had committed breaches of the agreement, giving the defendants power to determine the same, and that they had determined. The plaintiff by his reply denied the alleged breaches, and further said that even if the lessee did break the provisions of the agreement as alleged, yet the defendants were not nor was any of them entitled by reason of the alleged breaches, to determine the agreement for certain reasons which the reply proceeded to state at length.

On an application by the defendants to strike out the reply as irregular and erroneous in form and point of pleading,

Held (reversing the decision of Bacon, V.C.), that there was nothing in the rules of court to limit the plaintiff's right to state what facts he pleaded in his reply to meet a defence by confession and avoidance, so that they were not irrelevant or scandalous.

THIS was an appeal from a decision of Bacon, V.C., ordering the plaintiff's reply to be set aside as irregular and erroneous, and giving leave to the plaintiff to amend his statement of claim.

The facts and arguments are fully set forth in the report of the case in the court below (*supra*, p. 735).

Sir H. Jackson, Q.C. and C. Browne for the appellant.

Kay, Q.C. and Morton Smith for the defendants.

The following cases were cited:

Earp v. Henderson, 34 L. T. Rep. N. S. 844; L. Rep.

2 Ch. D. 254;

London and St. Katharine Docks Company v. Metropolitan Railway, ante 733;

Watson v. Rodwell, ante 86.

[Order XIX., rr. 14, 18, 19; Order XXIV., r.

(a) Reported by H. S. Roche, Esq., Barrister-at-Law.

1, 2; Order XXXVI., r. 3; Order XXXVII., r. 5, were also referred to.]

JAMES, L.J., said that this case reminded him of a saying of the late Mr. Jacob, which he had often heard quoted, that the importance of questions stood in this order: The most important of all was costs; the next was practice; and the third, which came very far behind, was the merits of the case. The time occupied in the argument of the present case was wholly disproportionate to its importance. The plaintiff, by his statement of claim, said, "I am entitled to specific performance of a certain agreement." The defendants, by their statement of defence, said, "you have committed breaches of the agreement which entitle us to put an end to it." The plaintiff in his reply said, "Your allegations are not true, and if they are the things which you say I have done I was induced to do by you." It was not questioned that the plaintiff was entitled to say this in some way if it was true. The only question was whether he was entitled to say it as part of his replication. Now Order XIX., rule 2, said that the plaintiff should deliver a statement of his reply (if any) to the defence, and there was no limit that his Lordship knew of as to what might be said in the reply, except that it must not be irrelevant or scandalous, or anything which the court might consider as tending to prejudice, embarrass, or delay the fair trial of the action. The reply was left as much at large as the statement of claim on the defence. It was contended that the plaintiff ought to have said what he had to say by means of an amendment of his statement of claim, and of course if the rules had so provided, the court would be bound by them. But if the rules had not so provided it seemed to him most illogical that the plaintiff should have to do this. It was no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it. This would be a return to the old system of pleading in the Court of Chancery, which certainly ought not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant, and to make charges in reply to them. His Lordship was of opinion that the reply was the proper place in which to meet a defence by confession and avoidance. The appeal must therefore be allowed.

BAGGALLAY, J.A. was of the same opinion. Order XIX., rule 2, pointed out the proper course to be pursued in ordinary cases, and there was no restriction of the generality of the words—no suggestion that they applied only to a simple reply. Then rule 4 said that forms similar to those in the Appendix C might be used, and in that appendix several forms of special replication were given. To one of these forms a note was added, that the facts stated in that reply should in general be introduced by amendment into the statement of claim. It had been argued that this note showed that, as a general rule, new facts ought to be introduced by amendment and not by a special reply. He read it differently. The note was added to one only of the forms, and, looking at the facts stated in that form, it was clear that in that particular case they would be most conveniently introduced by way of amendment. This view of Order XIX. was confirmed by Orders XXIV. and XXV. Rule 2 of Order XXIV. said

that no pleading subsequent to a joinder of issue, should be put in by a party of the court or a judge. This might contain something which would require some further pleading necessary.

BRAMWELL, J.A. said he was of opinion that this appeal must be allowed. It was not influenced by any love of pleading, which for a quarter of a century he had done his best to get rid of, and he thought it had now gone. But it was so, and under it this answer would have come in the reply, that you should not leap before you can stand. It might be a question whether it should be allowed. Some might say there should be no pleadings, but he thought that the pleadings should be allowed. Some might say that the pleadings should be allowed, and ordered that they should stop at that point, was, however, inclined to think that the rules intended the replication, but he was clear that the pleadings to go on. He also thought that the plaintiff was entitled to reply specially, and amendments made by the defendant under rule 2, seemed decisive on that point. It was reported that a reply might be put in on a point of issue. But it was said that it was a matter for the discretion of the court that the new matter would be introduced by amending the statement of claim. It was clear to his Lordship's mind, and that that was shown by rule 2, which said that the plaintiff should deliver a statement of his reply to the defendant's statement of defence, and of the relief to which he claimed. Now the waiver by the defendant of the breach of covenant formed no part of the complaint, or of the relief which he claimed. It would be illogical to place it in the statement of claim, and that it should be put in the reply was certainly not compelled by the rules. It was a mischievous practice to allow the plaintiff to do so, because the plaintiff could not be compelled to raise the possible defences which he must lead to great length of pleading. He did not much admire the practice, which seemed to him prolix, and that the new matter was much more conveniently, and compendiously introduced by amendment in the reply than by amendment of claim.

Solicitor for the plaintiff, J. H. B. Solicitors for the defendant, J. H. B.

SITTINGS AT WESTMINSTER

(Before MELLISH, L.J., and BRETT, J.J.)

Feb. 13 and 14

GILG v. GILG

Bankruptcy Act 1869 (32 & 33)

—Composition by instalments

—Ship—Construction—Sub

—Liability of surety.

(a) Reported by P. B. HUTCHINS.

A surety who guarantees the payment of an instalment under a composition resolution is not released by the debtor subsequently being adjudicated bankrupt at the suit of creditors who are not bound by the resolution.

The creditors of B. agreed by resolution to accept a composition payable by three instalments, the last instalment to be guaranteed by defendant.

By a subsequent deed of inspectorship, B. was to be allowed to carry on his business, but if he made default the inspectors might apply for an adjudication in bankruptcy, or compel him to assign his effects to them; and the deed provided "that in the event of the said B. being adjudicated bankrupt or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents" before payment, defendant should be released from his guarantee.

B. was afterwards adjudicated bankrupt on the petition of creditors not bound by the resolution.

Plaintiff, a creditor, sued on the guarantee.

Held (affirming the judgment of the Queen's Bench Division), that, defendant's position not being altered by the act of a party to the contract of guarantee, and B.'s bankruptcy not having been brought about by the inspectors under the deed, defendant was not discharged from liability.

APPEAL from the judgment of the Queen's Bench Division (Mellor and Lush, JJ.), in favour of the plaintiff on a special case.

The decision of the court below is reported 35 L. T. Rep. N.S. 761, where the case is set out.

Benjamin, Q.C. and Willis, for the defendant.—The position of the defendant is altered by the terms of the composition not having been carried out, and the debtor having been made bankrupt, and therefore he is discharged from all liability under the guarantee: (*Cooper v. Joel*, 1 De G. F. & J. 240.) It is not a question whether the surety is actually prejudiced; if his position is altered, even though the result may in reality be to benefit him, he is discharged. Here the surety is discharged by the express terms of the deed, which provides "That in the event of the said Charles Bedell being adjudicated bankrupt or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents before full payment of all the aforesaid promissory notes, the said Henry Parry Gilbey shall thereupon stand released from his aforesaid guarantee." The meaning of this clause is that the surety is discharged by a conveyance and assignment of the debtor's property under the deed, or by the debtor's bankruptcy, however brought about. The words "under the provisions of these presents," do not refer to the words "being adjudicated bankrupt." The effect of holding that the defendant is not released is that the plaintiff may sue the defendant for the instalment of the composition, the payment of which is guaranteed, and prove for his whole debt under the bankruptcy.

C. Russell, Q.C. and Holl, for the plaintiff, were not called on.

Feb. 14.—BAGGALLAY, J.A.—In this case it appears that a person of the name of Bedell carried on business as a wine and spirit merchant, and not being able to meet his engagements, presented a petition for liquidation of his affairs by arrangement or composition under the Bankruptcy Act 1869. A meeting of his creditors was held, and a resolution passed, by which it was resolved that a

composition of 7s. 6d. in the pound should be accepted, payable by certain instalments, the last instalment to be secured by the guarantee of the defendant. This security was given by the memorandum set out in paragraph 5 of the special case, which was signed by the defendant. The resolution was registered, and became binding on all the creditors who were included in the statement of the debtor produced at the meeting, but not on any others(a). The first instalment was paid, but default was made in payment of the second, and before the third became due, certain creditors not named in the statement produced at the meetings, took proceedings which resulted in the bankruptcy of Bedell. A part of the resolution was that a deed of inspectorship should be executed, by which the debtor should carry on his business under the inspection of certain persons thereby appointed, and a deed was accordingly prepared, and was executed by some of the creditors, and one portion of the argument was directed to the terms of this deed, by which it was contended that the surety was wholly released. The first part of the argument was that under the general circumstances of the case the surety was released from liability; it was said that Mr. Gilbey was only surety on the terms that the composition should be carried out, and therefore is released. I cannot follow that argument, for the consideration is limited to the passing of the resolution, and the guarantee is left open subject to the possibility of a variety of accidents, which might prevent the carrying out of the composition. One illustration is the case of bankruptcy caused by subsequent creditors, or, as has been suggested, the burning down of the premises and destruction of the stock-in-trade. It appears, therefore, that the resolutions must be understood to have been subject to other accidents which might prevent their being carried out. I can see no distinction between a bankruptcy brought about by subsequent creditors, or the destruction of the premises and stock-in-trade, and what has occurred, namely, a bankruptcy brought about by some of those creditors who were not bound by the resolution. I think, therefore, having regard to the guarantee itself and all the surrounding circumstances, there was no release. Then it has been ingeniously contended by Mr. Benjamin that on the true construction of the deed itself the defendant is released from liability by this clause: "Provided . . . that in the event of the said Charles Bedell being adjudicated bankrupt, or of a conveyance and assignment of his property and effects being made or required under the provisions of these presents before full payment of all the aforesaid promissory notes the said Henry Parry Gilbey shall thereupon stand released from his aforesaid guarantee." And he asks us to construe the words, "under the provisions of these presents," as applicable only to the second branch of the alternative mentioned in the earlier part of the sentence, and not to both. He would read the clause in this way: "In the event of Bedell

(a) By the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 126, "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors."

being adjudicated bankrupt, or in the event of a conveyance, &c., being made &c. under the provisions of these presents before full payment," &c., the surety shall be released. It seems to me impossible to construe the clause in that way, and a further observation occurs to me, which is that under the terms of the original guarantee it is clear that the surety's liability would not be affected by a future bankruptcy. The party contending for such a construction of the deed as that sought to be placed upon it on behalf of the defendant must show clearly that such is the true meaning. It would be possible if the other parts of the deed bore out that view, that the construction contended for might be placed on the clause in question, but the other provisions do not point to such a construction. I think, therefore, that on neither view of the case is the defendant released from his liability, and the judgment of the Queen's Bench Division is right, and ought to be affirmed.

BRETT, J.A.—The question now before us is limited to whether judgment ought to be for the plaintiff or for the defendant, and I think it ought to be for the plaintiff. There are two points. It is contended first, assuming the construction of the deed to be against the defendant, that he is released by his position being wholly altered, and secondly, that on the construction of the deed under the circumstances he is not liable. It seems most convenient to consider the second question first, but on both points it may be material to see who are the parties to the deed. It was argued by Mr. Willis that all the creditors were parties; it is true that the parties of the fourth part are described in the deed as the "creditors of said Charles Bedell," but the facts are that only some of the creditors executed the deed, while others who were named in the statement of the debtor did not execute, and some neither executed nor were named in the statement; therefore some of them were not parties in the sense of not having executed the deed, and not being named in the list of creditors furnished by the debtor. The resolutions were passed by a sufficient majority to make them binding on all the creditors, but the utmost that can be held is that those who executed the deed and those who were named in the list furnished by the debtor, are made parties, and any others might be bound, who, though not named in the list, may have come forward and taken the benefit of the composition. It follows that the persons who made Bedell bankrupt were not parties to the deed. As to the point on the deed itself, it is entirely a question of construction. Mr. Benjamin argued that the words, "under the provisions of these presents," were limited to the second part of the preceding clause, and were not applicable to the first. It follows, if this is so, that if the debtor were to be made bankrupt by subsequent creditors that would be within the proviso. According to the grammatical meaning it might be read either way, but it is more natural to apply the stipulation to both parts of the clause; considering the matter in a business aspect, and looking to the whole of the deed, I think it refers to both. I think the first part may be read as if it were "in the event of the said Charles Bedell being adjudicated bankrupt under the provisions of these presents." Then, how could he be made bankrupt under the deed? If everything went right the inspectors

could not make him a bankrupt under the provisions of these presents before full payment," &c., the surety shall be released. It seems to me impossible to construe the clause in that way, and a further observation occurs to me, which is that under the terms of the original guarantee it is clear that the surety's liability would not be affected by a future bankruptcy. The party contending for such a construction of the deed as that sought to be placed upon it on behalf of the defendant must show clearly that such is the true meaning. It would be possible if the other parts of the deed bore out that view, that the construction contended for might be placed on the clause in question, but the other provisions do not point to such a construction. I think, therefore, that on neither view of the case is the defendant released from his liability, and the judgment of the Queen's Bench Division is right, and ought to be affirmed.

Next it is said that as the deed is altered he is released. No, altered, but I take the law to be that he is relieved only if his position is altered by the position of persons who are parties to the deed. When we asked for some doctrine extended further, we were told, unless *Cooper v. Joel* authority to that effect. In *Cooper v. Joel* the surety has been altered by the position of creditors, and the question is enlarged this rule? In my opinion, there the liability on the guarantee to arise only if a certain condition is formed, that is, if the sale was true that the sale was prevented by extraneous means, and the construction of the contract was made what the judgment creditor should be done. That is therefore for enlarging the rule, that the debtor was strangers no more relieves than any other accident it had to carry out the terms of the contract, therefore, that the judgment is affirmed. Mellish, L.J., who yesterday, has asked me to give our view of the case.

Solicitors for plaintiff,
Longden.

Solicitor for defendant, *Br*

Monday, Feb. 2

THE BELGIC

ON APPEAL FROM THE ADMIRALTY

Damage—Collision leaving authority—Pilot—Negligence of ship—Insufficiency of equipment—Vessel leaving dock with a tug within the space over which authority extends by statute—Damage resulting from the tug's power by her mast tug is in the general employment of the company, there being no obligation on the company to supply a tug.

THIS was a cause of damage in the London Court by the Thames Shipbuilding Company (Limited) the dumb barge or lighter *Ke* steamship *Belgie* (belonging to the pool), and the Oceanic Steamship Company (Limited) the owners of

(a) Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

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THE BELGIC.

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total loss of the *Kertch*, and her cargo through the alleged negligence of those on board the *Belgic* whilst that vessel was coming out of the Victoria Docks into the Thames on the 25th Nov. 1874. The cause was heard by Mr. Serjeant Petersdorff, deputy judge, on the 23rd July 1875, when it was proved that the *Belgic*, a vessel 370ft. long, was coming out of the Victoria Docks stern first into the river Thames, that there was a pilot on board, who said he was not in charge, but was in readiness to take charge when the vessel got into the river, and that the dock master was on the quay giving directions, that the wind was blowing strong from the S.W. and up the river across the dock entrance, and that it was about an hour before high water, the tides being spring. There was a contradiction of testimony as to the person by whom some of the orders were given to regulate the movements of the ship, but at a time when all the ropes were cast off from the quay, and a tug of about 50-horse power belonging to the Dock Company had a hawser made fast to the starboard quarter of the *Belgic*, and was towing on it down stream, the force of the wind and tide on the *Belgic's* quarter overpowered the tug, and caused the *Belgic's* port quarter to come into contact with some barges lying at the upper pier head waiting to go into dock, crushing and sinking two of them, the *Kertch*, whose owners brought this action, and the *Industry*, whose owners brought a separate action, which it was agreed should be decided by the result of this one. There were a great number of barges lying at the same place, and it was proved that it was not uncommon for barges to lie there when waiting to go into dock, and that the Dock Company's servants were aware that the *Kertch* was lying there and had assisted to make her fast in her then position after moving her a little further from the dock gates than she originally had placed herself. On the quay wall and within a hundred yards of the place where the barges lay was a board and painted on the board:

NOTICE TO LIGHTERMEN AND OTHERS.

No craft or vessel of any kind is allowed to lie at the entrance, or within one hundred yards of the pier head of these docks, except with the permission of the dock master. Lightermen or other persons obstructing by their craft the free access to the landing place by the steam ferry boat, or allowing any barge or other vessel to be within the above limit without such permission, and, failing to remove such craft or vessel as being required to do so by the dock master, are liable to a penalty of five pounds, and a further sum of twenty shillings for every hour the said craft or other vessel is allowed to remain in such position (10 Vict. c. 27, s. 63); and the dock master is empowered to remove such craft or vessel, and hold the same until the cost of such removal is paid by the owner (10 Vict. c. 27, s. 58).

(Signed) CHARLES NORMAN, Superintendent.
London and St. Katherine Docks Company.
August 1870.

After the collision the *Belgic* anchored for a few minutes outside the dock gates, and then proceeded on her voyage to New York. She had a cargo, but no passengers on board. The defendants had given notice of the defence of compulsory pilotage in accordance with Order XLIX. of the General Orders (Admiralty Jurisdiction) County Courts 1869, but had given no notice of any other special defence, and the following agreement had been made between plaintiffs and defendants:

In the City of London Court, the *Belgic*.

All the orders of the pilot were properly carried out by the crew of the *Belgic*. No order was given by the master

or officers of the *Belgic* to the helmsman or engineer of the vessel, or step taken by them, except by the direction of the pilot or dock master.

Dated this 30th day of June 1875.

(Signed) R. E. WEBSTER, for plaintiffs.

GAINSFORD BRUCE, for defendants.

The learned Deputy Judge, after hearing *Reid* with him *Webster*, for the plaintiffs, and *Bruce*, with him *Malden*, for the defendants, and consultation with the Nautical Assessors, gave judgment in the following terms: "Having had the very efficient and great assistance of the gentlemen assisting me in this inquiry, I have come to a conclusion, and so far as facts are concerned they agree with me, and we find that in fact the vessel was not under his (i.e., the pilot's) control either immediately before the collision or at the time of the collision or subsequent to it. I do not decide any point of law. I decide upon the evidence, and that evidence is recognised by the two assessors, who think that at the time of the collision the pilot was not the official in control or management of the vessel. With regard to the other point, as to whether there was negligence on the part of the master of the *Belgic*, these gentlemen, who are far more competent than I am to form any opinion upon the subject, have come to the conclusion, as a matter of fact on which they entertain no doubt, that, looking to the time, looking to the state of the tide, and looking to the condition of the wind, the necessary and proper precautions were not taken by the master of the *Belgic*, and that the accident which did happen—the collision which had led to this inquiry—was the result of his fault. We decide no point of law: we simply decide those facts as a matter of fact, without reference to any question that could be discussed of a technical character. Our judgment, therefore, is in favour of the plaintiff."

From this judgment the defendants appealed to the High Court of Admiralty, and on the 16th Nov. 1875 the appeal came on for hearing.

The statutes on which the argument turned as to compulsory pilotage were The Victoria (London Docks) Act 1853 (16 & 17 Vict. c. cxxxi.)

Sect. 49. That the docks shall be deemed and held to be situate within and part of the Port of London.

The Pilotage Act (6 Geo. 4, c. 125), repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120), was as follows:

Sect. 63. Provided always, and be it further enacted, that when any ship or vessel shall have been brought into any port or ports in England by any pilot duly licensed, nothing in this Act contained shall extend, or be construed to extend, to subject to any penalty the master, mate, or other person belonging to such ship or vessel, and having the command thereof, or, if in ballast, any person or persons appointed by any owner, or master, or agent of the owner thereof, for afterwards removing such ship or vessel in such port or ports for the purpose of entering into or going out of any dock, or for charging the munnings of such ship or vessel.

Sect. 72. That any licensed pilot who shall, without lawful excuse, refuse to take charge of any ship wanting a pilot, upon being required so to do by the master, or any person having the command thereof, or being entrusted therewith shall, for every offence, forfeit 100*l*.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

Sect. 353 continues all exemptions from compulsory pilotage existing at the passing of the Act.

Sect. 365. If any qualified pilot commits any of the following offences: that is to say—(8) refuses or wilfully delays, when not prevented by illness or other reasonable cause, to take charge of any ship within the limits of his licence upon the signal for a pilot being

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however, the pilot had been required to take charge under sect. 72 of the same statute, and, therefore, was in charge. The whole of 6 Geo. 4, c. 125, was repealed by 17 & 18 Vict. c. 120. But the exemption of sect. 63 is continued by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 353: (*General Steam Navigation Company v. British and Colonial Steam Navigation Company*, L. Rep. 4 Ex. 238; 20 L. T. Rep. N. S. 581; *The Earl of Auckland*, Lush 164, and on appeal, *ib.* 387.) The corresponding enactment to 6 Geo. 4, c. 125, s. 72, is 17 & 18 Vict. c. 104, s. 365(8), but here he had never been required to take charge, and, as he has himself sworn, was on board merely in readiness to take charge when the vessel got into the river. Under the circumstances he was not in charge; the order he gave to go ahead was given by him as the mouthpiece of the owners, to avoid a collision with the vessels outside. That order, however, did not cause the collision with the *Kertch*, but, on the contrary, brought the *Belgic* again to a position of safety. The immediate cause of the collision was the subsequent employment of a tug of insufficient power. It is not the duty of the dock master to supply a tug. The defendants had a more powerful tug of their own in attendance, and had they used her, in all probability the collision would not have occurred. The dock master did not order the *Belgic* to use the dock company's tug, but suggested that a tug should be used, and offered the assistance of his. That offer was accepted by the *Belgic*, and a prudent man should have foreseen the result of employing so weak a tug by itself to perform such a service in such weather. On the *Belgic's* acceptance of the assistance of the tug, the tug became a portion of her (the *Belgic's*) appliances for going out of dock, and the *Belgic* is responsible for the inadequacy of the tug as much as she would be for the inefficiency of her own engines, or for a collision occasioned by the carrying away of a rope of obviously insufficient strength for the purpose for which it was used. The *Kertch* was lying in a perfectly proper place; she was known to be there by the servants of the dock company, and indeed had been assisted by them to make fast in that place, and therefore, whether within or without the limit of the district over which the dock master's control extends (the Victoria (London) Docks Act 1853, 16 & 17 Vict. c. cxxxi., s. 46), she had a perfect right to be there. The notice to barges not to lie there is habitually disregarded by the dock company themselves, and appears to have been *ultra vires*, as it seems to apply to a district in the river over which the dockmaster's authority does not extend, as it professes to measure 100 yards from the pier head, which is much further out than the centre of the outer dock gates. There was no necessity for the *Belgic* to move at all out of the dock; she could remain as long as she liked on payment of her dues, and it was negligence on the part of her master to allow her to be sent out of dock at all at such a time. Looking to the state of the weather and the tide, this act of negligence was the original *causa causans* of the accident.

Bruce in reply.

Sir Robert Phillimore.—This is an appeal from the City of London Court in a cause of collision. The *Belgic*, a screw steamer 370 feet long, and of

between 2000 and 3000 tons, on the 25th of Nov. last, in the daytime, came stern foremost out of the Victoria Dock and ran into a dumb barge or lighter called the *Kertch*, and sank her, doing also damage to another barge. The *Kertch* brought her action against the *Belgic* in the court below, and obtained the judgment of the court in her favour. The learned judge, assisted by nautical assessors, said that he did not decide any point of law, but that he found as a fact that the pilot was not exercising control over the steamer, and that the master did not take proper precautions in coming out into the river, and therefore was to blame for the collision. The appellant contends that this judgment ought to be reversed upon three grounds, viz.: First, that the *Kertch* was to blame for lying where she did; secondly, that the *Belgic* was not responsible because she was under the orders of the dockmaster or the pilot; thirdly, that the collision was inevitable. This last ground may be at once disposed of. The collision was clearly evitable. Then as to the first ground, the *Kertch* was a dumb barge, laden with wood and iron for a ship in the Victoria Docks. The barge arrived at dead low water near the dock entrance, and brought up outside. There were fifty or sixty barges also lying alongside. Two hours before high water the barge was ordered by the dock company's servants to shift higher up, which order she obeyed, and one of them handed a rope for making her fast after having been on board her, saying, "that will do, Bob; here is something that will hold you." Looking to these and other circumstances, I am of opinion that the barge was not to blame for lying where she did. The remaining ground of objection is now to be considered. I agree with the opinion of counsel that the learned judge of the court below had not only a question of fact, but also, to some extent, of law to consider: because, if the master was to blame for this collision, it must be on the ground that neither the authority of the dockmaster nor of the pilot had superseded at the time of the collision the authority of the master. The dockmaster was naturally anxious to get rid of this long steamer in order to admit other vessels waiting to come in. The principal facts appear to be that the gates were opened about an hour and a half before high water. The dockmaster ordered the *Belgic* to go out astern. About this time a schooner dropped her anchor near the mouth of the entrance. The pilot, who says he was not at this time in charge, seeing that a collision with the schooner on the one side or the barge on the other would be inevitable if the *Belgic* went out, took upon himself to order the *Belgic* to go ahead, thereby stopping her way. Upon this the dockmaster said, "What are you going to do? You can't stop here; you are stopping our work." The pilot said, "We are going to do nothing;" and, after a pause, the dockmaster said, "Well, will you let our tug take hold of you and pull you out?" The pilot said, "As you like." The vessel was pulled out. The tug proved too weak to hold the steamer off, and she ran into the barge. It has been pressed upon me that either the dockmaster or the pilot was in command; the pilot expressly says that he had not as yet taken charge, but I also think that the dockmaster was still exercising his authority. I do not think it necessary to consider whether a

captain would be obliged by the dockmaster to execute an order which manifestly brings about a collision. I think he would not be so obliged, but I need not decide that point, because I am of opinion that no command was given to the captain by the dockmaster. A proposal was made which was accepted on behalf of the captain. The dockmaster is not bound to find a tug for ships, at least no such obligation has been shown to me. The captain chose to adopt the tug as his own motive power for the occasion; it proved too weak, and the captain is as much responsible to the third parties for the consequence as if it had been his own tug. I decline to reverse the decision of the court below, and I dismiss the appeal with costs.

From this judgment the owners of the *Belgic* again appealed, and the further appeal came on for hearing in the Court of Appeal before Cockburn, C.J., James, L.J., and Baggallay, J.A., on the 28th Feb. 1876.

Butt, Q.C. and *Myburgh*, for the appellants.

Webster and *Baikes* for respondents.

The COURT, without calling on the respondents, dismissed the appeal with costs.

Solicitors for the appellants, *Wood and Tinkler*.

Solicitor for respondents, *J. A. Farnfield*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER of the ROLLS.)

Monday, July 17, 1876.

HALE v. HALE. (a)

Will—Gift to a class—Remoteness—Severance of the objects of the gift.

A testator gave his residuary real and personal estate to trustees upon trust to pay the income thereof to his wife during widowhood, and after her death or second marriage upon trust for his children who might be living at the time of such death or second marriage, and the issue of any child who should have previously died, such issue to take the share of his, her, or their deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to him or them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or any female issue of a deceased child to be held upon the trusts therein mentioned.

Held, that the whole of the gift over, upon the death or second marriage of the testator's widow, was void as infringing the rule against perpetuities.

Re Moseley's Trusts (L. Rep. 11 Eq. 499; 24 L. T. Rep. N. S. 260) not followed.

WILLIAM HALE, by his will, dated the 22nd Aug. 1867, gave his residuary real and personal estate to his wife, *Anne Hale*, and to *Frederick Hale*, and *Nathaniel Warren Hale*, upon trust to get in and convert certain parts of his personal estate, and invest the same in manner therein mentioned, and to pay the income of such investments and of all his real and his other personal estate to *Anne Hale* during widowhood, and after her death or second marriage, upon trust to sell his outstanding real and personal estate; and he directed that

his trustees should stand possessed of the net proceeds arising therefrom for all and every of his children who might be living at the time of such death or second marriage, and the issue of any child who should have previously departed this life, such issue to take the share of his, her, or their deceased parent in equal shares and proportions, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to him or them as and when he or they should respectively attain the age of twenty-four years. And as to the shares of his daughters, or the female issue of any deceased child, upon trust to invest the same upon the securities thereinbefore mentioned, and to pay the annual income arising from such investment into the proper hands of his said daughter or granddaughters for their respective sole and separate use and benefit for and during the term of their natural lives, without power of anticipation, and the same not to be subject or liable to the debts, control, or engagements of any husband with whom they or either of them might intermarry, and her and their receipts alone, whether covert or sole, should be the only proper discharge to his trustees for their respective shares. And he empowered his said daughters, or granddaughters, or either of them, by will to appoint, give, and bequeath a life interest in the whole or any part of their respective shares to any surviving husband or husbands, and after the decease of his said daughters or granddaughters, or either of them, upon trust, subject to such appointment, if any, as aforesaid, for all or any of the lawful issue of his said daughters or granddaughters, for such interest in such proportions, and in such manner in all respects as his said daughters, or granddaughters, or either of them, by their or her last will and testament in writing might appoint; and in default of such appointment, in trust for the child, if only one, or for all the children equally, if more than one, of his said daughters, or granddaughters, who should be living at the time of their respective decease, and should have attained or should live to attain the age of twenty-four years; and in case either of his said daughters or granddaughters should die under the age of twenty-four years without leaving issue, or leaving issue all such issue should die under that age, then the share or shares of such of his daughters or granddaughters so dying should go to and be divided equally amongst all his children who should be then living, and be paid and payable to him or them upon the same terms and conditions as his, her, or their original share or shares under his will. The will contained a power of advancement out of the presumptive or expectant share of any of the testator's children or grandchildren of such sums as therein mentioned, such payments, if made, to be considered as made on account of the presumptive share or shares of any of the children or grandchildren receiving the same; and it also contained a power for the trustees to apply the whole or any part of the income of the contingent shares of the respective children and issue in or towards their respective maintenance, or otherwise for their respective benefit during their minorities, and the trustees were directed to accumulate the unapplied income, and add the accumulations to the capital of the respective shares whence the income should have arisen.

CHAN. DIV.]

HALE v. HALE.

[CHAN. DIV.]

The testator died on the 3rd Nov. 1874, leaving his wife and two sons and four daughters. Five of the children had attained the age of twenty-four at the time of the testator's death; the youngest, a daughter, was about sixteen years of age. This suit was instituted for the execution of the trusts of the testator's will, and the cause coming on for further consideration, the question was raised as to the validity of the gifts after the life interest of the widow.

Chitty, Q.C. and *H. A. Giffard*, for the testator's widow contended that the gift over, being to a class, which could not be ascertained within the period allowed by law, was void for remoteness. They referred to

Callin v. Brown, 11 Hare 372; and
Smith v. Smith, L. Rep. 5 Ch. 342.

Davey, Q.C., and *Seward Brice*, for the testator's children and grandchildren argued that the parties must wait until the period of distribution to see which of the shares had vested at that time, and they referred to *Re Moseley's Trusts* (L. Rep. 11 Eq. 499; 24 L. T. Rep. N. S. 260).

Cookson, Q.C. and *Owen* for other parties.

JESSEL, M.R.—I am of opinion that the gifts after the death or second marriage of the testator's widow are void for remoteness. The doctrine on the subject is perfectly well settled. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. The question here is, whether the class of objects whom the testator means to benefit are necessarily ascertainable within that time. The class consists of the children and grandchildren, being issue of deceased children of the testator; that is to say, if at the death of the widow there are any sons living, or there are any grandchildren living who are the sons of a deceased child, they are to take vested interests at the age of twenty-four years. In this will it is clear that "vested" means vested. The rule as to the construction of the word "vested," as laid down by Sir William Grant is, that it has its proper legal meaning, like every other word, unless you find a context to control it. In this case there is no context to control it, but, on the contrary, express mention is made in the maintenance clause of there being contingent shares. "Vested," therefore, means vested, and, consequently neither son nor grandson can take a vested interest until he attains the age of twenty-four years. At the death of the testator, the widow was alive, and she had children. No human being could tell, at the death of the testator, how many of such children would die in the lifetime, or before the second marriage, of the widow, nor whether any such child so dying would leave sons or not, and if the child so dying left sons, whether or not they would attain the age of twenty-four years. The result might be that a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year, the widow might die or marry, and such son might not attain twenty-four years of age within the legal period, and consequently you could not within that period ascertain the class to take, for that is the important point. You could ascertain the class in one sense—you could say that, at the death of the widow, the class could not exceed a given number, that is to say, it could not exceed all the children

then living, and all those who died in her lifetime, leaving children, and you could say, at the testator's decease, that in no case could the whole class to take exceed the whole number of the testator's children, because grand-children would only come in the place of children. In that sense, the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four after the legal period, and then that share ought to come back to the others, if you could divide it, but you could not. It must remain absolutely uncertain what share each child would take until it was ascertained whether the grand-children attained twenty-four or not. The shares were not necessarily ascertainable at the death of the testator for life; for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares? that is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness, as he may possibly take beyond the legal period. There again, you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more. As I understand it, *Leake v. Robinson* (2 Mer. 363), and the whole of that class of cases negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this court, which has held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject, and it is only necessary to refer to two or three of them. One is the case of *Smith v. Smith* (sup.), which is very like this. It was decided originally by Vice-Chancellor Malins, who held you could sever the shares. It then went to the Court of Appeal, who reversed the decision on the ground I have mentioned that the class must be ascertainable within the period, and you cannot separate the shares by calculating the minimum shares beforehand. This decision would be binding upon me if I had any doubt upon the question, which, however, has been settled so long ago as *Leake v. Robinson*. Besides that, there is the case of *Seaman v. Wood* (22 Beav. 591), which is exactly this case. There the late Master of the Rolls held that as you could not ascertain the shares necessarily within the limited period allowed by law, the whole gift was void. He said, "In my opinion the class here to take consists of the children who attain twenty-one, and a limited class of the grandchildren, namely, those who attained twenty-one, but are children of children who have died under twenty-one. Therefore, the class to be ascertained consists of the plaintiff's own children, and the grandchildren who attain twenty-one born of deceased

infant parents. There is a direction afterwards as to what shares they are to take. The children are to take equal shares, and the grandchildren collectively are to take the shares which their parents would have taken if they had lived. This class will not necessarily be determined within the period allowed by the rule against perpetuities. I think that this is a gift to a class which is too remote, and that the principle of *Leake v. Robinson* applies." That is exactly in point. I think *Smith v. Smith* is also fairly in point. Then there is the case of *Re Moseley's Trusts* (sup.) decided by Vice-Chancellor Malins in the year 1870, the same year as the appeal was decided in *Smith v. Smith*. It is exactly in point, and is exactly the other way. Therefore, in one sense, I have to elect between *Seaman v. Wood* and *Re Moseley's Trusts*, but in another I have not to elect, because, if I am right in my view of *Smith v. Smith*, it decides the point independently of the conflict of opinion between the judges in *Seaman v. Wood* and *Re Moseley's Trusts*. When you look at *Re Moseley's Trusts* you see that the Vice-Chancellor does not deny the rule; he says, "It was argued for the residuary legatee that the gift is void for remoteness because it includes objects who could not necessarily be ascertained within twenty-one years after the termination of a life in being at the death of the testator. If the gift had been to the children and grandchildren as a class, that would undoubtedly have been the case, because the grandchildren would not necessarily be twenty-one years of age within twenty-one years after the death of their grandmother, but here the number of objects must be ascertained within twenty-one years after the death of the testator." [I think that here the Vice-Chancellor forgot that they might diminish; he was thinking of the maximum number.] "It is to the children who attain twenty-one, and the issue of those who die under that age, so that necessarily the whole number of the class will be ascertained within a life in being and twenty-one years. The property, therefore, is to be divided into as many shares as the number of children who attain twenty-one and who die under that age leaving issue, and the issue are to take just that which the parent would have taken if he had lived to attain twenty-one years." As I read the gift in *Re Moseley's Trusts*, it was to the issue who should afterwards attain the age of twenty-one years, that was a part of the description of the issue, and, therefore, it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue; there is no gift to the issue as such, only to such as attain twenty-one. That is the mistake which, as it seems to me, the Vice-Chancellor made in that case. He said you ascertain the number of shares by seeing what children left issue, but leaving issue does not determine the point; it is, leaving issue and such issue attaining twenty-one. Looking at the principle and the authorities, I think in this case that the grandchildren not being capable of being ascertained within the period allowed by law, the gift wholly fails for remoteness.

Solicitors: *Jenkinson, Owen, and Olivera.*

(Before Vice-Chancellor
Dec. 15, 1876, and *Re*

Re Hoskin's Trusts

Trustees Relief Act—Unnecessary court—Costs—General position under settlement—absolute gift by will—Executor's duties—trustees of settlement—23 V.L.R. 161.
By a settlement A., a married person, gave power of appointment by will to certain persons, and appointed trustees who were willing to pay out of the probate, and the executor appointed, but refused to pay the fund without the concurrence of the trustees, which, being refused, the executor, paid the fund out of his own pocket.
Trustees Relief Act.

At the time of paying in the actions as to who were the trustees entitled. A petition was presented by the beneficiaries for payment of the fund, who would be entitled in the court, and agreeing to the terms of the petition.

Held, that the trustees ought to pay the executor on his sole receipt of the costs of the petition other than the costs of proving their title, the proper person to have present the petition.

By an indenture of settlement 1836, and made between Philip Hoskin, Sarah Hoskin (then Sarah of the second part, and certain of the third part, a sum of 500 £ the said Sarah Hoskin was engaged as therein mentioned, was assigned and it was declared that the trustees possessed of the same, and also Consols upon trust after the death of Philip Hoskin and Sarah Hoskin interest thereof during the lives of Philip Hoskin and Sarah Hoskin, and then as therein mentioned, and of the survivor of them upon capital and income thereof in fee simple to the children if any of the marriage should be no such child, then in case the said Philip Hoskin should die in the lifetime of Sarah Hoskin from and after his death such person and persons, for the purposes, and subject to such powers, declarations as the said Sarah Hoskin will or any codicil should, no trust, appoint.

By an indenture, dated the 15th day of December 1876, it was declared that a further sum of 200 £ in part consisting of accumulated fund of 200 £ should be held in trust, upon trust as to the settlement, upon trust as to the decease of the said Philip Hoskin in the events which happen and persons, for such intent subject to such powers, provisions as the said Sarah Hoskin codicil should, notwithstanding or appoint.

Sarah Hoskin made her will

(a) Reported by F. GOULD, Esq.

1860, and thereby in pursuance of the powers contained in the indentures of the 15th July 1836, and the 24th May 1851, she appointed certain small legacies, and she directed all the rest, residue, and remainder of the said two sums of 200*l.* and 500*l.* Console, and the dividends, interest, produce, and accumulations thereof, and of any other fund or personal estate over which she had a disposing power by or under either of the said two indentures to be divided into five equal portions, and she appointed and bequeathed such five shares as therein mentioned, and she appointed William Patching and Edward Reynolds, executors of her will.

Sarah Hoskin died on the 27th June 1863, and her will was proved by Reynolds alone on the 31st March 1875.

Philip Hoskin died in Dec. 1874.

In the month of Aug. 1876, the trustees of the settlements had in their hands the sum of 720*l.* 19*s.* 2*d.*, as representing the amount of the settled funds, appointed by the will of Mrs. Hoskin, which amount they paid into court under the Trustees Relief Act, after deducting therefrom 34*l.* 6*s.* 6*d.* for the expenses of so doing. The affidavit of the trustees filed in support of the payment into court stated the names of the parties whom they believed to be entitled to the fund.

The trustees had agreed to pay to the executor out of the fund, the duty on the probate of the will, and the costs of obtaining it, but they declined to pay him the balance without the concurrence of the beneficiaries. At the time the money was paid into court there were questions on the will as to the parties beneficially entitled, but on the petition all the parties interested according to any view were before the court, and concurred in the proposed distribution.

A petition for payment out of the fund to the parties beneficially entitled was now presented, and the petition prayed that the costs of the petition might be paid by the trustees of the settlement on the ground that they were not justified in relieving themselves of the responsibility of administering the trust fund by payment into court.

Bristowe, Q.C. and *Bardswell*, for the petitioners.—The trustees were not justified in paying the fund into court, and thus diminishing it by the expenses consequent thereon. The testatrix, Mrs. Hoskin, had a general testamentary power, and by her will she exercised her power and appointed executors, who could have given a complete discharge to the trustees of the settlement. They cited

Re Philbrick's Settlement, 12 L. T. Rep. N. S. 261; 34 L. J. 368, Ch.;

Hayes v. Oatley, 26 L. T. Rep. N. S. 816; L. Rep. 14 Eq. 1;

Re Woodburn's Will, 29 L. T. Rep. O. S. 206; 1 De G. & J. 333;

Re Cater's Trusts, 25 Beav. 361;

Foligno's Mortgage, 32 Beav. 131;

Re Elliot's Trusts, L. Rep. 15 Eq. 194.

[They were stopped by the court.]

Dunning, for the executor of the will and some of the beneficiaries.

Yate Lee (*Glasse, Q.C.* with him), for the trustees of the settlement.—I submit that the trustees of the settlement were in no way to blame for paying the fund into court, and were justified in not

parting with the money to the executor. I admit that the decision in *Re Philbrick's settlement* is against the trustees. As to *Hayes v. Oatley*, that was a case where the trustees had actually paid over the money to the executor of the appointor, and a bill was filed to compel him to restore it. It would have been a very hard case against the trustee if the suit had succeeded, and Lord Romilly, M.R. followed his previous decision in *Re Philbrick's settlement*. But in *Platt v. Routh* (10 L. J. 105, Ex.; s. c. 3 Beav. 257) it was held that the executor of Mrs. Platt could not have recovered the property appointed by her will, and that view of the common law judges was adopted by the House of Lords (s. c. sub-nom. *Drake v. Attorney-General*, 10 Cl. & Fin. 257). The statute of 23 Vict. c. 15, was passed in consequence of the decision in *Platt v. Routh*, and sect. 4 imposes probate duty on a will exercising a general power of appointment over personal estate, but it is only "for the purposes of this Act" that the appointed property is to be deemed the personal estate of the appointor, it does not make the property recoverable by the executor. In fact, sect. 5 recognises the fact that it does not belong to him by providing that the duty paid by the executor shall be repaid him by the trustee or owner of the property. [MALINS, V.C.—I am bound to follow the decision of Lord Romilly unless I dissent from it. I do not think the trustees would have incurred any liability by paying the fund to the executor.]

Bristowe, Q.C., in reply.—After the Act of 23 Vict. c. 15 the trustees cannot rely on *Platt v. Routh*.

MALINS, V.C.—The Trustees Relief Act is a most useful enactment, as by means of it points of law of great difficulty are decided in a comparatively inexpensive manner, but at the same time it may be used as a means of great oppression. Now in this case a small sum of between 600*l.* and 700*l.* has been paid into court, and the expenses of obtaining its payment out of court it is stated may be 150*l.* Take it as at least 100*l.* Now when trustees take a step involving such a dip into their trust fund they ought to be well satisfied beforehand of the propriety of the proceeding. Under the circumstances which happened in this case, Mrs. Hoskin had a general power of appointment over the fund in question. That is equivalent to the absolute ownership. She executes her power by will, and by her will she appoints executors. According to the law at that time her executors could not do anything without first proving the will; the Act of 23 Vict. c. 15, had made the will liable to probate duty. Upon general principles, therefore, she being the owner of the property and having appointed executors, their duty was to pay her debts if she had any, and they were the persons to give a discharge for the money to the trustees of the settlement. There are two well known decisions by Lord Romilly on the point, one of which is *Re Philbrick's Settlement*. In that case there is a formal decision on the point, but there is a still more formal decision in *Hayes v. Oatley*, and what was the fate of that case? The plaintiff's bill was dismissed with costs. Now after these two decisions, what did the trustees want a release for? If you have money to pay to A. B., the proper course is to pay it to him and take his receipt. That is a sufficient discharge. In the case before me this over anxiety of the trustees to be made secure led

to a long correspondence; then 36l. is deducted from the fund for the expenses of paying it into court. Then there is a long affidavit pointing out who are the parties entitled to the fund. The proper course was for the trustees to pay over the fund to the executors of Mrs. Hoskin, and they ought to have insisted on its payment to them. Beyond doubt the trustees were wrong in not paying it to the executors, and if the executors had been the petitioners, the trustees should have paid all the costs. But the executors have waived their strict right. There will be an order according to the prayer, and by the consent of the petitioners let the trustees pay the costs other than the costs of the beneficiaries in proving their title.

Solicitors, *Burton, Yeates, and Hart*; *Brownlow*; *Meredith, Roberts, and Mills*.

(Before Vice-Chancellor HALL.)

June 26 and 27, 1876.

JONES v. CLIFFORD (a).

Vendor and purchaser—Contract of sale—Condition restrictive of investigation of title—Discovery of facts aliunde—Common mistake—Specific performance.

In an agreement for sale of freehold and leasehold property there was a condition that the purchaser was to assume that "E. M. was at the time of his death seised in fee simple of the said premises," and should "not require the production of or investigate, or make any objection in respect of the prior title to the said lot, whether such prior title is or is not referred to in any abstracted document." The purchaser discovered by an inspection of an inclosure award that E. M. was not at the date of his death seised of the said hereditaments, but that he, the purchaser, was entitled to the same.

Held, that this condition did not preclude the purchaser from acquiring such knowledge aliunde, and on the ground thereof refusing to carry out the contract, although no fraud was alleged. Inquiry directed accordingly.

Bingham v. Bingham (1 Ves. Sen. 126) and *Cooper v. Phibbs* (16 L. T. Rep. N.S. 678; L. Rep. 2 H. L. 149) commented upon and followed.

THIS was a bill for the specific performance of articles of agreement, dated 28th Sept. 1871, by which Richard Jones and his wife, Jane Jones, the plaintiff, agreed to sell to the defendant for the sum of 2350l. certain freehold and leasehold hereditaments described in the first and second schedules thereto. In the first schedule were comprised three pieces of land in the township of Hopton Upcha, in the county of Montgomery, containing 2a. 1r. 32p. or thereabouts, and numbered 94, 110, and 116 respectively in the plan of the tithe commutation apportionment for the township, and in the second about 100 acres of arable and pasture land and about 120 acres of sheep-walks.

Clause 4 of the articles of agreement provided as follows: "The purchaser shall assume that E. Mountford, who died on the 22nd April 1841, died intestate, leaving the said Jane Jones" (who was the plaintiff in the suit), "his only child and heir-at-law him surviving; and that the said E. Mountford was at the time of his death seised in fee simple of the said premises, and shall not re-

quire the production of or investigate or make any objection in respect of the prior title to the said lot, whether such prior title is or is not referred to in any abstracted document. The vendors will, however, at their own expense, if required, furnish a statutory declaration by a competent person that the said E. Mountford was in possession or receipt of the rents of the said hereditaments and premises as the owner thereof at the time of his decease, and that the vendors have since received the rents of the said hereditaments." Requisitions on the title were to be sent within a specified time; and any error or misstatement in the schedules was not to have the effect of annulling the sale, but was to be the subject of compensation.

The vendors delivered their abstract of title, and no objection was taken within the time limited in that behalf. Subsequently, however, the defendants made a requisition for a statutory declaration, not of the seisin of E. Mountford, but of the plaintiff's heirship to him. The declaration was duly furnished.

The defendant did not complete the purchase within the specified period. At his request the vendors gave him further time, but on his continued failure to complete, they pressed him to do so, but he asked still further time, and offered to pay interest on the purchase money.

As the delay, however, continued, the plaintiff filed her original bill on the 3rd Feb. 1873, her husband having died in the previous year. By her bill the plaintiff stated that she was absolutely seised in fee of the hereditaments comprised in the first schedule, and entitled to the leasehold hereditaments for the remainder of the term on which the same were held. The defendant by his first answer, dated the 12th Aug. 1873, admitted the plaintiff's title, and declared his willingness to carry out the contract. He filed, however, a supplemental answer on the 5th March 1876, in which he insisted that he was not bound to complete. In September 1873, he contracted, as he alleged, with Henry Keate, for the sale of an estate of his own, called Lower House Farm, together with the property which the defendant had contracted to purchase from the plaintiff. To make out his own title it was necessary to inspect the Hopton Inclosure award. He had unsuccessfully attempted to do so, but Keate's solicitor had succeeded in obtaining an inspection of the award, and thereby discovered that the three pieces of freehold land specified in the first schedule to the articles of agreement, and numbered 94, 110, and 116, had never belonged to the said Edward Mountford, and consequently did not belong to the plaintiff, but were allotted to one Thomas Morgan, through whom it was then actually vested in the defendant himself, subject to the residue, consisting of a few years only, of a term created in 1781, which was vested in the plaintiff. The defendant's solicitor, accordingly, on the 23rd Dec. 1873, wrote to the plaintiff's solicitor to inform him of this discovery, and claiming to set aside the whole contract on that ground. To this the plaintiff's solicitor answered as follows: "I had an appointment with Mrs. Jones to-day, and laid before her yours of yesterday, as to the freehold property contracted to be sold to Colonel Clifford. Her surprise was no less than your own seems to have been. Without prejudice to the contract and her right under the same as against Colonel Clifford, there seems to

(a) Reported by J. E. THOMSON, Esq., Barrister-at-Law.

be no difficulty in the matter. As you seem to have seen the award, which I could never get at, nor could my client, you must also have seen that the parcels of plan 94, 110, and 116, were allotted to Thomas Morgan, in exchange for an allotment to Joseph Davies and John Francois, containing 2a. 1r. 16p., part of a field called the Four Acres, numbered 14 on the sale plan, and then called Lower Llanabereod Meadow. This allotment of 2a. 3r. 16p. was clearly the land of which Mr. Mountford was seised in fee, the conveyance of which to him Mr. Broughall saw when at my offices examining the deeds. Francois' moiety was purchased by Mr. Mountford in 1825, and was conveyed by deed of feoffment, and Miss Dorothy Davis, one of the witnesses to livery, is still living, and can speak positively to the fact, as indorsed on the deed. The other moiety (Davies') was purchased in 1840. Mr. Mountford was at this time between eighty and ninety years of age, and the conveyance was prepared by a Mr. Farmer, of Montgomery, of a moiety of parcels 94, 110, and 116, instead of the allotment to Francis and Davies. In the first moiety the consideration was 19*l.*, and for the second, 55*l.* The tithe commutation was made after Mr. Mountford's death, and it seems to have set us all wrong, and I suggest the better plan will be simply to substitute in the conveyance from Mrs. Jones the 2a. 3r. 16p., instead of the three smaller pieces allotted to Colonel Clifford. As to these, Mrs. Jones will, if required, give absolute covenants for title."

The defendant's solicitor replied that if his client had known the state of the facts he would never have entered into the agreement. His object in entering into the agreement was to acquire lots 110 and 116, which immediately adjoined the house on Lower House Farm, and considerably enhanced its value. The contract had been entered into under a common mistake, and the defendant was, therefore, entitled to rescind it.

The plaintiff then amended her bill, denying the alleged discovery, and charged that the defendant by his laches was precluded from taking the objection. She stated also, that she had discovered that she had an absolute freehold interest in three acres of this land formerly supposed to be leasehold; but that if the defendant was willing to complete, considering his title to lots 94, 110, and 116, she would give him the benefit of the enlarged interest, or she would allow him compensation, if he made compensation in respect of the greater interest which he would acquire in the freehold lot supposed to be leasehold.

Osborne Morgan, Q.C. and *Romer* for the plaintiff.—The defendant accepted the title, and in the absence of fraud, and no fraud is alleged, he cannot withdraw. Besides he assumed the ownership of the property by attempting to sub-sell. *Dart's Vendors and Purchasers*, 4th edit. 398, *Simpson v. Sudd* (2 Sm. & G. 469; 4 D. M. & G. 665). He is, moreover, precluded by clause 4 of the agreement, from making any inquiry in any quarter as to the title: (See *Spratt v. Jeffery*, 10 B. & C. 249; *Hume v. Bentley*, 5 De G. & Sm. 520; *Hume v. Pocock*, L. Rep. 1 Eq. 423; 1 Ch. 379; 13 L. T. Rep. N. S. 555; 14 L. T. Rep. N. S. 127, 386; *Harnett v. Baker*, 32 L. T. Rep. N. S. 382; L. Rep. 20 Eq. 50). A man may be supposed to know his own title, and a vendor is not bound to direct the purchaser's attention to that of which he has express or implied notice: (*Dart's Vendors*

and *Purchasers*, 4th edit. 85.) We have, moreover, a good title by adverse possession, as the award was made in 1841. And it is certainly owing to our indulgence that the defendant has made this discovery. He cannot equitably use that indulgence to oust his vendor.

Dickinson, Q.C. and *Rodwell* for the defendant.—This is a case of a common mistake, caused by the imperfection of the abstract furnished by the vendors. *Spratt v. Jeffery* is disapproved in *Shepherd v. Keailey* (1 C. M. & R. 117), and in *Darlington v. Hamilton* (Kay 550), Wood, V.C., said that a condition precluding the purchaser from requiring production of the lessor's title, did not preclude him from acquiring any evidence he could *alibunde*. To the same effect *Malins, V.C.*, in *Hamett v. Baker* (32 L. T. Rep. N. S. 382; L. Rep. 20 Eq. 50), and the Court of Queen's Bench in *Waddell v. Wolfe* (L. Rep. 9 Q. B. 515). In answer to the argument that a man is supposed to know his own title, we rely on the well-known case of *Bingham v. Bingham* (1 Ves. Sen. 126), where a man bought his own estate under a mistake, and, though no fraud appeared, it was held that this was a case of common mistake which the court had power to relieve against.

Morgan, Q.C.—There are two classes of conditions, one in which the vendor precludes the purchaser from making requisitions on the title itself, and another in which the purchaser is estopped even from making inquiries or obtaining information from other quarters. The present case falls within the latter division.

HALL, V.C.—This case is different from those which have been cited before me, and it appears to me that the plaintiff is not, under all the circumstances of the case, entitled to a declaration that she can make a title, but she ought to have an inquiry as to title. The plaintiff had made the usual stipulation as to the time within which objections to the title were to be taken, and I must take it that the title was accepted. It appears to me also that the plaintiff is right in saying that the statutory declaration as to the seisin of Mr. Mountford was only to be given if required, and no such declaration was required, but only a declaration of Mrs. Jones's heirship to Mr. Mountford, which was furnished. The defendant bought with the intention of selling again, and he caused great delay in the completion of the purchase. The plaintiff showed him great indulgence, and it was only accidentally, two years after the contract, that the defect in title was discovered. And it was the sub-purchaser, not the purchaser, who raised the point. Then the purchaser says: "We have been proceeding under a common mistake. The property is mine, subject perhaps to a lease to which you are entitled." It seems to me, therefore, under the circumstances, that this is not a case in which the court would be right in ordering a specific performance of the contract, but it would be justified in directing an investigation as to the title. There seems on both sides to be cause for an inquiry, unless the contract itself and the law on the subject shuts out inquiry for either vendor or purchaser. The plaintiff contends that even if it is made out that the purchaser has bought his own property, still that by the terms of the contract and the law, he is compelled to purchase and pay for what is his own. Now, as to the law, the cases may be divided into two classes. First,

those in which the terms of the contract preclude the purchaser not only from making inquiries from the vendor; and, secondly, those in which he is precluded from investigation into the title in any other quarter. No doubt a condition of this latter kind is valid, but the court has never gone so far as to say that the purchaser is precluded from saying: "There is a common mistake. I now find by a document which has been brought before me, that the property is mine, and that the contract is without consideration, and I shall be getting nothing for my purchase money." When there has been such a common mistake, and there is no fraud, the court will not compel the purchaser to complete. The case of *Bingham v. Bingham* (1 Ves. Sen. 121), upon which the defendant relied, carries the matter even further, unless there was fraud. On that I shall have more to say. That case is authority for saying that in circumstances like the present, even if the purchase money has been paid, the purchaser may come to the court and compel the vendor to refund the money. That case is good law, and is referred to in several editions of Sugden's Vendors and Purchasers. In the tenth edition it is mentioned with a long statement from the registrar's book, and it would seem that it was not considered a case of fraud. There was only a misstatement as to the legal effect of an instrument. It has been referred to as an authority for the general proposition contended for by the defendant, and though Lord St. Leonards himself, in some editions of his book, throws doubt upon it where there was no element of fraud, in the last edition he definitely states it as an authority where "no fraud appeared": (See 14th edit. p. 245). In *Saunders v. Lord Annesley* (2 Sch. & Lef. 101), Lord Redesdale expressed a doubt whether in such a case a court of equity would interfere in the absence of fraud. He says: "In a case of fraud it certainly might, in a case of mere ignorance, although I incline to think it might, yet after looking a little into the subject, I find great difficulty in holding that a court of equity could interfere." But in *Cochrane v. Willis* (34 Beav. 368; L. Rep. 1 Ch. 58), Romilly, M.R., and Turner, L.J., treated *Bingham v. Bingham* as an authority in cases of mere mistake without fraud. *Bingham v. Bingham* was decided by Fortescue, M.R., sitting for Lord Hardwicke. I may also refer to what was said in *Cooper v. Phibbs* (16 L. T. Rep. N. S. 678; L. Rep. 2 H. of L. 149, 164), by Lords Cranworth and Westbury. Lord Cranworth says: "The consequence was that the present appellant, when after the death of his uncle he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was in truth his own property; for in truth this fishery was bound by the covenant and belonged to him just as much as did the lands in Ballysadare; therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it. In support of that proposition he relied upon a case which was decided in the time of Lord Hardwicke, not by Lord Hardwicke himself, but by the then Master of the Rolls, *Bingham v. Bingham* (1 Ves. Sen. 126), where that relief was expressly administered. I believe that the doctrine then acted upon was perfectly correct doctrine; but even if had not been, that will not at all show that this appellant is not en-

titled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents." And Lord Westbury says: "It is said '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting some general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties. The respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it; the mistake is discovered, and the agreement cannot stand." It seems to me that the principle is rightly stated by Lord Westbury, and applies to this case. I am, therefore, of opinion that an inquiry must be directed whether the hereditaments comprised in the first schedule of the contract, did or did not belong absolutely to the defendant, subject only to the terms granted by the lease of 1781, of which only a few years remain unexpired. This the defendant must make out. If he does not there will be a decree for specific performance, and the defendant will have to pay all the costs of this suit. If a title cannot be made, the case will come on again for further consideration, when the costs will have to be disposed of. In case the defendant proves his proposition the bill will be dismissed without costs.

Solicitors, *G. Cart*, agent for *E. M. Jones*, Welchpool; *Fortune*, agent for *Minett, Son, and Peddocke*. Ross.

QUEEN'S BENCH DIVISION.

Monday, Jan. 15.

SCOTT v. FREEMAN (a).

Action remitted to County Court—Where judgment to be signed—19 & 20 Vict. c. 108, s. 26—Order XXXVI., rule 22a—Order XL., rules 1, 3, and 7.

The rules of the Supreme Court respecting motion for and signing of judgment do not affect the provision of the County Court Act 1856 (19 & 20 Vict. c. 108, s. 26), that judgment in an action remitted to a County Court may be signed in a "Superior Court" in accordance with the certificate of the registrar of the County Court.

This was an action originally brought in the High Court and remitted to the County Court, under the provisions of 18 & 20 Vict. c. 108, s. 26, which section is as follows:

Where in any action of contract brought in a Superior Court the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set off or otherwise, to a sum not exceeding fifty pounds, a judge of a Superior Court, on the application of either party after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name, and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue, and the judge of such court

to the master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court.

Judgment having been signed in the County Court in accordance with the above enactment, and Pollock, B. having refused to set the same aside,

Gye now moved to rescind the order of Pollock, B., and argued that judgment ought to be entered and signed in accordance with the rules of the Supreme Court, inasmuch as the action was originally brought in the High Court. He referred to

Order XXXVI., r. 22a ;

Order XL., rr. 3 and 7.

The COURT (Mellor and Lush, JJ.) were clearly of opinion that 19 & 20 Vict. c. 108, s. 26, remained in full force, and was not affected by the rules of the Supreme Court, which referred to proceedings in the High Court only.

Application refused.

Solicitors for plaintiffs, *Williamson, Hill, and Co., for England and Son, Gooole.*

Solicitors for defendants, *Le Riche and Son, for George Rideal, Manchester.*

Wednesday, Jan. 31.

POWIS v. LORD DYNEVOR AND ANOTHER. (a)

Agreement for lease—Specific performance—Laches

--Continued possession and payment of rent.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time.

In 1844 the plaintiff verbally agreed with the agent of a predecessor in title of D, to build a shop, and hold the same on lease at a rent of 5s. per annum. The plaintiff built the shop and occupied and paid rent for it up to action brought, but no lease was executed, nor were negotiations for a lease had. In 1876 the plaintiff sued D. for specific performance.

Held, that specific performance ought not to be decreed.

This was an appeal from the decision of the Judge of the County Court of Glamorganshire holden at Neath.

The action was brought by the plaintiff, a blacksmith living near Neath, against the defendant, for specific performance of an alleged verbal agreement, the plaintiff's claim being as follows:

The plaintiff demands specific performance by you of an agreement to grant him a lease, for his life, of a blacksmith's shop and land now in his occupation, situate at Neath Abbey, near Neath, in the county of Glamorgan.

He also states that the estate to which the suit relates does not exceed 500*l.* in value.

3. The action came on for hearing before T. H. Terrell, Esq., the judge of the said court, who (having added Henry Compton as a defendant, with his consent), on the 16th Feb. 1876, made the following decree:

It is adjudged that the plaintiff is entitled to specific performance of an agreement entered into between himself and the late Mr. Wickens, as agent for the defendant, for a grant of a lease to him for his life of the blacksmith's shop mentioned in the particulars filed in

dants do execute a lease of the said premises to the said plaintiff for his life, at the yearly rent of 5*s.*, such lease to contain the usual covenants. And that the plaintiff do execute a counterpart of such lease, the said lease and counterpart to be prepared at the expense of the plaintiff, and that such lease be settled by the judge of this court. And it is further ordered that the defendants do pay the costs of this action up to the hearing.

The following facts were proved at the hearing:

4. On the 12th Sept. 1875, the plaintiff was occupying the blacksmith's shop mentioned in the particulars, and was paying a yearly rent of 5*s.* therefor to the defendants. He claimed to be occupying a small piece of ground adjoining under the same letting, but such piece of ground was not fenced off or divided in any way from the remainder of the land, or otherwise defined, and the defendants denied that the plaintiff was in occupation of any ground except the shop.

5. In the previous August the defendants had agreed to lease the whole of the land (including the land on which the plaintiff's shop stood) to one John Rees, and in that month the defendants gave the said John Rees possession of the whole of such land except the plaintiff's shop, and the said John Rees at once commenced to build on the land adjoining the shop.

6. On the said 12th Sept., in order that the defendants might be able to give possession of the whole to the said John Rees, they caused the following notice to quit to be served upon the plaintiff:

To Mr. John Powis, of Cadoxton Juxta, Neath, in the county of Glamorgan.

As agent for and on behalf of the Right Honourable and Reverend Francis William Baron Dynevor and Henry Compton, your landlords, I hereby give you notice to quit and deliver up possession of the smith's shop, hereditaments, and premises, with the appurtenances, which you rent or hold of them situate at Cadoxton Juxta, Neath, or elsewhere in the county of Glamorgan, on the 25th March now next ensuing, or at the end of the current year, of your tenancy, which shall expire next after the end of one half year from the time of your being served with this notice.

7. Previous to the plaintiff becoming possessed of the land on which the blacksmith's shop was afterwards built, that land and the adjoining land were in the possession of one John Parsons, as tenant of the then Baron Dynevor and Henry Combe Compton, and were sublet by him as gardens, with certain houses occupied by his undertenants, which were held by the said John Parsons from the same landlords.

8. Before plaintiff commenced building the blacksmith's shop in 1844 Mr. Parsons consented to give up the land on which the shop was to be built, and thereupon an arrangement was come to between the plaintiff and Mr. Wickens, as agent of Lord Dynevor, that plaintiff should build the shop, and should pay 5*s.* a year rental, and should have a lease for his life, but such agreement was never reduced to writing. There was no application for a lease until Jan. 1876, when the plaintiff brought his action against the defendants.

9. Mr. Wickens died many years ago, and was succeeded as agent first by his son and afterwards by Mr. Warren. Parsons died in 1855 or 1856. Baron Dynevor died in 1852, and was succeeded after one intermediate (Baron Dynevor) by the present defendant Baron Dynevor, in 1869. Henry Combe Compton died in 1866, and was succeeded by the other defendant Henry Compton.

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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10. The plaintiff built the blacksmith's shop in the year 1844, at a cost of about 30*l.*, and he continued to pay the yearly rent of 5*s.*, down to the present time.

11. No evidence was given as to what interest the then Lord Dynevor and the said Henry C. Compton had, in the said piece of ground, in the year 1844, nor as to what interest the present defendant had.

The judge, however, held that there was sufficient evidence on all the points, and found that the verbal agreement was proved, that the 30*l.* laid out by the plaintiff, together with occupation for so long a period under the alleged agreement was sufficient to take the case out of the Statute of Frauds, and that he had the power to make the decree against the defendant above set out.

The question for the opinion of the court was whether the judge was right in making the said decree, and whether such decree ought to have compelled the granting of a lease by the defendant for a longer period than by law they could grant such a lease.

If the court should be of opinion that the decree for specific performance was correct, then the decree should be qualified so that the defendants might not be decreed to execute a lease which they have not power to execute.

But if the court should be of opinion that the judge was wrong, then the said decree was to be set aside, with such directions as to costs and otherwise as the court may seem fit.

William Barber (*Bray* with him), for the appellant, the defendant below, relied on

Davenport v. Walker, 34 L. T. Rep. N. S. 168;
Beton v. Blade, 7 Ves. 278; 2 White and Tudr 482.

as showing that the plaintiff had, by his own laches, disentitled himself to a decree, and that the payment of rent and possession could not avoid the effect of such laches.

Hadley, for the respondent, the plaintiff below, who was requested by the court to address himself to the question of laches only, argued that, as the plaintiff had paid rent for so many years, the case was one in which the ordinary rule would be relaxed. He cited

Walker v. Jeffreys, 1 Hare 353.

MELLOB, J.—I am of opinion that the County Court Judge was wrong in this case. I can imagine nothing more seriously prejudicial to the defendant than the facts as they appear. We have before us an allegation that the agent of a predecessor of the defendant agreed to grant the plaintiff a lease for a rent of 5*s.* a-year in the year 1844. Nothing was done, however, and the agent died. After lying by till after the death of the agent, and after the death of the principal, the plaintiff sets up a claim against the successor of the principal, the present Lord Dynevor, and says that no prejudice is done to the present Lord Dynevor by such a claim. I think we shall be violating all principles of equity if we allowed such a decree to stand.

FIELD, J.—I am of the same opinion. In *Story's Equity*, sect. 771, the rule is laid down thus: "In general it may be stated that to entitle a party to a specific performance he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been guilty of gross laches, or if

he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross negligence of suitors." Now, here the plaintiff has produced no draft lease, nor has he shown any equitable circumstances in his favour. All the equitable circumstances are against him. Mr. *Hadley* urges that, as the plaintiff had been in possession, and had paid rent all the time, the ordinary rule ought to be relaxed, as if the present were an analogous case to *Shepherd v. Walker* (L. Rep. 20 Eq. 659; 33 L. T. Rep. N. S. 47.) But the fact is that the two cases are very different. In *Shepherd v. Walker*, the landlord was enforcing an agreement on a tenant who had had the means of fulfilling it in his own hands, and it was the tenant's own fault that he neglected to do so. The distinction is pointed out in *Davenport v. Walker* (*ubi sup.*), which very much resembles this case. The payment of rent by the plaintiff makes no difference. "It is a most fixed and unalterable rule of equity," observed *Bacon, V.C.*, in *Davenport v. Walker*, "that a man who comes for specific performance must come at a proper time; but here the plaintiff, remaining for nearly twenty years without the burden of any covenants, now comes and asks that he may have a lease."

Judgment for the appellant.

Solicitors for the appellant, *Bray and Co.*

Solicitor for the respondent, *Tucker, New, and Co.*

Wednesday, Jan. 31.

COLE v. MANNING. (a)

Bastardy Act 1872, s. 4—Corroboration of evidence of mother—Admissibility of evidence as to circumstances prior to begetting of child.

On the hearing of an affiliation case, evidence in corroboration of the evidence of the mother is admissible, although the particulars to which such evidence testifies happened prior to the begetting of the child.

By the *Bastardy Act 1872, s. 4*, the justices, on an affiliation summons, "shall hear the evidence of the woman, and such other evidence as she may produce," and also any evidence tendered by the person alleged to be the father, "and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices," they may adjudge the man to be the putative father.

The appellant having been delivered of a bastard child in Oct. 1875, and having applied for an affiliation order against the respondent:

Held, that evidence of the appellant and the respondent having been frequently surprised together in the summer of 1874, was evidence admissible in corroboration of the appellant.

THIS was a case stated, under 20 & 21 Vict. c. 43, by *Ralph A. Benson, Esq.* stipendiary magistrate, sitting at the Southwark, Police-court, in the county of Surrey, and the following are the material parts of such case.

The appellant had preferred a complaint against the respondent under the 3rd section of the *Bastardy Laws Amendment Act 1872* (35 & 36 Vict. c. 65), charging that the respondent was the father of a bastard child of the appellant, born

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within the twelve months next preceding the date of the complaint. The magistrate dismissed the complaint. It was proved at the hearing on the part of the appellant, and found as a fact that the said appellant had been delivered of a bastard child on the 10th Oct. 1875, and the appellant swore that the respondent was the father of such child, the connexion having taken place at the respondent's house where he had taken her on an evening in Jan. 1875. Of that meeting and that intercourse there was no corroborative evidence, nor was the magistrate satisfied with such evidence as was adduced of subsequent conversations between the friends of the appellant and the respondent. But it was proved to his entire satisfaction that during the summer of 1874 several months before the child could have been begotten, the parents of the appellant, with whom previously to that date the respondent had been on terms of great friendship and intimacy, refused him the house and quarrelled with him owing to their suspicions with regard to his conduct towards the appellant. They deposed that they surprised the appellant and the respondent together on more than one occasion; that the door of the parlour where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent, and to other circumstances which would have had great effect on the judgment of the magistrate had they occurred at or about the time the child might have been begotten. The appellant was rather of weak intellect, but there was no evidence of any similar misconduct on her part with other men than the respondent. After taking time to consider, the magistrate was of opinion that he was not at liberty so to interpret the words of the statute, "if the evidence of the mother be corroborated in some material particular" (35 & 36 Vict. c. 65, s. 4) as to include evidence of the facts long antecedent, and having no direct relation to the actual begetting of the child, however strong might be the moral conviction that such facts might convey to his mind, but that the word "material" must be taken to imply a closer connection of the "particular" in question than was apparent in the case, with occurrences at or about the time when the child must have been begotten, or with subsequent words or actions of the respondent tending to fix the paternity.

The case concluded as follows: "If the court shall be of opinion that it was within my discretion and legally competent to me according to the requirements of the above section of the statute to hold the evidence above set forth as corroborating 'in some material particular' the evidence of the mother, then I pray the court to remit the case for rehearing with their opinion thereon, or otherwise to make such order as to the court shall seem fit."

Spearman and Saffery, for the appellant, referred to

Hodges v. Bennett, 5 H. & N. 625; 2 L. T. Rep. N. S. 190, per Martin, B.;
R. v. Fearcy, 17 Q. B. 902; 18 L. T. Rep. N. S. 238; 16 Jur. 193;

Lawrence v. Inguire, 20 L. T. Rep. N. S. 391;

as authorities under the Act of 7 & 8 Vict. c. 10 (which does not differ with respect to the provision as to corroboration from the Bastardy Act 1872) that the question was one for the magistrate to determine. They were stopped by the court, who called upon

John Thompson, for the respondent, who argued

that the words "material particular" must receive a limited construction. No person would be safe if evidence dating so far back could be held admissible. [MELLOR, J.—That objection goes rather to the weight of the evidence than to its admissibility.]

MELLOR, J.—I am of opinion that the stipendiary magistrate has taken a wrong view of the law. He should have received this evidence, and judged of the weight of it. There is no rule of law to exclude such evidence, which might or might not be very material according to the peculiar circumstances of each case. Here it afforded material corroboration as showing an antecedent probability that the respondent was the father of the appellant's child.

FIELD, J.—I am of the same opinion. The case must be remitted to the magistrate for his determination, after hearing the excluded evidence. The object of the Bastardy Acts is to give a single woman the right of having her child maintained by the father. As the paternity is proved by the evidence of the woman, and as there is great danger in admitting the evidence of one single person against another single person in reference to that which is ordinarily secret, the Legislature has thought fit to require that the evidence of the mother shall be "corroborated in some material particular." But no restriction has been imposed with reference to dates. That the evidence would have been material if it had testified to facts happening between the begetting and the birth is not disputed. It is for the magistrate to decide whether evidence testifying to facts happening earlier is material or not.

Judgment for the appellant.

Solicitors for the appellant, *Cordwell and Tuman*.

Solicitors for the respondent, *Hicklin and Washington*.

Wednesday, Jan. 24.

VERDIN v. WRAY AND ANOTHER. (a)

Voting paper, fabrication of—Prosecution by unsuccessful candidate—"Party aggrieved"—Public Health Act 1875.

By the Public Health Act 1875, s. 253, proceedings for the recovery of any penalties under the Act shall not be taken by any person other than by a party aggrieved. . . . By rule 69 of schedule 2, any person who fabricates any voting paper is liable to a penalty not exceeding 20l.

The appellant and M. were candidates at an election under the Act. A voting paper fabricated by the respondents gave three votes to M., who was elected by a majority of five votes.

Held (on a case stated by justices under 20 & 21 Vict. c. 43), that the appellant was a "party aggrieved."

Per Lush.—A candidate would be a party aggrieved whether the fabricated votes turned the election or not.

THIS was a case stated by justices of the borough of Middlewich, in the county of Chester, and the following are the material parts of such case:

The respondents were charged with fabricating the voting paper of one Anne Padley, who was entitled to three votes at an election for the office of member for the Wharton Ward of the Local

(a) Reported by J. M. LEE, Esq., Barrister-at-Law.

Board District of Winsford. The information was preferred at the petty sessions held at Middlewick in the county of Chester.

There were only two candidates, the appellant and Mr. Moss. Mrs. Dudley's voting paper, to the fabricating of which one of the respondents pleaded guilty, was found when opened by the proper officer to give three votes to Mr. Moss. The result of the election was the return of Mr. Moss by five votes, the appellant receiving eighty-nine, and Mr. Moss ninety-four votes. The appellant having preferred an information against the respondents for fabricating Mrs. Dudley's three votes, the justices dismissed the information, being of opinion that the appellant was not a party aggrieved within the meaning of the 253rd section of the Public Health Act 1875 (38 & 39 Vict. c. 55), which is as follows:

Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority . . . without the consent of the Attorney-General.

The sanction of the Attorney-General not having been obtained, the question for the court was whether the appellant was a "party aggrieved" within the meaning of the above section.

Gye, for the appellant, cited

Boyes v. Higgins, 14 C. B. 1; 23 L. J. 5, C. P.;

Hollis v. Marshall, 27 L. T. Rep. 235, Ex.; 2 H. & N. 755;

Rochfort v. Atherley, L. Rep. 1 Ex. D. 511;

and argued that as the appellant's election might have been turned by the three fabricated votes being given for him instead of for his opponent, he was clearly a "party aggrieved."

Tickell, for the respondent, relied on *Hollis v. Marshall* (*ubi sup.*), in which case it was held, under the corresponding sect. 133, of the Public Health Act 1848 (repealed by the Public Health Act 1875, and substantially identical with sect. 253 of the latter Act), that where a party disqualified is returned and acts, a defeated candidate is not a "party aggrieved."

The COURT (Mellor, and Lush, JJ.), were clearly of opinion that the appellant was a party aggrieved. And Lush, J. said that he thought that a candidate would be aggrieved by a fabricated vote being given against him, whether the election would have been turned by such fabricated vote or not.

Judgment for the appellant.

Solicitor for the appellant, C. R. Cuff.

Solicitors for the respondent, H. Tyrrell.

COMMON PLEAS DIVISION.

Wednesday, May 31, 1876.

CROYDON COMMERCIAL GAS AND COKE COMPANY v. DICKINSON AND POLLARD. (a.)

Guarantee—Separate payments—Giving time in respect of one payment—Discharge of surety.

Defendant was surety under a bond for payment by D. to plaintiffs of money becoming due under a contract by which payment was to be made within the first fourteen days of each month, unless plaintiffs by writing, signed by their secretary, allowed a longer time. D. made default in one payment, and after the fourteen days had expired plaintiffs' secretary wrote to D., inclosing a promissory note payable one month after date, and stating that if

he signed it time would be returned the note:

Held, that time had been given not within the agreement defendant was discharged, both which time had been given.

THIS was an action on a bond defendant Dickinson as principal Pollard as Dickinson's surety by Dickinson of the which should become due under made between the plaintiffs which the plaintiffs agreed with certain time and other time.

The terms of payment in fifth clause of the contract,

Dickinson agrees that the account liquor had by him shall be settled every calendar month, and that shall be made within the first fifteen month after every estimate the company shall by writing, allow a longer time for payment.

Payment of the account clause should have been in July, was not made within of August, and on the 21st the plaintiffs' company wrote a promissory note payable date for him to sign, and set the note further time for payment Dickinson accordingly signed back to the secretary.

No time was given in respect of money which subsequent the contract.

The case was tried before the minister, who directed judgment the defendant Pollard, with to move to enter judgment Pollard for 115l. 16s. 8d., or those sums, the court to have references of fact.

Grantham and Walpole, for accordingly.—The giving of not such a giving of time surety to the bond; it was the 5th clause of the agreement stipulates that the giving writing under the hand of not prevent time being given of the fourteen days allowed as to the sums which subsequent respect of which no promise and no time given, the plaintiffs cannot discharge the surety were separate and distinct: L. Rep. 1 C. P. 518; 35 L. referred to *Skillett v. Fletch* 36 L. J. 206, C. P.; 16 L. J. was not a case of time being a lump sum; the different under the contract. See

Simpson v. Crippin, L. R.

Q. B.: 27 L. T. Rep. N.

Freeth v. Burr, L. Rep. 9 C.

29 L. T. Rep. N. S. 773;

A. L. Smith and J. M. defendant Pollard.—The only ground come within the 5th clause before the expiration of

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

therefore the letter of the plaintiffs' secretary came too late. But time was given here, not by writing the letter but by taking the promissory note: (*Bee v. Berrington*, 2 Tudor's Leading Cases in Equity 887, 3rd edit.) Time having once been given, the surety is exonerated from liability in respect of the subsequent payments: (*Eyre v. Bartrop*, 3 Maddock, 221.) [Grove, J.—In *Roscoe v. Nisi Prius Evidence* (pp. 459, 460, 13th edit.) the rule is thus stated: "Any alteration by a binding agreement in the relative position of the creditor and principal debtor, whereby the latter is released, or the remedy against him suspended, or the risk of the surety varied without the surety's assent, will be a discharge of the guarantee both at common law and in equity;" in support of which *Lewis v. Jones* (4 B. & C. 506) and other cases are cited.]

Grantham replied.

BRETT, J.—I think in this case our judgment should be for the defendant. The plaintiffs have sued the defendant as surety on a bond given by the defendant to secure the fulfilment by one Dickinson of an agreement, made on the 20th Jan. 1874, between Dickinson and the Croydon Commercial Gas and Coke Company. The answer of the defendant is that he is absolved from liability upon his suretyship bond by reason of the plaintiffs having altered to his detriment their position with regard to Dickinson. Now, in answer to that it is urged for the plaintiffs that, if time were given to Dickinson it was given in such a mode and manner as to come within the terms of the agreement between them and Dickinson, and therefore, though they did give time, the sureties are not absolved. Further, it was urged on behalf of the plaintiffs that if the defendant is absolved as to a sum of 115*l.* 16*s.* 8*d.* arising upon the transaction in August, yet he is not absolved with regard to two further sums, making up altogether a sum of 118*l.* 12*s.* 11*d.* arising from defaults afterwards, and therefore, it was argued for the plaintiffs, they are entitled to recover either the whole sum or, at all events, the sum of 118*l.* 12*s.* 11*d.* Now, with regard to the transaction in August, it seems to me that, taking into account the letter of the 21st Aug and the promissory note inclosed in it, which promissory note was signed by Dickinson and given back to the company, and held by them—it seems to me that taking those two together, it is true to say, in one sense that time was given to Dickinson by means of their accepting from him his promissory note for a month, and it is true to say that in one sense, taking the letter and the promissory note together the company did, by writing signed by their secretary, allow a longer time for payment than fourteen days. But I think upon consideration, although that is so, it is not that time allowed for payment by writing signed by their secretary, which is contained in the fifth article of the agreement of the 20th Jan. 1874, because the time (although it is allowed in writing) is allowed after the lapse of fourteen days. I agree, as has been pointed out by my brother Denman, that the agreement of the 20th Jan. 1874 should be construed now as if it were being construed immediately after it was made, and without there being any bond given by sureties that the agreement should be fulfilled, and that it is to be construed as between Dickinson and the gas company. I cannot quite agree with many of the arguments

that have been used, namely, that the words will bear only one interpretation, or with the arguments which say that the meaning is obvious or clear. On the contrary, it seems to me that the words will bear either interpretation—that is, taking the words grammatically; but I think we are bound to look at it as a business document, so as not only to construe it grammatically, but to construe it according to what the whole thing implies in a business meaning. I think that the 5th article is the article in the agreement which is to fix the time at which Dickinson is to become liable for payment. In another sense it may be said to be the time which is to fix the amount of credit that was given to Dickinson; but when persons say in a business document that they fix the time for which credit is to be given, they really mean that they are fixing the time at which the debtor will become liable for non-payment. That is the meaning of giving credit. Giving credit means that you give a time during which he shall not be liable for non-payment, and that fixes the amount of time at which he is to become liable for non-payment. Now, construing the article in that sense, the first moment of time at which Dickinson is to become liable for non-payment is at the end of the first fourteen days of the ensuing month. If nothing is done, that is the time at which he is to become liable; but if something be done, that time shall be extended. It is to be at the end of the fourteen days, unless the company shall, by writing, allow a longer time for payment. It is to fix the time at which he is to be liable—that is according to that, at the end of the fourteen days, or it may be some time after; but if he has once become liable, then you cannot fix after that the time at which he is to become liable. It shows that the fixing of the time, if the fourteen days is to be altered, must be before the fourteen days have run out, otherwise you have two moments of time at which he is to become liable. The meaning of this is that there is to be only one moment of time—either at the end of fourteen days, or, if that is altered, then at some subsequent time. It can only be altered in one particular way, that is by writing signed by the secretary. It seems to me, therefore, that, although we should hold that here there was an allowance of time, and an allowance of time signed by the secretary—because I think, taking the promissory note and the letters together, the meaning of the letter is, I will give you a month in which to pay if you sign the promissory note; I think this is an allowance of time under the hand of the secretary if the man does sign the promissory note—yet I think that that allowance of time is too late, and is not an allowance of time authorised by the 5th article of the agreement between Dickinson and the Gas Company. Then, if that be so, the taking of the promissory note is a giving of time to Dickinson, and the giving of time is not such a giving of time as is authorised by the agreement. Therefore, there has been a giving of time unauthorised by the agreement, and it has always been held that the giving of time may alter the position of a surety; not that it necessarily does, but the giving of time beyond a contract may alter the position of the surety, to his detriment, and therefore it absolves him from the liability of his suretyship. It would, therefore, follow that as to the 115*l.* 16*s.* 8*d.* the surety is absolved. Then arise

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the question whether, inasmuch as he is absolved from his liability at that point, he is not absolved for ever; that is to say, his liability under the suretyship bond being once gone with regard to one point, namely, fulfilment of the original contract, whether it is not gone altogether. Now it seems strange that that which one has always fancied to be a received doctrine—and it is a doctrine well known to us all—when it is challenged, and when we look into the books for it, we cannot (at all events for the moment) find that which we thought to be the law absolutely stated as a proposition in any case. That does seem strange, but still I think the cases to which we have been referred really do show that that is the doctrine. I think the case cited by Mr. Smith (*Eyre v. Bartrop*, 3 Madd. 221), is an authority on the very point. There the suretyship was with regard to the payment of an annuity, an annuity which would therefore last during the lifetime of the annuitant, and it was to be paid quarterly. There was a binding contract between the person who was to receive the annuity and the person who was to pay it, that it should not be paid quarterly for the first five years; but that of course did not prevent the annuitant from being entitled to insist after the five years that the payment should be made quarterly. There was, therefore, an alteration in the position of the parties, as it was said, to the detriment of the surety, because it was a giving of time with regard to the first five years. Then it was urged before Sir John Leach, V.C., that although that was so, and that therefore the surety must be absolved in respect of any non-payment of the annuity during the five years, yet that he would be bound for non-payment of the annuity for the rest of the annuitant's life if the payments should be in arrear after the five years. Sir John Leach held and directed positively that, inasmuch as the position of the surety had been altered during the first five years, his liability was gone, not only for those five years, but as to the whole of the contract. Now, if that be the case, *prima facie* the position of the surety having been altered with regard to the payment that ought to have been made on the 14th Aug., it follows that he is absolved from being liable for any default in Dickinson at any time afterwards. Then two cases were cited to us, which were said to be authorities for holding that this contract, as it was to be fulfilled at different times, must be treated as if the surety had guaranteed the performance of different contracts; and that, although the surety was absolved in respect of the non-fulfilment of one contract, he might still be liable for the non-fulfilment of other contracts. The cases of *Skillett v. Fletcher* and *Harrison v. Seymour* (*ubi sup.*) were cited in support of that proposition. But when those cases are looked at, it is obvious that there the suretyship contract was made to guarantee the fulfilment of separate contracts—of absolutely separate and distinct contracts—not the fulfilment of a contract which was to be fulfilled at successive periods of time; and thereupon it was held that, although the suretyship bond or contract was one, yet it was in reality two, amounting to a contract for the fulfilment of two separate contracts, and therefore was equivalent to two separate suretyship contracts. But those cases seem to be no authority for saying that where there is one contract admittedly, but which is to be fulfilled at successive periods of

time, the suretyship bond can be so divided as to say that the surety can be absolved as to the fulfilment of the first part, and yet be made liable for the non-fulfilment of it at subsequent periods. Those two cases seem to be authorities, although not directly in support of the ruling of Sir John Leach, V.C., to show that as a general rule, where the surety is absolved as to one part of the contract, he is absolved altogether as to subsequent non-fulfilment. I therefore think that the defendant, being absolved from the contract by reason of the conduct of the plaintiffs in August, is absolved altogether, and that the plaintiffs cannot hold the sureties liable for non-fulfilment of the contract which they had made with Dickinson at subsequent periods. Upon the whole, therefore, I think our judgment ought to be for the defendant, and therefore this rule will be discharged.

GROVE, J.—I am of the same opinion. With regard to the first point, I should be inclined to think, if the facts had supported it, that if the letter of the secretary with a promissory note had been written and sent, or at all events if that promissory note had been signed and received by the secretary of the company before the expiration of the fourteen days, that would have been a sufficient giving of time in writing—an enlarging or allowing of longer time in writing, signed by the secretary of the company. But I think that an allowance—if one can call it, strictly speaking, an allowance—of time given after the expiration of the fourteen days, is not within the agreement, or within what was contemplated by the parties, namely, Dickinson the principal debtor and the parties with whom he agreed; and, if so, not within what the sureties became sureties for. Now, let us suppose that this portion of the contract were read simply with reference to the ordinary impression which its language on the face of it would produce, without looking at the consequences. "Dickinson agrees that the account of tar and ammoniacal liquor had by him shall be estimated on the last day of every calendar month, and the payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, unless the company shall by writing, signed by their secretary, allow a longer time." Now I should read that thus: It means that the company are to allow Dickinson fourteen days after the estimate is made, and that they are to allow him a longer time if they please to do so, but such allowance must be in writing, that is to say, they may allow either fourteen days, or any longer time than fourteen days. The fourteen days we may say is in writing, because it is in his agreement, and if they allow a longer time, that must also be in writing. Now is that complied with by what I must own does not seem to be within the fair meaning of the words of the agreement, the fourteen days having expired—by a writing at any time after that fourteen days giving him further time? It appears to me that that is not giving a fair meaning to the word "allow" here, and it is not giving a fair meaning to the term "longer time," because I take "longer time" to mean, and it must mean, a longer time than fourteen days; that is to say, if it is not to be limited to fourteen days, it should be more than fourteen days—that is, by some extension of the fourteen days made in writing. Now, if after the fourteen days have expired a month were allowed to elapse without any writing, that would be at once,

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if I may so call it, a breach of the provision agreed to in this agreement, and upon the faith of which the sureties became sureties. There would be fourteen days and a month longer allowed, but not allowed in writing. Therefore, that which the surety would look to would not have been complied with, and the surety at the end of that time, if that had been for a definite time, would be discharged; and they cannot, if he is once discharged, reimpose his liability by their making a writing which not only allows him a further time from the date of the writing, but which, if I may so say, condones or governs the allowance which is not according to the agreement, but which is a verbal agreement; it condones that by giving subsequently an allowance of further time, and makes that time that has been imposed without a writing equivalent to a time which had been allowed by them. In other words, the surety who entered into this would expect that whatever time was given more than the fourteen days must be sanctioned by writing. But the construction which is put upon this article of the agreement by the plaintiffs is this, that it need not be sanctioned by writing, but that which the sureties have looked to may be considerably departed from; and it is said the company might allow more than fourteen days not in writing, provided they ratified that verbal allowance by a subsequent writing, and by that subsequent writing allowed a further time. Again, it may fairly be asked, would a ratification alone, without further allowance, be sufficient? If that construction be good, if the ratification coupled with the further allowance would be good, the ratification alone would be good. Therefore, if the company here could allow the fourteen days, they could allow one month or two or three months, by a verbal agreement, and then ratify an allowance which is not within the terms of this deed by a subsequent writing. It seems to me that is not within the fair sense and meaning, or within the object sought to be obtained by this agreement. A surety would give this agreement to his legal adviser to peruse, and he would consider that fourteen days was the normal average time, but that if they allowed the man time they must take care to fix his liability by a writing, which is like a writing within the Statute of Frauds, and that will prevent any doubt as to what was agreed to, because you shall take care by writing to allow only such time as you can tie him to, and tie him to by an instrument in writing. That may have been the object of the thing, and it seems to me to have been the object; but that would be entirely defeated if a verbal allowance of time could be given which at any time could be ratified by writing. I have certainly come to a clear conclusion on that part of the case. If the debtor had gone to the company with a promissory note, as in this case, and acquired a sufficient extension of time, or an allowance of a longer time, and if that had happened before the expiration of the fourteen days, or possibly on the last day, that would be one thing; but a time has intervened after the expiration of that time, and I therefore think this letter would not be an allowance of a longer time within this agreement, but it would be a ratification of something done not according to the agreement, and it would not have been within the contemplation of the surety. On the second point, as my brother Brett has already said, I should have thought that that must have been decided long ago by authority; and although

the case cited by Mr. Smith is in point, it is as clearly applicable to this case as one would have expected, seeing the great number of bonds, in sureties' names attached, which are entered in for the security of payment of money at regular periods. One would have expected that this must have been more expressly decided, but first of all, acting on that case so far as it goes, and also acting on the principle which has been acted upon with regard to the discharge of a surety. I think where, without any act being done on the part of the surety, the debtor has a definite time given by the principal—where that has once been done, and the surety is once released from what has undertaken to be bound to—the parties cannot after that revive, if I may use the term, the obligation of the security because some subsequent act is irregularly done, or some payment is irregularly made. The ground, as I understand it, is this, that any arrangement made with respect to the principal debtor that may alter the position of the surety absolves the surety, and it need not *prima facie* necessarily be such an alteration as to be disadvantageous to the surety. The surety has a right to make his own bargain, and say, "I entertain reasons of my own I entered into this contract, and I must be allowed to be the judge of what is beneficial to me or what is not." Now when the surety enters into such a bond as this which we have before us for the performance of this agreement, I think we have a right to put him in the position of saying this: "I undertook to be surety provided you took care to keep a strict hand over the debtor, and to see that he duly performed what he was bound to do by the agreement. If you have neglected to do that for one, two, or three payments, you have put me in a different position; you have indulged a person who has gradually become more and more negligent; you have deprived me of my remedy, and therefore, you have put me in a less advantageous position; you have, without consulting me and without my consent, consented to allow the debtor to go on in a slipshod way; thereby it has ultimately resulted in his becoming insolvent, and I, if I am liable, may be called upon to pay. I did not agree to this; I did not undertake to be at any time liable to be called on, although you may have violated and neglected your duty, and not have kept the debtor up to his payment; and by that means you have very considerably changed my position. I undertook to be surety upon the ground that you would act on the terms of the agreement." I think, therefore, upon the authority of the case which has been cited, the surety in this case is discharged and entirely discharged. I think the distinctions that have been already pointed out by my brother Brett in the cases of *Horriam v. Seymour* and *Skillett v. Fletcher* (*ubi sup.*) do not apply to the present case, because in those cases it was very much as if separate bonds had been entered into, that is to say two distinct and separate contracts, where the performance or non-performance of one could not affect the performance or non-performance of the other. I therefore think, upon both grounds, our judgment should be for the defendants.

DENMAN, J.—I am of the same opinion. The statement of claim in this case is founded upon a supposed liability of the sureties for the non-performance by Arthur John Dickinson of an agreement

entered into by him on the 20th Jan., and the breach was that he did not make good payments of moneys, amounting to two sums that are in question in this action, which became due and owing under and by virtue of the agreement. In the statement of defence the defendants set out the agreement itself, which was made on the same day, but before the contract of suretyship. The 5th clause of that agreement is the one upon which the defendants rely. The clause is that Dickinson agrees that the tar and ammoniacal liquor had by him shall be estimated on the last day of every calendar month, and the payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, unless the company shall, by writing signed by their secretary, allow a longer time for payment. Now, I think, as my brother Brett has stated, that in the first instance, in construing that clause of the agreement, we are not entitled to give it a different interpretation by reason of the mere existence of the suretyship from what it would have if it concerned only the company. Considering it in that way—though I am by no means prepared to say that the interpretation put upon it that the words are consistent with an allowance after the expiration of the fourteen days is an impossible construction—construing it according to my real belief of what the words mean, it appears to me that those words must be taken to mean, and do mean, that the payment is to be made within the first fourteen days, unless within that time the company shall, by writing signed by their secretary, allow a longer time for payment. I think so for this reason mainly, that it appears to me it would be a thing which could hardly be in the contemplation of any reasonable person that there should be an agreement for the performance of such an act as the payment of goods to be supplied, which agreement should contemplate a non-payment within the time stipulated by the agreement, a breach of that agreement for an indefinite time by such non-payment, and then a rehabilitation of the agreement by setting it up again as contemplated in the first instance, by an allowance of a longer time for the payment than the original time which was in anticipation after a breach had actually taken place. I think, if that agreement stood alone without any contract of suretyship to interfere with the construction of it in any way, that is the construction that a reasonable man would put upon the agreement as the agreement by which the parties have bound themselves, namely, Dickinson and the company. Now, if that be so, then in the case which has arisen on the 14th and 15th Aug. there was a sum actually due (because there had at that time been no writing signed by the secretary allowing a longer time for payment) for goods supplied. There had been a breach of the contract to pay by Dickinson, and Dickinson was in default, and the company could at that time have sued him for the money. Now, that being the state of things, instead of enforcing their rights against Dickinson, what they do at a subsequent time is to take a promissory note from Dickinson, which would suspend their remedy against him for the whole month from the time they took that note. That being so as regards this payment, I think the ordinary principle applies to it, which is very well stated in Chitty on Contracts, 10th edit., page 498, thus: "If the creditor gives time to the principal—that is, if by a

new and valid contract between the principal, to which the sum the period be extended at between them the principal will pay the creditor—the surety is rule freed from responsibility. *Combe v. Woolf* (8 Bing. 156) a case extremely like this, where the surety was prejudiced, exonerated, by reason of a note. Now I am not aware of any case where the liability of a surety for non-performance of one contract as a whole payments should be made in time by the contract in respect of which are to be made, that that is to the extent as that, if there is a breach in respect of that breach, the surety may be sued separately though he shall be absolved from former breach by reason of time in respect of that. It is a matter altogether that where the words are together, as it does here, the holding of the surety liable have been cited certainly do because they are cases in which proceeded precisely on the ground that there were severable contracts in matters, and therefore might be one contract, but as two or three is a different case to the point I think in this case the general rule held to apply, and that the defendant to retain the judgment given.

Judgment.

[This judgment has been reversed on appeal as to 118l. 12s. 11d., and affirmed.]

Solicitors for the plaintiffs, *and Adams*, for *Drummond*, Croydon.

Solicitor for the defendant.

COURT OF BANKRUPTCY

Monday, Jan.

(Before the CHIEF

Ex parte HALL; Re

Bill of sale—Unregistered—another when required—A

A. gave B. a bill of sale on property, as security for a bill of sale was not registered to execute another bill of sale. Within six weeks B. required another bill of sale, which and under which B. took possession afterwards A. became bankrupt. Held, that the agreement to give was lawful, and that the bill was neither a fraudulent preference nor a bankruptcy.

THIS was an appeal from the Judge of the County Court of at Poole.

Prior to the month of May

(a) Reported by A. A. DORRIS, Esq.

Jackson applied to Hall for a further advance, and the latter then required and pressed Jackson for security for that, as well as for the 45*l.* then due to him. Accordingly, on the 29th May, Jackson executed to Hall a bill of sale over the whole of his property in consideration of 60*l.*, and on the following day Hall handed to Jackson the sum of 15*l.*, making, together with the previous sum of 45*l.* lent, the sum of 60*l.* mentioned in the bill of sale. At the urgent request of Jackson, this bill of sale was not registered, he promising and undertaking to execute another bill of sale when required. In pursuance of this arrangement, Jackson on the 3rd July at the request of Hall, executed another bill of sale of the same property, and for the same debt. This bill of sale was duly registered.

On the 24th July, Hall instructed his agent to take possession under his bill of sale, and he accordingly entered and remained in possession.

On the 23rd Sept., Jackson filed his petition for liquidation, and on the 29th Henry Pratt was appointed receiver; Pratt thereupon forcibly ejected the agent of Hall, and took possession of the property comprised in the bill of sale. Hall's agent resumed possession the next day.

On the 14th Oct. the first meeting of the creditors was held, when a liquidation by arrangement was resolved upon, and Henry Pratt was appointed the trustee.

On the 3rd Nov. the County Court Judge, upon the application of the trustee, declared the bill of sale of the 3rd July fraudulent and void as against the trustee.

Against this order Hall appealed.

Pollard, for the appellant, contended that the transactions resulting in the second bill of sale were *bonâ fide*, and that it was neither a fraudulent preference nor an act of bankruptcy. He cited

Harris v. Rickett, 28 L. J. 197, Ex.; 24 L. T. Rep. N. S. 137;

Mercer v. Petersen, 18 L. T. Rep. N. S. 30; L. Rep. 3 Ex. 105;

Lomax v. Buxton, L. Rep. 8 C. P. 107; 24 L. T. Rep. N. S. 137;

second bill of sale was in fact an assignment of all the debtor's property in consideration of a past debt. There was no further advance at the time, no evidence of a pre-existing agreement to execute the bill of sale when required, and even if there were such an agreement, it was against the policy of the Bills of Sale Act, and against the general law of Bankruptcy. The case was on all fours with

Ex parte Stevens, re Stevens, 33 L. T. Rep. N. S. 135; L. Rep. 20 Eq. 786;

Ex parte Cohen, re Sparke, 25 L. T. Rep. N. S. 473; L. Rep. 7 Ch. App. 20;

The CHIEF JUDGE.—The case is argued by the respondent upon the sole ground that the bill of sale in its inception was an act of bankruptcy. It is said that the transaction was an act of bankruptcy, because there was a stipulation that the bill of sale should not be registered until the creditor required it. Is that an unlawful agreement? Is that in any way affected by *Ex parte Cohen, re Sparke*, or *Ex parte Cohen, re Stevens*? This creditor could at any time have insisted upon the execution of the second bill of sale. He could have brought an action for specific performance in the Court of Chancery, and there would have been no answer to it. He did, in exercise of his rights, demand performance of the agreement, and the debtor complied with that demand. Accordingly a bill of sale was executed and it was duly registered. In my opinion it is a valid bill of sale, and is unaffected by the fact that the first bill of sale was not registered. In July, when the creditor took possession under his bill of sale, there was no bankruptcy nor any appearance of bankruptcy. Then, in September, the debtor became bankrupt, and at that time the property was in the actual possession of the grantee under the bill of sale. Unless, therefore, the bill of sale was an act of bankruptcy, it cannot be impeached. In my opinion it cannot be impeached upon any grounds whatever. The appeal must be allowed with costs.

Solicitors for the appellant, *Lumley and Lumley*.
Solicitors for the respondent, *Neal and Philpot*.

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